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FRATT v. HUNT et al. (No. 18,442.)

(Supreme Court of California. July 31, 1895.)

Lease—Covenant—Breach—Action against Executor—Presentation of Claim.

1. During the life of a lease covenanting that the lessee at the termination thereof shall return certain furniture in as good condition as when the lease was made, action for injury thereto cannot be maintained, as it may be repaired so as to be in as good condition before the termination of the lease.

2. The presentation against the estate of decedent of a contingent claim for any damages claimant may sustain by reason of any injury to furniture, which a subsisting lease, on which deceased was guarantor, provided should be returned in good condition at the termination of the lease, will not support an action for damages for actual destruction of the furniture, there being no allegation in the complaint that this occurred subsequent to the presentation and rejection of the contingent claim.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Francis W. Fratt against Emma L. Hunt, executrix of H. B. Hunt, deceased. Judgment for defendant. Plaintiff appeals. Affirmed.

Holl & Dunn, for appellant. Mastick, Belcher & Mastick, for respondent.

GAROUTTE, J. Francis W. Fratt, as the owner of certain hotel property situated in the city of Sacramento, leased the same, including furniture, etc., to one Sherwood, for the term of five years, at a stipulated rental per month. This contract of lease contains the following provision: "And it is agreed by the party of the second part that, at the expiration of said term, or the sooner termination thereof, he will return to the party of the first part all the furniture, fixtures, bedding, gas fixtures, and all other articles described in said inventory A, according to the inventory therein mentioned, in as good condition as said articles now are. Any window glass that may be broken must be replaced by said second party with glass of equal quality, at his expense, and, at the expiration of said term, the said party of the second part will quit and surrender the said premises in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted." Inventory A contained a statement in detail of the personal property aforesaid. Hunt, the defendant's testator, in writing guarantied the faithful performance of the covenants of the lease upon the part of Sherwood. Prior to the expiration of the five-year term, Hunt, the guarantor, died, and thereupon Fratt presented a claim to the defendant, as executrix of his estate, for: (1) Balance due for rent already accrued; (2) amount of rent hereafter to become due prior to the expiration of the lease; (3) a contingent liability, to wit, "for any damage claimant may sustain by reason of any injury which may be done to any of the personal property described in said inventory or schedule B, hereto attached, and also for any damage which claimant may sustain by reason of the nondelivery or return to him of any of the property described in said schedule B; but the amount of such damage this claimant is at this time unable to state." The aforesaid claim set out the guaranty of Hunt and the facts in detail concerning the transaction. Both the absolute and contingent claims for rent were allowed by the executrix; but the contingent claim for damages for loss and injury to furniture, etc., was rejected. Thereupon this action was brought upon the claim as presented, and a general demurrer to the complaint was interposed and sustained by the trial court. The sole purpose of this appeal appears to be to test the ruling of the court in sustaining that demurrer.

In so far as the claim was for rent due and to become due, it was approved by the executrix. Hence, no cause of action could be based upon it in those particulars; and that portion of the complaint wherein it is sought to recover a judgment for rents was clearly susceptible to a general demurrer. Plaintiff also sued to recover a sum of money as damages for broken panes of glass; but, inasmuch as Sherwood agreed to replace all such glass upon the expiration of the lease, an action for such damage prior to that time is clearly premature. The complaint contains the following allegation: "Plaintiff alleges that, before the filing of the complaint to which this is amendatory, the said T. J. Sherwood had carelessly and negligently permitted a large amount of personal property, furniture, and fixtures leased with said hotel, and described in Exhibit B, attached to said complaint, to become utterly lost and destroyed; that said personal property, furniture, and fixtures, so lost and destroyed, was, at the time of said loss and destruction, of the value of $1,000, as this plaintiff is informed and believes; that, by reason of said loss and destruction of said personal property, this plaintiff was damaged in the sum of $1,000, as he is informed and believes. The plaintiff further alleges that the personal property, furniture, and fixtures described in said Exhibit B, which was, at the date of filing said complaint, and still is, in the said Union Hotel, and which consists of all of said personal property, furniture, and fixtures in said exhibit described, except such as has been lost and destroyed, as aforesaid, was, during the continuance of said lease, and while the same was in the possession of said T. J. Sherwood, by his carelessness and negligence, greatly injured and damaged; that is to say, the same was damaged and injured to the extent of $2,174.45." It is upon this allegation of the complaint that plaintiff must rest his cause of action, if the pleading states one, and our consideration will now be addressed to its sufficiency.

The claim presented to the executrix, upon which the allegation of the complaint just quoted is based, is in its nature essentially a contingent claim. Section 1498 of the Code of Civil Procedure declares when actions must be brought upon claims due and claims not due at the date of rejection. The claim here presented cannot be classed in either category; and the declaration of this principle finds full support in the case of Verdier v. Roach, 96 Cal. 474, 31 Pac. 554. We find no other provision in the statute prescribing the time within which suit must be brought upon rejected claims; hence, as to rejected contingent claims, the matter may be said to be enveloped in some doubt. As is said in Verdier v. Roach, supra: "The allowance of such a claim would have admitted and established the validity of the obligation, and would have entitled it to be filed in court, etc." And, while it is possible that an action upon a rejected contingent claim may be brought to secure a judgment, giving the claim the same status as would come to it by its allowance, still, we find, upon examination of the complaint in this case, and especially of the allegation previously quoted, that no such judgment is here sought; but a money judgment for damages pure and simple is asked for. This allegation of the complaint has a twofold character. It lays a claim for damages in the sum of $1,000 for furniture, etc., lost and destroyed by the lessee, and also a claim of $2,174.45 for furniture, etc., injured and damaged. As to the damage for injury to the personal property leased by plaintiff, we are clear that any action for such damages will be premature until the expiration of the lease term. The lessor, under his contract, agreed to return this personal property "in as good condition as said articles now are," and no cause of action for a breach of that covenant could arise until the time came for a return of the property. The mere fact that it was injured and damaged at some time during the life of the lease would not show that it could not be returned subsequently in substantially its original condition. It would not show but that repairs would place it in the same condition as when leased. As to the claim of $1,000 for property destroyed and lost, it must be assumed that such property not only was placed beyond repair, but could not be returned; and, such being the fact, it may be conceded, for present purposes, at least, that a cause of action in damages for its loss would arise at the date of its destruction, regardless of the time of the expiration of the lease; for, even though the lessee's stated time for performance had not yet arrived, if he voluntarily placed it out of his power to perform, he committed a breach of the contract, and was liable at once. It may also be conceded that the covenants of his contract as to returning this property could not be satisfied by a return of other property of a similar kind and character. But, for other reasons, we think this claim of $1,000 for damages does not state a cause of action; and those reasons also furnish additional grounds for defeating the plaintiff's claim of damages for property injured and damaged. The allegation of the complaint in this regard is that, "before the filing of the complaint to which this is amendatory, the said T. J. Sherwood had carelessly and negligently permitted a large amount of personal property," etc. It will be observed that the claim presented and rejected was a contingent claim. No damages were alleged, and no allowance for damages asked. The complaint, as we see, asks for damages. Upon such a state of facts, it is necessary to the statement of a cause of action that an allegation be found therein that such damages arose from a breach of the contract occurring since the presentation and rejection of the contingent claim. No claim for damages was presented to the executrix of the estate. She had no opportunity to allow such a claim, and necessarily rejected no such claim. No such claim ever being presented and rejected, no action for damages upon a claim of that character will lie; for its presentation and rejection were conditions precedent to the bringing of an action. An allegation of the character suggested would seem to be as necessary to a complaint in this class of actions as an allegation showing that the breach of the contract occurred during the life of the guaranty. The complaint upon its face must show a present liability of the guarantor. It must show a presentation and rejection of the claim upon which the action is brought, or a legal reason excusing such presentation and rejection. This the complaint does not do. If a complaint showed an action against an administrator or executor upon a claim against a decedent, without alleging its presentation and rejection, no cause of action would be stated, and in this case there is no cause of action stated against defendant, inasmuch as there is no allegation that this breach of contract was made subsequent to the presentation and rejection of the contingent claim. An allegation in the one case is no more important than in the other. For the foregoing reasons the judgment is affirmed.

We concur: McFARLAND, J.; HARRISON, J.

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5 Cal. Unrep. 101

BIGELOW v. BALLERINO. (No 19,480.)[1]

(Supreme Court of California. July 31, 1895.)

VACATION OF ALLEY—RIGHTS OF ABUTTING OWNER.

Where a public alley is vacated, the right of an abutting owner to the portion adjoining his land is not, as against an abutting owner on the opposite side of the alley, affected by the fact that the vacation was unlawful.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by L. M. Bigelow against Bartolo Ballerino to quiet title. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Horace Bell, for appellant. A. W. Hutton, for respondent.

BRITT, C. There was a street in the city of Los Angeles called "Negro Alley." Plaintiff owned land which, as she claimed, abutted on the westerly side of such alley, and defendant owned land adjacent to the easterly side thereof, opposite to plaintiff's land. In April, 1889, the city council of Los Angeles vacated said alley as a street, and about the same time laid out a new street, called "Los Angeles Street," a little to the west of said alley. Such new street included nearly all of plaintiff's land, the city paying her for the portion taken. The court found that there was left, however, of her property, a wedge-shaped piece, varying in width from a few inches at the north end to a few feet at the south end, contiguous to said Negro alley, and lying between the westerly line of the alley and the easterly line of the new street. Defendant, claiming the right, upon the vacation of the alley, to extend his frontage to the new street, constructed a small building adjacent to the east line thereof, covering a section about 16 feet in length of the said narrow strip of plaintiff's land, and extending eastward into what had been Negro alley. Plaintiff brought this action to quiet her title against defendant to the land between her north and south lines lying east of the new street and extending to the middle line of such former alley, and to recover possession of the parcel so built upon by him. She had judgment, and the defendant appeals from the same, and from an order denying his motion for new trial. The only question of any consequence in the case is whether the evidence sustains the finding that plaintiff is the owner of that portion of the narrow strip between Los Angeles street and the line of the former Negro alley, where defendant constructed his building. If she is, then of course she is entitled to resist the encroachments of the defendant on her side of the alley, whether it was lawfully vacated or not, and whether he consented to its vacation or not. Civ. Code, 831. On this question the record is not very clear; but, upon examining the evidence set out, we think the court was justified in its conclusion that plaintiff is the owner of the disputed ground,—by long continued possession of herself and her predecessors, if not by paper title. We see no useful purpose to be served by detailing the testimony here. The judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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5 Cal. Unrep. 83

JENSEN v. HUNTER et al. (No. 19,321.)

(Supreme Court of California. July 11, 1895.)

DIVERSION OF WATER—CONTRACT—CONSIDERATION—LICENSE—ADVERSE POSSESSION.

1. Where suit was brought by an upper riparian owner to compel defendant to desist from taking water from a stream, such compulsory abandonment cannot constitute a consideration for an agreement by another owner to allow defendant to divert the water from a point lower on the stream.

2. Title to a ditch diverting water from a stream on the land of plaintiff's decedent cannot be claimed by adverse possession by one who, after using the water for three years, acknowledged decedent's title by offering to pay for a grant thereof.

3. An oral permission given to divert and use water from a stream is a mere license, which is revocable, and does not vest any estate in the land.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

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[1] Reversed in banc. See 44 Pac. 307, 111 Cal. 559.

Action by Mercedes Jensen, as executrix, against R. B. Hunter and others, to quiet title. Defendants had judgment, and plaintiff appeals. Reversed.

Paris & Allison and H. W. Nesbit, for appellant. Goodcell & Leonard and W. A. Purrington, for respondents.

HAYNES, C. Cornelius Jensen died December 12, 1886, seised of the lands described in the complaint, and plaintiff brings this action, as his executrix, to quiet the title of the estate thereto. The only controversy between the parties relates to an alleged water right and right of way for a ditch claimed by defendants over said lands. The court found in favor of defendants, establishing their right to the water and ditch, and plaintiff appeals from the judgment entered thereon, and from an order denying her motion for a new trial.

The water in question rises above plaintiff's land, and flows through it in a natural stream or water course. About four years prior to 1882, the water was diverted by one Kelting at a point above plaintiff's land, and conducted by a ditch to his land, which is now owned by the principal defendant, Margaret Scott, who was formerly the wife of said Kelting. The point of diversion was then upon the land of one Evans, who, in 1882, refused to permit Kelting to longer take the water out upon his land. Whether any part of the ditch, as it then existed, was upon plaintiff's land does not clearly appear. Jose Jensen testified that "it might have crossed a corner of our land." Phillippe Martinez and one Quintana were interested in the ditch with Kelting, but they were not made defendants. Whether they have or claim any present interest does not appear. The defendants, other than Mrs. Scott, are tenants and incumbrancers of Mrs. Scott's land, which was formerly owned by Kelting, and neither her land nor that of Martinez or Quintana touch the stream from which the water was taken at any point.

Mrs. Scott's answer alleged ownership of the right to divert the water for use on her land, and the right to maintain and use the dam and ditch, by the adverse use and possession thereof for more than five years; and for a second defense alleged a parol agreement between her grantor, Kelting, and said Cornelius Jensen, whereby said Kelting agreed to abandon his right to divert the water "at said higher point," and to abandon the use of the ditch at that point, and that Jensen, in consideration thereof, promised and agreed that Kelting should have the perpetual right to divert the water at said lower point, and the like right to use and maintain a dam, and a ditch extending therefrom across Jensen's land to a point where it would connect with the ditch before that used to convey the water diverted at said higher point; that the new ditch was completed in the spring of 1882, and was used thereafter until 1886, when the dam was washed away, and that Jensen then orally agreed with Mrs. Scott that she should have the perpetual right to maintain a dam at a point about 200 yards above the site of the one washed out, and to construct a ditch from the new dam to connect with the ditch then existing; that the new dam and ditch were used by Mrs. Scott until June, 1888, when plaintiff prevented the further use of the dam and ditch. The court found all the averments of the answer to be true, except that the court was unable to find or determine the quantity of water to which the defendant was entitled, but found that she was entitled to the flow of the water to the full capacity of the ditch, not to exceed, however, 300 inches measured under a 4-inch pressure, that being the quantity she alleged she was entitled to.

Appellant contends that the findings are not justified by the evidence. The answer, as we have seen, alleged a consideration for the parol agreement alleged to have been made by Jensen with Kelting for the right to construct the dam and ditch on the land of the former. That consideration is alleged to have been the abandonment by Kelting of the right to divert the water at a point above Jensen's land. The evidence, however, shows that about four years before the construction of the dam and ditch on Jensen's land Kelting diverted the water upon the land of one Evans, and that Evans brought suit against Kelting, and compelled him to desist from taking the water, and it was this enforced abandonment of the diversion of the water and use of the former ditch that is referred to as the consideration of Jensen's alleged parol agreement with Kelting. Such enforced abandonment could not constitute a consideration for the alleged agreement. There was, however, no evidence that any promise or agreement was made by Jensen, whether by parol or otherwise, at or before the construction of the dam, conferring upon Kelting a right to the water, or to construct the dam or ditch; nor was there any evidence in support of the allegation that when the dam was washed away in 1886 Jensen orally agreed with Mrs. Scott that she should have the perpetual or any right to maintain a dam or ditch at any place upon his land; but the evidence shows that the first dam and ditch constructed upon Jensen's land was by his license or permission, and that after that dam was washed away another dam was constructed at a different place, and a new ditch taken out and connected with the old one, also with Jensen's permission. That the construction of the dam and ditch was not based upon any assertion of right in Kelting or his associates, Martinez and Quintana, who assisted in their construction and participated in the use of the water, is clear. Neither of them were riparian proprietors, and the place of diversion which they had been compelled to abandon, as well as the water diverted, was the private property of Evans. The particulars of the litigation with Evans do not appear in the record, but it must be assumed from the result that they had no right. If they had purchased the water right from Evans, the right to the ditch across his land would have been sustained; and a right acquired by adverse possession would have been equally efficacious to sustain their right to both the water and the ditch. If, therefore, they had no right to the water as against Evans, they could have no right to it as against Jensen, and defendants cannot now assert any title to either the water or the ditch, unless it has been acquired by adverse possession, there being not only no evidence of any grant, but both the answer and the evidence on the part of the defendants concede that no conveyance of the right was ever made.

In Pitzman v. Boyce, 111 Mo. 387, 19 S. W. 1104, a case involving a similar question, it was said: "The question to be first determined in this case is whether the use was really adverse to the owner, or was it merely permissive in its character? If permissive in its inception, then such permissive character, being stamped on the use at the outset, will continue of the same nature, and no adverse user can arise until a distinct and positive assertion of a right hostile to the owner, and brought home to him, can transform a subordinate and friendly holding into one of an opposite nature, and exclusive and independent in its character." In Thomas v. England, 71 Cal. 456, 460, 12 Pac. 491, it was said: "To perfect an easement by occupancy for five years, the enjoyment must be adverse, continuous, open, peaceable. It must be adverse, and under claim of legal right so to do, and not by the consent, permission, or indulgence merely of the owner of the alleged servient estate." That the use of the dam, ditch, and water by the defendants was not under a claim of "legal right" is apparent from the testimony of Mrs. Scott, the principal defendant, as well as from the testimony of other witnesses. Mrs. Scott, it is true, testified that she used the water peaceably until about two years before the trial, and during that time claimed it as her own property. She further testified, however, as follows: "I went to Mr. Cornelius Jensen to get him to give me a writing for the right of way, and took money along to pay him for it. He said it was not necessary, the water was mine, and he could not take it, and nobody else, and offered to defend me if I had any trouble with it. This conversation was two or three years before Jensen died." She further testified that she had three or four conversations with him about the water, and that he always said it was hers; that she never had any writing from Mr. Jensen for the right of way; that he said it wasn't necessary, that he gave it to her husband, and she had had it so long it was hers without any writing. Mrs. Berkmere, a sister of Mrs. Scott, testified that she went with Mrs. Scott to see Mr. Jensen; that they went because they heard other parties were talking of buying the water from Jensen. "We thought we would go to Mr. Jensen, and pay him something to secure this water,—not the water, the right of way." Mr. Ferris, a witness called by the defendants, testified to the changes in the location of the dam and ditch; that the dam was put on Jensen's place because Evans had sued them and stopped them; that Jensen said she could take it across his land, so that she would not lose her garden or use of the place. Upon cross-examination he was asked: "Q. Did he say he would simply give permission to run the water through his land? A. Yes, sir; he had let them have a chance to have some water there. I took it from what he said that he should let her have a right of way. I asked him one time why he did not deed it to her if he wanted her to have it, and he said it would be all right. He said Mrs. Kelting had a big family, and he wanted her to have the use of the water, and that he might not want the water for some time. He told me that he would not sell any of that water,—that he wanted Mrs. Kelting to have it;" and, in reply to a question whether Jensen did not say that he might need the water himself some time, answered, "No, sir; he told me he could never use that water on his land, and it was thought so at that time." These conversations testified to by Mr. Ferris took place about 1884. Frank Wilkinson, for defendant, testified that he was with John Berkmere when he tried to get some writings from Jensen giving Mrs. Kelting (now Mrs. Scott) a right of way. That also was in 1884. Phillipe Martinez, called by the plaintiff, testified, in substance, that he was interested in the ditch with Kelting and Quintana; that they went to Jensen and got permission to take out the ditch; that Jensen said he was willing that his neighbors should have the use of the water; that the dam would often break, and he would go and get permission to build another, and to take out a new piece of ditch, but that Jensen never sold or gave the right of way; that in 1886, shortly before Mr. Jensen died, he went to him on behalf of Kelting, Quintana, and himself to purchase the right of way for the ditch, and the water right, and offered to give him $1,000 for it; that "Jensen said he did not care about it, as he was about to die, and his heirs would be left so they could fix his matters." Jose Jensen testified that they had been using the water on the Jensen land about two years.

It is a significant fact that the evidence nowhere discloses any effort to secure from Jensen a grant or conveyance of this valuable water right, and the right to construct and maintain upon his land the dam and ditch necessary to its use and enjoyment, until Mrs. Scott learned that others were talking of buying the water from Jensen, two years or more after the dam and ditch were constructed. It is urged by respondent that she had a right to buy in a title to secure herself, and that by doing so she did not waive any right or title she had. But she did not approach Jensen with any assertion of right, but offered to pay him for the conveyance of a right she did not have. It is true she testified that Jensen told her she did not need any writing, that he had given it to her husband, and used other expressions of like character, but the fact remains that the use had continued but two or three years, that unless she could obtain a conveyance of the right she could have no title otherwise than by adverse possession for five years, and her application at that time was a confession of Jensen's title, and that the only source from which she could obtain title was from him. She asserted no right as against him, and, whatever he may have said to her, the fact remains that he refused to convey the right to her. The testimony of Mr. Ferris, already quoted, shows that he only intended her to have the use of the water temporarily, and that that was the reason he did not convey to her the right by deed. His verbal declarations testified to by Mrs. Scott could not vest in her the title to the water, nor the easement of the ditch. In Lovell v. Frost, 44 Cal. 471, it was held "that the offer to purchase or rent the property, and not merely to purchase an outstanding or adverse claim or title to quiet his possession or protect himself from litigation, as in Cannon v. Stockmon, 36 Cal. 538, amounted to a clear and unequivocal recognition of the defendant's title. Such recognition proves that the plaintiff's intestate did not, at that time, claim the title as against the defendant, and, the recognition having been given before the full period of the statute had run, the plaintiff is precluded from relying on the statute as vesting in his intestate the title as against the defendant; for in order to secure that position his possession must not only have been adverse to the defendant, but he must also have claimed the title as against the defendant during the entire statutory period." See, also, Railroad Co. v. Mead, 63 Cal. 112, and Insurance Co. v. Stroup, Id. 150, 154. The elements of adverse possession are very clearly stated in Unger v. Mooney, 63 Cal. 586, and need not be repeated here; and in De Frieze v. Quint, 94 Cal. 653, 663, 30 Pac. 1, it was said: "The burden of proving all the essential elements of an adverse possession, including its hostile character, is upon the party relying upon it;" but here the use by Kelting and those interested with him, being by the permission and license of Jensen, was in subordination to his title and possession. Brumagim v. Bradshaw, 39 Cal. 24, 37. The facts disclosed by the evidence constituted simply a parol license, founded in personal confidence or favor, and is defined to be an authority to do some act, or a series of acts, on the land of another, without passing any interest in the land. Cook v. Stearns, 11 Mass. 533; Clark v. Glidden, 60 Vt. 702, 15 Atl. 358; Houston v. Laffee, 46 N. H. 505; Iron Co. v. Wright, 32 N. J. Eq. 248. Kent thus distinguishes it from an easement: "A claim for an easement must be founded upon grant, or by deed, or writing, or upon prescription which presupposes one, for it is a permanent interest in another's land, with a right at all times to enter and enjoy it; but a license is an authority to do a particular act, or a series of acts, upon another's land, without possessing an estate therein. It is founded in personal confidence, and is not assignable." 3 Comm. 452. It is essentially revocable, and its continuance depends on the will of the person by whom it is given (Bartlett v. Prescott, 41 N. H. 493; Tanner v. Volentine, 75 Ill. 624; Hill v. Hill, 113 Mass. 103); and it is terminated at the death of the party conferring it (Carter v. Page, 4 Ired. 424; De Haro v. U. S., 5 Wall. 599). In the case last cited the court (at page 627) said: "There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party, and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it. A sale of the land by the owner instantly works its revocation, and in no sense is it property descendible to heirs."

The evidence, showing as it does that the original entry upon Jensen's land in 1882, and the construction of the dam and ditch, and the diversion of the water, were not under a grant, nor upon a claim of right asserted by Kelting and his associates, but under a parol license given by Cornelius Jensen, and that Jensen died in 1886; and, as the license was then terminated, the possession and use by Mrs. Scott may have been adverse from that time; but I see nothing in the evidence justifying the conclusion that prior to that time she had asserted any right or title as against Jensen, who is conclusively shown to have been the owner of the land and water; but, on the contrary, she expressly acknowledged his title in 1884, less than five years before her use of the water and ditch was interrupted by the plaintiff in June, 1888. Where, as here, the evidence clearly shows that the entry and use was under a license merely, convincing evidence of the repudiation of the license, and an unequivocal assertion of a right hostile to the licensor, brought home to him, should be required to set the statute in motion. In the absence of such evidence, a license is a complete answer and defense to a claim of adverse possession or use, set up by the licensee, and some authorities hold that one who enters under a license cannot afterwards set up an adverse possession. Luce v. Carley, 24 Wend. 451; Blaisdell v. Railroad Co., 51 N. H. 483. A man's title to his land should count for something in controversies of this character.

The judgment and order appealed from should be reversed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

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108 Cal. 72

HARGRAVE et al. v. COOK et al. (No. 19,453.)

(Supreme Court of California. July 11, 1895.)

WATERS—RIPARIAN RIGHTS—LIMITATION—DIVERSION.

1. None of the rights of a riparian proprietor to put water of a stream flowing through or along his land to a legitimate use is lost by mere nonuser.

2. As a riparian proprietor's right to the use of water ceases when it has flowed past his land, his acquiescence does not give a person diverting such water to a useful purpose a prescriptive right therein against him by operation of the statute of limitation.

3. Under Civ. Code, § 1422, providing that the rights of riparian proprietors are not affected by the provisions of the Code as to appropriation of water, one who bases his right on appropriation of water over land then part of the public domain acquires no right superior to those attaching to riparian lands which at the time of the appropriation were private.

4. Under Civ. Code, § 1412, providing that the person entitled to the use of water may change the point of diversion if others are not injured thereby, applies only to a change of diversion made on land subject to his easement.

Department 2. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by E. T. Hargrave and others against D. C. Cook and others. From an order granting a new trial, plaintiffs appeal. Affirmed.

Blackstock & Ewing, for appellants. Chapman & Hendrick, Barnes & Selby, and Del Valle & Munday, for respondents.

HENSHAW, J. Appeal from the order granting a new trial. Plaintiffs claim ownership in common with some of the named defendants in a certain described ditch, flume, water right, and right of way, by means of which they diverted the waters of Piru river to their nonriparian lands. The ditch was known as the "Hargrave & Comfort Ditch." They averred the adverse claims of defendants, and asked for a decree settling their rights and enjoining defendants from further assertion of such or any claims. The defendants answered in accordance with their various claims; some asserting ownership in the ditch and water rights, others declaring upon superior rights by prescription. But in particular the defendant Cook claimed the rights of a riparian owner to the water of the creek, which rights are pleaded as superior to those of the ditch owners.

Stripped of matters unnecessary to this consideration, the following are the essential facts: Defendant Cook is the owner of the Temescal rancho under United States patent issued in 1871. Piru river flows through this ranch, and thence across the northwest quarter of section 20. About the year 1875, section 20 being public land of the United States, plaintiffs' predecessors in interest constructed the ditch, and diverted part of the waters of the river, with the acquiescence of the then occupant of the land; and, as the court found, plaintiffs and their grantors, "for more than fourteen years next preceding the commencement of this suit, have been in the quiet, peaceable, open, adverse, notorious, uninterrupted, and exclusive possession, claiming right and title of said water ditch, with the right to divert and use the waters of said Piru river to the extent of 271 inches, measured under four-inch pressure." The court further found that the predecessors in interest of the defendant Cook in the Temescal rancho did not use any of the waters of said stream except at rare and irregular intervals, and in small quantities; and that they at all times knew that the said Hargrave & Comfort ditch was being continuously used, and that the waters of the stream were being diverted and conducted to lands not riparian to the stream; and that such use, "with their full knowledge and acquiescence," had been continuous for a period exceeding 10 years before Cook acquired title to the Temescal rancho and the northwest quarter of section 20. Also it is found that when Cook acquired title he knew of the use of the water by defendants, and "did not object to such use, but fully acquiesced therein, until about the commencement of this suit; and that the rights of plaintiffs were not disputed until long after they had fully acquired a prescriptive right with their co-owners to a part of the waters of the said stream." The waters of Piru river had in the past been little used by the owners of the Temescal rancho, but upon Cook's acquisition of it he began the planting of extensive orchards of fruit-bearing trees, until, as he pleads, there were at the commencement of the suit over two millions of orchard and nursery trees dependent upon the waters of the Piru river for irrigation. This use of the water by Cook naturally lessened the flow of the stream to plaintiffs' ditch, decreased the supply available for their purposes, and led to this action. The Piru Water Company, another of the defendants, took water from the Piru river by means of a ditch higher up the stream than the ditch of plaintiffs. Its ditch, at the time of the action, tapped the stream upon the land of the Temescal rancho, and carried the water over and across it to other nonriparian lands. Its right by prescription was claimed to be prior and superior to the right of the owners of the Hargrave & Comfort ditch, and this seems to have been conceded; though the precise extent of the right is a matter of controversy which will be considered hereafter.

The court, by its judgment and decree, awarded: (1) The right to Cook to use the waters flowing over the Temescal rancho for domestic uses and purposes and the watering of stock; (2) the right to Cook to 100 inches of water, under 4-inch pressure, drawn off in the Esperanza ditch; (3) the right to the Piru Water Company to an amount not in excess of 285 inches, or so much thereof as may be necessary for the uses accustomed to be made upon certain nonriparian lands; (4) the right to the owners of the Hargrave & Comfort ditch to an amount not in excess of 271 inches, or so much thereof as may be necessary for the uses accustomed to be made, and in accordance with the amounts by the owners respectively accustomed to be used, upon certain described nonriparian lands; and (5) the right to Cook, "after the wants and necessities of the above prior owners have been fully and reasonably supplied," to use the surplus waters for irrigation on the lands of this ranch. By this decree the right of an upper riparian owner to the use of the water for irrigating purposes is made subordinate to the right of a lower appropriator, because at the time the right of appropriation vested the riparian owner was not actually using the water for the designated purpose. This view, appellants contend, is sound. It is the view taken by the court upon trial and expressed by the judge in the following language: "I think the law is well settled in this state that a person diverting and appropriating to a useful purpose the waters of a running stream may acquire an ownership in the right to the use of such waters to the amount he has appropriated to such useful purpose, by operation of the statute of limitation, even against an upper riparian owner, although the point of diversion is without the limits of the lands of such riparian owner, except as against any lawful use to which the riparian owner had or was making of the waters during the time of the creation of the right in the appropriator by operation of statute of limitation." Upon the hearing of the motion for a new trial the court receded from this position, after the consideration of authorities not before called to its attention, and ordered a new trial. Other grounds were urged in support of the motion. Such of them as are deemed necessary will receive attention, but the principal point inviting consideration is the one above set forth.

The right of a riparian proprietor in or to the waters of a stream flowing through or along his land is not the right of ownership in or to those waters, but is a usufructuary right,—a right, among others, to make a reasonable use of a reasonable quantity for irrigation, returning the surplus to the natural channel, that it may flow on in the accustomed mode to lands below. If his needs do not prompt him to make any use of them, he still has the right to have them flow onto and along and over his land in their usual way, excepting as the accustomed flow may be changed by the act of God, or as the amount of it may be decreased by the reasonable use of upper owners and riparian proprietors. But none of his rights to put the water to legitimate uses is lost by mere nonuser. His rights are not easements, nor appurtenances to his holding. They are not the rights acquired by appropriation or by prescriptive use. They are attached to the soil, and pass with it (Lux v. Haggin, 69 Cal. 255, 10 Pac. 674), and may be lost only by grant, condemnation, or prescription. With any use or diversion of the water after it has passed his land the upper riparian proprietor, having no ownership in, and no longer any rights to, it, would have no concern. (The right to forbid the lower owner from backing the water and flooding his land not being here under consideration.) None of his rights would or could be impaired thereby, and without such an impairment he would be without injury, and, consequently, without cause for complaint or redress. "His right extends no further than the boundary of his own estate. He cannot complain of the mere facts of the diversion of the water course either above or below him, if, within the limits of his own property, it is allowed to follow its accustomed channel." Lux v. Haggin, supra. The Rancho Temescal was never public land, within the meaning of the United States statutes affecting appropriations of water. The riparian rights of the owners of private land are fully protected by section 1422 of the Civil Code. One who bases his right solely upon appropriation made of waters over land which at the time of the appropriation was part of the public domain acquires thereby no right superior to or in derogation of those attaching to lands riparian to the same stream, which, at the time of the appropriation, were held in private ownership.

The "acquiescence" of Cook and his predecessors in interest in the acts of the owners of the Hargrave & Comfort ditch, as declared by the findings, receives this support from the evidence, and no more: With knowledge of these acts, they never attempted to interfere with them. But before one can acquire a right to the doing of an act in which another so acquiesces, the act itself must amount to an invasion of that other's rights, and the doing must either have been so long continued as that a prescriptive claim can be supported upon the theory that the acquiescence presupposes a grant, or under such circumstances as will raise an estoppel against the objecting party. But, as the upper riparian proprietor's right to object to any use or diversion of the water below ceased when it had flowed past his boundary, any such use could not work an invasion of his rights, and he was not called upon to protest against it. Thus, in Hansen v. McCue, 42 Cal. 303, the waters of a spring had been appropriated below by plaintiff. The time arrived when defendant, upon whose land the spring was situated, desired to make use of the waters which fed it. A prescriptive right in plaintiff was urged by reason of defendant's long acquiescence in the use, but this court said: "It will be seen at once that McCue, or those from whom he purchased, could, in the nature of things, have no right to complain that the water in the artificial channel, after leaving the spring, was appropriated below by the owners of the Hansen lot. If they had no right to complain in the first instance, we are not driven to the presumption of the grant of an easement to account for why they did not complain." The same principle is announced in Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76, where a lower appropriator claimed a right to a certain amount of water against an appropriator whose ditch was higher up the stream. The finding was that plaintiff diverted his ditch full of water "whenever there was water in the stream to fill it," and a right superior and adverse to that of defendant was predicated upon this. But the court said: "If the plaintiff's ditch was simply diverting water which defendants allowed to pass down the stream while the headgate of their ditch was closed, the act of plaintiff in diverting the water thus permitted to pass down could not, in the nature of things, be adverse to the defendants. The latter could not complain, and title by prescription cannot be acquired unless the acts constituting the adverse use are of such a nature as to give a cause of action in favor of the person against whom the acts are performed." To like effect are the cases of Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 192, 30 Pac. 623, and Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645. No estoppel is pleaded or found, nor would the facts warrant such a finding. The motion for a new trial was properly granted upon the ground considered.

In contemplation of the new trial it is proper to say that the rights of defendant Cook, and of defendant the Piru Water Company, of which Cook is a stockholder, are in issue in this action only to the extent that their rights affect or are affected by the rights of the plaintiffs. As between themselves, their rights are not subject here to determination, excepting so far as may be necessary to do complete justice to plaintiffs, and excepting so far, as between themselves, they have tendered and joined hostile issues. The limitation upon the use of the water appropriated by the Piru Water Company is not warranted by the evidence. So far as plaintiffs are concerned, the Piru Water Company is prior in time and superior in location, and had acquired the ownership of a given amount of water while that water was used for proper objects, with the right to change the place and purpose of use so long as the change did not injuriously affect the rights of the subsequent appropriators and claimants. Ramelli v. Irish, 96 Cal. 214, 31 Pac. 41; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119; Davis v. Gale, 32 Cal. 26; Pom. Water Rights, § 69.

Upon the question of the right of the owners of the Hargrave & Comfort ditch to extend it five or six hundred feet over the northwest quarter of section 20, now the land of Cook, the better to facilitate the obtaining of their water, we do not deem it proper, upon this appeal, to do more than point out that, while an appropriator of water upon government land retains his rights when the land passes into private ownership, by virtue of the confirmatory statutes of the United States (14 Stat. 253; 16 Stat. 218), and while in the exercise of these rights he may change the point of diversion to another place upon the servient tenement, he is nevertheless limited in so doing to the exigencies of the situation, and has no right to make such change arbitrarily and at will. He may do so when, under certain circumstances, it is required to enable him to make the amount of water to which he has ownership, but then only when "others are not injured by the change." Civ. Code, § 1412. His rights are the rights of the grantee of an easement, and extend, in the matter of changing the point of diversion, no further than the boundaries of the servient tenant; and even when entering upon this he is bound only to make reasonable changes with reasonable care, and also to repair, so far as possible, whatever damage his labors may have occasioned. Gale & W. Easem. 235. As to lands other than those subject to his easement, and as to other claimants and owners, he can make no change at all which injuriously affects them or their rights. The order appealed from is affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

(108 Cal. 68)

MESNAGER v. ENGELHARDT et ux. (No. 19,455.)

(Supreme Court of California. July 11, 1895.)

INJUNCTION—INCONSISTENCY OF FINDINGS.

In an action to restrain defendant from interfering with plaintiff in laying pipes over defendant's land, and in construction of a dam, the court found that plaintiff had a right of way for conducting water across defendant's land, but not for the construction of a dam; that defendant had interfered with plaintiff in the enjoyment of his easement, and unless restrained from interfering with him in laying water pipes along the right of way, and "rebuilding his dam at the point of diversion," great injury will be done plaintiff's crops. The decree restrained defendant from interfering with plaintiff in laying the pipes, but adjudged that plaintiff had no right to build a dam. *Held*, that the decree could not be reversed on the ground of inconsistency in the findings.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by George L. Mesnager against George Engelhardt and wife for an injunction to restrain defendants from interfering with plaintiff's construction of a dam, and laying of pipe on a right of way over defendants' land. From the judgment on the merits, and an order denying a new trial, plaintiff appeals. Affirmed.

Horace Bell, for appellant. Will D. Gould, for respondents.

HENSHAW, J. The action was for an injunction. Plaintiff alleged that he was "the owner of a right of way, and in particular for the purpose of laying a pipe line and the erection of a dam, and the construction of ditches, and for the doing of any work necessary for the diversion of the water flowing in the Verdugo creek, over the following described land." The land is then described. Next follows a description of the "particular right of way" claimed, which commenced at "the point where the dam constructed by the plaintiff in 1892 was situated," and extends over and across the land of defendants to the point where "said pipe line constructed by plaintiff in 1892 crossed the northeasterly line of defendants' land." Plaintiff then avers the interference of defendants, their preventing him "from entering upon said land, and from using his right of way for the purposes aforesaid," and his damage, and prays "that his right of way over the land described in his complaint, and in particular for ditches, dams, and pipe lines, for the purpose of diverting the water from the said Verdugo creek, be declared good and valid forever," and for a perpetual injunction. The defendants, for answer, made denial, and the facts as disclosed by the evidence or found by the court proved to be that the land upon which the dam was to be constructed and the ditches dug, and over which the pipes were to be laid, was the separate property of the wife of defendant George Engelhardt. In 1891 the husband, without authority from his wife, attempted to convey by instrument in writing to plaintiff the right "to build a dam and make a ditch in the Verdugo creek, and on my north line, as near as possible from the northeast corner, about two hundred feet, more or less, providing said dam and ditch will not interfere with any private entrance." In April, 1892, the Engelhardts, husband and wife, granted to plaintiff "the right of way over their land for all purposes, and also the right to use a certain water ditch, now existing on the place, to run his own water along with theirs, or to build new ditches, and so forth." Under these instruments plaintiff assumed the right to construct a dam upon defendants' land, obstructing the natural flow of the creek waters, and to lay a pipe line to conduct these waters to his lands; and in 1892 entered upon the lands, and, with the assistance of George Engelhardt, built a dam and laid his pipe line at an expense of $2,000. The dam was injured by the floods of the following winter, and in 1893 plaintiff again attempted to enter upon defendants' land to relay his pipes and rebuild the dam, when he was forcibly prevented by defendants.

Mrs. Englehardt testified that her husband had no authority to execute the first attempted grant to plaintiff, and that she did not know of the dam until after it was constructed. She declared that she did not object to plaintiff's digging a ditch or laying pipes across her land to take his own water from the creek, but did object to his building a dam and taking her own water from her property. Under this evidence plaintiff would not be entitled either to build such a dam on defendants' land or to appropriate any of the waters of the creek rightfully belonging to defendant Jesus de Engelhardt, and the court so concluded. The husband was not shown to be the agent of the wife, nor was she bound to allow the maintenance of a dam against the construction of which she protested, nor the appropriation of her water by means of it. The difficulty arises solely in construing the findings, which it is contended are inconsistent with themselves, do not support the conclusions and decree, and do entitle plaintiff to the relief sought. It will be noticed that the complaint does not in terms aver a right in plaintiff by grant, appropriation, or prescription, to divert the waters of the creek upon defendants' land, but somewhat curiously pleads a right of way for the doing of any work necessary for such diversion. Plaintiff is the owner of a tract of land bordering upon the creek above the lands of the Engelhardts. He diverted the water upon this upper land, and carried it by ditch across defendants' land onto his lower tract. The easement granted gave him the right to construct new ditches or pipe lines for this purpose, but under it he wrongfully asserted the right, as has been seen, to dam the creek upon defendants' land, and make there a new point of diversion. By the decree he was given all to which he was justly entitled.

The alleged ambiguity or inconsistency in the findings is not sufficient to justify a reversal of the case. The court first finds, with much particularity, the right of way and the nature and extent of the easement to which plaintiff is entitled. It is a right of way for the purpose of transporting plaintiff's water across defendants' land, and not a right of way for the construction of a dam. The defendants are found to have interfered with plaintiff in the enjoyment of his easement. And it is then found that plaintiff's crops will suffer great damage "unless defendants are restrained from further interfering with and obstructing plaintiff, as aforesaid, in relaying his said water pipes along his said right of way, and *rebuilding his dam at the point of diversion aforesaid.*" By the decree defendants are enjoined from interfering with the plaintiff's right of way for the laying of pipes and construction of ditches, and plaintiff is adjudged to have no right to build any dam or do any work for the purpose of diverting the water of the creek upon defendants' land. The inconsistency, it is charged, is found in the italicized portion of the finding above quoted. But while plaintiff and his crops suffered from the interference of defendants with his acts, some of which were legal and others illegal, and while these acts are all grouped and collectively declared against, it plainly appears that, so far as concerns the construction of the dam, the interference caused damnum absque injuria, since plaintiff had no just cause of complaint against it.

The judgment and order are affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

(108 Cal. 129)

GIER v. LOS ANGELES CONSOLIDATED ELECTRIC RY. CO. (No. 19,577.)

(Supreme Court of California. July 3, 1895.)

INJURY TO STREET-CAR EMPLOYE — NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

1. An employé of a street railroad company, who was crushed between cars passing on the switch and main tracks while standing there to change the switch, is not guilty of contributory negligence where it appears that this position is the one usually taken, and not in itself a place of peril.

2. Under Civ. Code, § 1970, providing that an employer shall not be liable for injuries to an employé through the negligence of a coemployé unless he has neglected to use ordinary care in the selection of such coemployé; and section 1971, providing that an employer must in all cases indemnify his employé for loss caused by the former's want of ordinary care, —in an action by an employé for injuries resulting from the negligence of plaintiff's coemployé, where it was shown that defendant used due care in selecting the coemployé, plaintiff cannot recover without showing that such coemployé was in fact incompetent, and that defendant had knowledge thereof, or that his reputation was such that defendant should be presumed to have had knowledge of his incompetency.

3. In an action against an employer for injury resulting from the incompetency of a fellow servant, where it is shown that defendant exercised ordinary care in the selection of such servant, plaintiff cannot recover merely on proof of his reputation for recklessness and carelessness, without also proving that he was in fact reckless and careless.

Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by W. H. Gier against the Los Angeles Consolidated Electric Railway Company for personal injuries. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

John D. Pope, for appellant. Murphey & Gottschalk, for respondent.

HENSHAW, J. Plaintiff, a conductor upon one of defendant's electric cars, was injured under the following circumstances: He had stopped his car and gone ahead to turn a switch to permit the passage of his car from one track to the other. He turned the switch, standing, while doing so, in the V-shaped space made by the switch track and the main line. Another car, coming up, had stopped on the main line, just behind him. At this moment his own car was moved forward by its motorman. The plaintiff was caught between the cars in the wedge-shaped space, crushed, and injured. This action is for a recovery on account of his injuries, and to maintain it he pleads the negligent and careless act of the motorman, —admittedly a fellow servant,—and a lack of ordinary care upon the part of defendant in selecting and hiring the culpable employé. Some charge is also made of defective and inadequate switching apparatus, but this contention seems to have been abandoned. In any event, the record does not disclose any evidence in support of it, nor is argument addressed to maintain it. Some evidence was introduced tending to prove that the plaintiff might with safety have stood in another place and turned the switch point, and that he voluntarily selected a dangerous spot from which to perform the act; but his position, it is shown, was the usual one, and not in itself a place of peril. No contributory negligence can be predicated upon that fact. Taylor v. Railroad Co. (Tenn.) 27 S. W. 663.

There is likewise conflicting evidence upon the question whether or not plaintiff ordered his motorman to move forward, but the verdict of the jury upon this disputed fact will not be disturbed. The evidence, however, does abundantly establish that plaintiff suffered through the carelessness of the motorman in sending his car ahead under such circumstances as must inevitably bring death or serious injury to the plaintiff, and upon this proposition not the least convincing testimony comes from the motorman himself. But herein it is to be noted that the act was not one evincing incompetency, employing the word strictly to denote a lack of skill or ability to use appliances or perform a duty in a workmanlike way, but was a single and signal exhibition of carelessness or recklessness,—such, however, as the most competent man might at some time be guilty of. Nor does the evidence of plaintiff's witnesses establish, or seek to establish, incompetency, as the word is here used. It is addressed to establishing the propositions that the motorman was in fact habitually reckless or careless, or both, and that his general reputation was in accord with this fact. If these propositions are satisfactorily demonstrated, it follows from them that the defendant, being presumed to know this reputation, was negligent in not pursuing inquiries which would have shown that it was well founded, and that the man was an unfit employé.

Coming thus to the consideration of the employer's liability, the evidence shows that in the selection and at the time of the selection of the culpable motorman the company did not fail to exercise ordinary care. The undisputed and supported testimony is that the defendant first employed the motorman as a driver of one of its horse cars, and, upon changing the power to electricity, he was trained as a motorman, and had served continuously as such for a considerable period of time. The motorman had, previous to his employment by defendant, been the driver of a horse car upon a line afterwards acquired by defendant, and continued in the same occupation under the new management. At the time of the change inquiry was made by defendant of the former employers of the motorman as to his fitness and competency, and he was declared to be the best and most careful of the men. During all the time he was in defendant's employ, previous to the occurrence charged upon, no accident is proved to have happened to his car, or to any person or property, the responsibility for which attached to him. Indeed, the court instructed the jury that there was no evidence "of any special acts of carelessness on the part of the motorman, Defrain, prior to the time when Gier was hurt, from which the jury would be authorized to find that said Defrain was either careless or incompetent as a motorman." Respondent criticises the omission of defendant to question Defrain himself (the motorman) as to his competency, skill, and carefulness at the time of his employment. Such inquiry would be natural and prudent were no better source of information at hand; but defendant was not in fault, since it took pains to avail itself of evidence upon the matter at once disinterested and superior,—that of his former employer. It appears, however, that in the original selection of the employé the defendant was not remiss, did not fail to exercise ordinary care. The determination of this fact in its favor, defendant contends, entitles it to a reversal of the order and judgment. "An employer," says section 1970, Civ. Code, "is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé." The strict construction of this section for which appellant contends would support his contention, and at the same time relieve the employer from all liability to an employé for the acts of such a culpable servant, even though afterwards the employer had received knowledge that such servant had become grossly incompetent, reckless or unfit, provided only that at the time of his selection ordinary care was exercised. Thus an employé, skillful and competent and careful at the time of his employment, might, through drunkenness or other vice, become wholly unfit and untrustworthy, yet, though knowledge of this were brought home to the employer, and he refused to act upon it, the helpless fellow servant, himself perhaps in ignorance, would have no redress. A court would be strenuous against such a construction, and, if forced to adopt it, would regard it only as an inevitable and unfortunate miscarriage of justice. But no such result need here arise. If necessary, we should not hesitate to construe the acts of the employer, under such circumstances, as constituting a new selection of the culpable employé. This, however, we do not deem requisite, for the section following the one quoted provides generally that an employer must in all cases indemnify his employé for losses caused by the former's want of ordinary care. Civ. Code, § 1971. Such lack of ordinary care may as well be shown by the retention of an unfit employé after knowledge of the fact as by a failure to use due diligence at the time of his selection, and in either case the liability of the employer attaches.

The defendant, then, having exercised due care in the selection of Defrain, to render it liable for the injury complained of, it was necessary for the plaintiff to establish the following facts: First, that the accident happened by reason of the carelessness or incapacity of Defrain; second, that Defrain had become and was actually unfit or incompetent through negligence or incapacity; third, that defendant knew this, or that Defrain's general reputation was so in accord with the fact that the presumption is that defendant knew it, and was therefore negligent in not acting upon the knowledge. And this is so because the burden of proving the employer's negligence is on plaintiff. He attempts to do this by showing that his fellow employé was, in fact, unfit and reckless, and that the employer knew this, or is presumed to have known it. It is therefore the character of the employé which is the object of ultimate determination, not his reputation. Where the plaintiff has established that the employé was, in fact, unfit and incompetent, and has been able to show by direct proof that the employer knew this fact, the case so far is made out, and there is no need or utility in evidence of reputation. But, as such proof is difficult, and frequently impossible, to make, the law permits the employer to be charged after proof of the fact of unfitness, if it can be shown that the culpable servant's reputation for the particular matter in question was so generally and notoriously bad that it ought to have been, and therefore presumably was, known to him; for then, with knowledge of this reputation imputed to him, if the employer had acted with reasonable prudence upon this information, he would have discovered that the reputation was well founded, that the facts justified and supported it; in short, that he had in his employ an unreliable man. It becomes apparent, therefore, that as evidence of reputation becomes necessary only where there is an inability to furnish direct proof of the employer's knowledge, so it is proper only after the establishment of the fact that the employé is in truth an unfit person. And reputation is not proof of that fact. A man's reputation may be at variance with his character or in accord with it. He may be reputed reckless, and in fact be careful. An employer is not bound to discharge an employé merely because of his ill repute, but he is culpable if he retains in his employ a servant with a bad reputation, well founded. So it is that evidence of individual acts evincing negligence or incompetency is admissible. It is admitted, not to show reputation, but to establish the second requisite specified, namely, that the employé was veritably unfit or incompetent. Such is the rule. It will be found suggested or laid down with more or less particularity in the cases of Cosgrove v. Pitman, 103 Cal. 274, 37 Pac. 232; Baulec v. Railroad Co., 59 N. Y. 356; Davis v. Railroad Co., 20 Mich. 112; and Railroad Co. v. Hoover (Md.) 29 Atl. 994; Davis v. Railroad Co., 20 Mich. 105; Monahan v. City of Worcester, 150 Mass. 439, 23 N. E. 228; Railway Co. v. Stupak, 123 Ind. 210, 229, 23 N. E. 246. Applying it to the case at bar, the first fact, as has been said, was clearly proved, and it may be conceded (though not decided) that the bad reputation of Defrain was sufficiently established. But upon the other essential—the fact that Defrain was reckless or careless—there is not only a failure, but such an entire absence, of proof that the court was justified in its instruction to the jury to that effect. Plaintiff's case, as to this, then rests merely upon proof of reputation, but, as has been shown, proof of a reputation for unfitness is not proof of the fact of unfitness. The judgment and order are reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.

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108 Cal. 25

ALEXANDER v. McDOW. (No. 18,405.)

(Supreme Court of California. July 8, 1895.)

ACTION ON NOTE—COMPLAINT—AIDER BY JUDGMENT—DEFAULT JUDGMENT—ATTORNEYS' FEES.

1. A superfluous terminal letter added to the name of defendant will not invalidate a sheriff's return of service which also recited that defendant was duly served, and there was only one defendant.

2. Civ. Code, § 1459, provides that a nonnegotiable note may be assigned by indorsement. *Held*, that a complaint which, after setting out the note, added, "Indorsed: 'Pay to [plaintiff],' "—and alleged that the whole amount was due from defendant to plaintiff, sufficiently alleged the assignment, as against a motion to vacate a judgment entered on default.

3. Where a complaint set out the note sued on, in which there was a stipulation to pay attorneys' fees incurred in the collection thereof, and the suit was brought by an attorney, the complaint was sufficient to support an allowance therefor, the sum asked being fairly deducible from the face of the note.

4. Under Code Civ. Proc. § 585, subd. 1, providing for the entry of judgment by default in actions on contract for the recovery of money only, the clerk has authority to add to the amount due on a note the sum therein stipulated to be paid for attorneys' fees, if within the amount demanded in the summons.

Department 2. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by Jules Alexander against L. D. McDow on a note. Plaintiff had judgment by default, and defendant appeals. Affirmed.

Spencer & Raker and F. C. Spencer, for appellant. Shinn & Shinn, for respondent.

HENSHAW, J. There are two appeals. The first is from an order refusing to recall and quash the execution and to vacate the judgment; the second from the judgment rendered against defendant after his default. The grounds of the motion are that the judgment is void upon its face in showing no service of summons and complaint upon defendant, and that it is void for that the complaint states no cause of action.

1. Upon the summons the sheriff made the following return: "I hereby certify that I received the within summons on the 14th day of ——, A. D. 189–, and personally served the same on the 16th day of October, A. D. 1893, on L. D. McDow, defendant therein named, by delivering to each of said defendant personally, in the town of Susanville, county of Lassen, a copy of said summons, and upon defendant L. D. McDown, personally, in the town of Susanville, county of Lassen, a copy of said summons attached to a copy of the complaint in the action therein named." The irregularity which it is contended renders the return a nullity is the addition of the terminal letter "n" to the name of the defendant, L. D. McDow. The court, in its order holding the return sufficient, said: "There is no question but that the summons was regularly served. There is but one defendant, viz. L. D. McDow, and the return shows that 'the defendant' was served with copy of complaint, although, by what is evidently a clerical error, a slip of the pen, the letter 'n' is affixed to the last letter of the name 'McDow.' " We think the ruling and the reasons upon which it is based are both sound.

2. The complaint is in form as follows:

"Plaintiff complains of defendant, and for cause of action alleges: That on the 28th day of November, 1888, the defendant made and delivered to Levy & Alexander his promissory note in the words and figures as follows, to wit:

"'$848.14. Susanville, Cal., Nov. 28, '88. On or before the 29th day of November, 1888, without grace, for value received, I, or either of us, promise to pay Levy & Alexander, or order, eight hundred and forty-eight $^{14}/_{100}$ dollars, with interest thereon from November 28, 1888, at one per cent. per month, interest to be added to principal and compounded every six months, and ten per cent. of total amount due for attorneys' fees incurred in the collection of this note, when collection is made by attorney or other officer. Demand, notice of nonpayment, and protest of this note is hereby waived by each and every signer and indorser. Principal and interest both payable in United States gold coin, and the same collectible in any part of the United States.

"'P. O. address: ——.' L. D. McDow.

"Indorsed: 'Pay to Jules Alexander. Levy & Alexander.'

—"That no part of the principal or interest of said note has ever been paid, and the same and the whole thereof is now due and owing from defendant to plaintiff. Wherefore, plaintiff demands judgment against the defendant for the sum of $848.14, and interest thereon from the 28th day of November, 1888, according to the terms of said note, and for ten per cent. on the amount which may be found due for principal and interest for attorneys' fees incurred in the collection of this note, and for costs of suit." The test of the sufficiency of this complaint will be found in the answer to the question: Is it or is it not obnoxious to a general demurrer? "When this question arises," to quote the language of Mr. Justice Temple, "courts have always discriminated between insufficient facts, and an insufficient statement of facts; and where the necessary facts are shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing by necessary implication, the judgment will be sustained." Amestoy v. Rapid Transit Co., 95 Cal. 311, 30 Pac. 550; Garner v. Marshall, 9 Cal. 268; Hentsch v. Porter, 10 Cal. 555; People v. Rains, 23 Cal. 128. Thus, while a judgment will not relieve from the entire absence of a necessary averment, it will cure defects in all such averments as may by fair and reasonable intendment be found to have been pleaded, although defectively. The gravamen of the charge against this complaint is that it fails to make the necessary averment of assignment to plaintiff. The note, by containing a provision for the payment of attorneys' fees, was stripped of that essential characteristic of a negotiable instrument by which it could pass by simple indorsement, and all the attaching liabilities to the indorser. Assignment of it, therefore, became necessary to convey title. But such an instrument may be assigned by indorsement as fully as may a negotiable instrument. Civ. Code, § 1459. The assignment is pleaded in the complaint, with Cæsarian brevity, by the single word "indorsed," followed by the quotation. This, however, is aided by the subsequent statement that the principal and interest are due from defendant to plaintiff. By fair, if not by necessary implication, we learn from this that Levy & Alexander assigned the instrument by indorsement, and delivered it to plaintiff, and that plaintiff then became and now is the owner and holder of it. So construed, the complaint will support the judgment, although it must be added that the weight is quite all it is capable of sustaining.

3. We think, also, that there is sufficient in the complaint to support the allowance of attorneys' fees. The note, which is set forth in full, provides for them, and the prayer of the complaint asks for them, and the action is brought by an attorney at law. The sum asked as attorneys' fees is susceptible of exact determination by simple mathematical calculation. It is fairly deducible from the complaint, therefore, that plaintiff asks an allowance of a specific sum as being reasonable and due for attorneys' fees under the contract. It is true that this demand is in the nature of special damages, the allowance of which might have been contested by defendant. Prescott v. Grady, 91 Cal. 518, 27 Pac. 755. But his default admits the truth of the matters pleaded, and must, therefore, be construed to admit that the amount claimed is both reasonable and due. Thus no evidence was required to be taken for the purpose of fixing that amount.

4. The judgment attacked was entered by the clerk under section 585, subd. 1, of the Code of Civil Procedure, which provides: "That in an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk, * * * the clerk * * * must enter the default of the defendant, and immediately thereafter enter judgment * * *." The action of the clerk in estimating and adding the amount of the attorneys' fees to the judgment, under the above circumstances, was as purely ministerial as was his calculation of interest upon the principal sum of the note in accordance with the terms and the averments of the complaint. The clerk was acting within the scope of his authority in entering judgment.

5. It is finally contended that the judgment should be reversed because the clerk entered it for an amount in excess of that specified in the summons. Against this contention it is urged that the court below modified the judgment before the appeal was perfected. Nothing in the record, however, gives evidence of such modification, and the judgment must here be considered to be the one set

forth in the transcript. The entry of judgment for an amount in excess of that called for by the summons was indisputably error. Code Civ. Proc. § 585, subd. 1.

The order appealed from is affirmed, and the superior court of Lassen county is directed to order the clerk to modify the judgment by entering therein, in lieu of the amount named, the amount specified in the summons; and it is further ordered that appellant have his costs upon appeal.

We concur: McFARLAND, J.; TEMPLE, J.

5 Cal. Unrep. 77

COOPER v. WILDER. (No. 19,566.)[1]

(Supreme Court of California. July 9, 1895.)

PUBLIC LANDS—TIMBER-CULTURE ENTRY—EQUITABLE INTEREST.

1. 20 Stat. 113, relating to patents to timber-culture claims, provides that no final certificate or patent shall be issued unless, at the expiration of eight years from the date of entry, the person making such entry, or, if he be dead, his heirs or representatives, shall prove that for not less than eight years they have cultivated such trees as aforesaid. *Held*, that one who died within two years after entry had an equitable interest in the land, capable of devise, and the title, when perfected, inured to him in whom the equitable title vested at the date of the issue of the patent.

2. Where a land patent is issued to the heirs of a person who made the entry, the courts should decide to whose benefit it should inure.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action to quiet title by Charles Edward Cooper, by guardian, against H. G. Wilder. Defendant had judgment, and plaintiff appeals. Affirmed.

W. H. C. Ecker and Haines & Ward, for appellant. James E. Wadham and F. W. Stearns, for respondent.

SEARLS, C. This is an action to quiet the title of the infant plaintiff to a 40-acre tract of land, described as the N. W. ¼ of the N. W. ¼ of section 12, in township No. 14 S., of range No. 2 W., San Bernardino M., situate in the county of San Diego, state of California. The cause was tried by the court without a jury, and judgment entered in favor of defendant, from which judgment, and from an order denying his motion for a new trial, plaintiff appeals.

There is no material conflict in the evidence. The tract of land in question was duly entered as a timber-culture claim, under the laws of the United States (it being public land of the United States), in November, 1879, by David Cooper, who occupied the same until his death, which occurred in 1881. By his last will he bequeathed and devised all his property, real, personal, and mixed, to his wife, Narcissa T. Cooper, to the exclusion of his son, Charles Edward Cooper, the plaintiff and appellant herein. Administration was had upon the estate of said David Cooper, and the property, including the land here in dispute, was regularly distributed to the widow and devisee, Narcissa T. Cooper. In 1892 a patent issued to the land in question, which recites, among other things, that the claim of the heirs of David Cooper, deceased, has been established and duly consummated in conformity to law, etc., and then proceeds to grant the land as follows: "Now, know ye that there is, therefore, granted by the United States unto the said heirs of David Cooper, deceased, the tract of land above described, to have and to hold the said tract of land, with the appurtenances thereof, unto the said heirs of David Cooper, deceased, and to their heirs and assigns forever." In October, 1891, Narcissa T. Cooper (having previously intermarried with one Dodson) executed a mortgage on the land to H. G. Wilder, the defendant, who subsequently foreclosed, purchased the property at a sale, and, no redemption being made, received a sheriff's deed therefor in due time, and holds the title which Narcissa T. Dodson had or could convey therein.

Objection was made at the trial to the introduction in evidence of the probate proceedings upon the will and estate of David Cooper, upon the ground that such proceedings were wholly irrelevant and immaterial to the question of the title to said land, or to any title therein or thereto, of Narcissa T. Dodson, as grantor of defendant. The branch of the case which turns upon this exception is this: Had David Cooper an estate in the land at the time of his death which he could devise by last will to his wife, the grantor of defendant? The solution of the question depends upon the construction to be given to the timber-culture act, as amended June 14, 1878. 20 Stat. 113. The clause directly involved is contained in the latter portion of section 2, which is as follows: "And provided further that no final certificate shall be given or patent issued for the land so entered until the expiration of eight years from the date of such entry; and if at the expiration of such time, or at any time within five years thereafter, the person making such entry, or if he or she be dead, his or her heirs or legal representatives, shall prove by two credible witnesses that he or she or they have planted, and for not less than eight years have cultivated and protected such quantity and character of trees as aforesaid, * * * they shall receive a patent for such tract of land." The contention of appellant is: (1) That David Cooper, having died within two years after making his entry, could not have complied with the law which required him to "have planted, and for not less than eight years have cultivated and protected, such quantity and character of trees" as was required by the statute as a condition precedent to his receiving a patent to the land; (2) that the recitals in the patent and the granting clause thereof show that it was "the claim of the heirs of David Cooper, deceased," that was established, etc., according to law, and that it was "unto the said heirs of David Cooper, deceased," etc., that the grant was made.

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[1] Reversed in banc. See 43 Pac. 591, 111 Cal. 191.

We do not attach much importance to the fact that the patent issued to the "heirs of David Cooper." It was held at a comparatively early day that where a patent was issued to a man's "legal representatives," or to his "heirs," it was the intention of the land department to leave the question open to inquiry in the proper court as to the party to whom the patent should inure. The land department is not usually in a position to inquire into and settle the rights and equities of claimants under the patent, and cannot properly adjust such rights. Page v. Hogan, 2 Wall. 605; Weeks v. Railroad Co., 78 Wis. 501, 47 N. W. 737; Meader v. Norton, 11 Wall. 442; Simmons v. Wagner, 101 U. S. 260; Cornelius v. Kessel, 53 Wis. 395, 10 N. W. 520, and affirmed by the supreme court of the United States in 128 U. S. 456, 9 Sup. Ct. 122. It may be stated as a general proposition that the patent inures to the benefit of him who has the title, though it issued to another. Urket v. Coryell, 5 Watts & S. 60. These cases only go to the rights of those who have title, legal or equitable, to land patented to others, and do not solve the very question in issue, viz. did David Cooper have such a title as he could devise? Appellant likens the case of one in under a timber-culture claim to that of a pre-emptioner, who is universally held to have, as against the United States, no title or right which may not be abrogated by the government at any time before final entry and payment. Hutton v. Frisbie, 37 Cal. 475; Hemphill v. Davis, 38 Cal. 577; Montgomery v. Whiting, 40 Cal. 298; Kenyon v. Quinn, 41 Cal. 325; Rutledge v. Murphy, 51 Cal. 388; Buxton v. Traver, 67 Cal. 171, 7 Pac. 450; Frisbie v. Whitney, 9 Wall. 187; The Yosemite Valley Case, 15 Wall. 77. When a pre-emptor who has filed his declaratory statement dies before making his final entry and making payment, he has no title which can descend to his heirs, except that the pre-emption law provides that in such cases his executor or administrator, or one of his heirs, may complete the pre-emption, "but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned." Rev. St. U. S. § 2269; Elliott v. Figg, 59 Cal. 117. In the case last cited it was said: "Were it not for this provision, the pre-emption claim would not survive the pre-emptor. By this provision it survives only for the benefit of his heirs." It is not subject to the claims of his creditors, and the heirs take the title as purchasers from the government, and not by inheritance. Rogers v. Clemmans, 26 Kan. 522. So, too, under the Oregon donation act, the same principle has been asserted. Hall v. Russell, 101 U. S. 503. In this last case the court, speaking of the heirs, said: "Their title to the land was to come, not from their deceased ancestors, but from the United States. The title, it is true, was granted to them by reason of the possessory rights of their ancestor, but these were rights which he could not transfer, and which passed to them under the statute without any act of his. On his death his heirs became qualified grantees." And again: "It follows from this that Loring, at the time of his death, had no devisable estate in the land, and that the heirs of his devisees cannot maintain this suit."

This much has been said in reference to pre-emptors and claimants under the Oregon donation act for the reason that appellant, on the one hand, holds that like considerations apply to claimants under the homestead and timber-culture acts, while the respondent's claim is that there is a clear line of demarkation between the latter and the former; that homestead and timber-culture claimants occupy, from the inception of their claims, such contractual relations to the government as gives to them an equitable right to the lands they occupy as such claimants, subject to be defeated only by a failure to perform the conditions subsequent prescribed by the statutes. There seems a substantial basis for this distinction in the adjudged cases. In Railroad Co. v. Sture, 32 Minn. 95, 20 N. W. 229, the court, speaking through Mitchell, J., said: "We are aware that it has been authoritatively decided in Frisbie v. Whitney, 9 Wall. 187, and the Yosemite Valley Case, 15 Wall. 77, that occupation and improvement on public lands with a view to pre-emption do not confer any vested right in the land as against the United States; that this is only obtained when the purchase money has been paid, and the receipt of the land office given to the purchaser. This is put upon the ground that until such time the proposed pre-emptor has merely a right to be preferred in the purchase over others, provided a sale is made by the United States. But a homesteader after entry occupies an entirely different position. He has in effect purchased. His entry, which is made by making and filing an affidavit, and paying the sum required by law, is a contract of purchase, which gives him an inchoate title to the land, which is property. This is a substantial and vested right, which can only be defeated by his failure to perform the conditions annexed. It is true, no certificate or patent can be issued until the expiration of five years from the date of entry, the United States retaining the legal title to insure the performance of these conditions. But the vested right of the settler attaches to the land at the time of his entry, and is liable to be defeated only by his own failure to comply with the requirements of the law. * * * Until forfeited by his own failure to perform the conditions of his purchase, this right of property acquired by his entry must prevail, not only against individuals, but against the government itself." In Carner v. Railroad Co., 43 Minn. 375, 45 N. W. 713, which was an action by a claimant under the timber-culture act, the court, in referring to what had been said in the Red River v. Sture Case, supra, added: "The rights under the homestead acts, though differently acquired, are no greater than those under the timber-culture act. * * * His rights are analogous to those of one in under a contract to purchase." In Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350, Fuller, C. J., in discussing the rights of a homestead claimant, quotes with apparent approval the opinion of Attorney General MacVeagh, in an opinion to the secretary of war, July 15, 1881, in which the learned attorney general held in substance the same as in the case of Railroad Co. v. Sutre, supra. See, also, Railroad Co. v. Whitney, 132 U. S. 357, 366, 10 Sup. Ct. 112; U. S. v. Ball, 31 Fed. 667; U. S. v. Turner, 54 Fed. 228. The consensus of these opinions is to the effect that the homestead entry operates as an appropriation and reservation of the lands embraced within the same, segregates the tract from the public domain, and vests in the claimant an equitable interest therein which is good as against all the world, the government included, until forfeited by failure to perform the conditions of the act of congress.

The similarity of the provisions of the timber-culture act places claimants thereunder in the same category with homesteads; and, while the comparatively recent period of its adoption prevents the existence of but a limited number of cases thereunder, it is not doubted but that the rule as to an equitable interest in lands taken thereunder should be held the same as in cases of homestead. And as the act of congress of June 14, 1878 (20 Stat. 113), which provides for the issue of patents to the applicant, or, in case of his death, to his representatives or heirs, does not declare to whom the title shall inure, such title, when perfected, inures to him in whom the equitable title vested at the date of the issue of the patent. The equitable interest which David Cooper had in the homestead he could pass by devise. 1 Pom. Eq. Jur. § 105.

It follows that the evidence as to the probate of the last will of David Cooper, the probate proceedings, including the decree of distribution of the land in question to defendant's grantor as the devisee of said David Cooper, as well as the evidence of the mortgage by the widow of said Cooper, the foreclosure and sale thereunder, etc., was properly admitted; and the judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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108 Cal. 49

LOCKE v. MOULTON et al. (No. 18,260.)

(Supreme Court of California. July 11, 1895.)

JURY TRIAL—DEFENSE IN EJECTMENT.

In ejectment, wherein defendant alleged that the instrument under which plaintiff claims was in fact intended as a mortgage, the fact that the answer closed with a prayer that it be "adjudged that plaintiff is not the owner of the property described," does not render the defense an equitable one, so as to deprive defendant of his right to trial by jury.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action of ejectment by George S. Locke against C. S. Moulton and A. M. McCloud. There was a judgment for plaintiff, and from an order denying a new trial defendants appeal. Reversed.

Carter & Smith and Frank H. Smith, for appellants. L. W. Elliott and W. L. Dudley, for respondent.

VANCLIEF, C. Action of ejectment to recover possession of a half section of land. The complaint is in the most general form, alleging, in substance, that plaintiff owns, and is entitled to the possession of, the demanded premises, and that the defendants are in possession, and wrongfully withhold it from the plaintiff. In their answer the defendants deny that plaintiff ever owned the land, or that he was entitled to the possession thereof at the time of the commencement of the action; and, as a further answer, allege that on October 2, 1885, the defendant Moulton, who was then the owner and in possession of the land, executed to plaintiff a bargain and sale deed thereof, absolute in form, but which was intended by the parties thereto to operate only as a mortgage to secure payment to plaintiff of a debt of $6,127.50, with interest; and that it was understood and expressly agreed by the parties, at the time the deed was executed, that upon payment of the said debt the plaintiff would reconvey the land to Moulton. As a further answer, the defendants alleged adverse possession for a period of five years, etc. The answer closed with the following prayer: "Wherefore defendants pray that plaintiff take nothing by reason of this action; that it be adjudged that plaintiff is not the owner of, or entitled to the possession of the real property described in the complaint; that it be decreed that the instrument in writing herein described was and is a mortgage, and that the defendants have judgment for their costs." A former judgment in favor of plaintiff in this case was reversed by this court, and a new trial granted. 96 Cal. 33, 30 Pac. 957. After the remittitur was filed in the court below, to wit, on the first Monday in October, 1892, the case was called by the lower court for the purpose of setting a day for the new trial thereof, when the attorneys for defendants demanded a trial by jury, whereupon the court stated "that the defendants could have a jury on the common-law part of the action, but the court itself would try the equity part of the case," to wit, the issue as to whether the deed was intended to operate merely as a security for a debt. On December 1, 1892, the case was called for trial, when the defendants again demanded a jury trial upon all the issues in the case. The court again refused a jury trial on the issue as to whether the deed was intended to be a mortgage, and proceeded to try that issue alone. The result of such trial was a finding by the court that the deed "was not executed or delivered as a mortgage, and was not a mortgage of any kind, and was not to secure the payment of any money whatever"; and as a conclusion of law found "that said deed was not a mortgage, but that it was a conveyance and grant of the title to said real estate from defendant Moulton to plaintiff." These findings were filed on December 27, 1892, and disposed of the only material issue except that as to adverse possession, upon which, it appears from evidence given on the issue tried, the defendants could not hope for a verdict in their favor. Defendants moved for a new trial on all the grounds allowable under section 657, Code Civ. Proc., presented by a bill of exceptions. This motion was denied, and the defendants appeal from the order denying it.

The only grounds upon which appellants claim a reversal are (1) insufficiency of the evidence to justify the decision, and (2) that the court erred in refusing a trial of all the issues by a jury. As to the first of these grounds, I think the evidence was substantially conflicting to a degree which precludes a review of it by this court. But I think the court erred in denying a jury trial of the whole case. The affirmative allegations in the answer to the effect that the deed was intended as mere security for a debt do not constitute an equitable defense in the proper sense of those terms, since they could have been proved under the general denials. Smith v. Smith, 80 Cal. 329, 21 Pac. 4, and 22 Pac. 186, 549; Locke v. Moulton, 96 Cal. 21, 30 Pac. 957. They added nothing to the denials of plaintiff's alleged title. The defendants unnecessarily anticipated that plaintiff would rely upon the deed as evidence of his title, and improperly alleged the evidence by which they proposed to show that the deed did not convey the title. Of themselves, these affirmative allegations constituted neither a legal nor equitable defense to the action, and might have been stricken from the answer without impairing its legal effect. But counsel for respondent contend that the character of the defenses is to be determined only by the prayer of the answer; and since defendants, in addition to their prayer "that plaintiff take nothing by the action," asked the court to adjudge that plaintiff is not the owner of the land, and that the deed is a mortgage, this affirmative relief could be administered only by a court of equity, and therefore it was within the discretionary power of the court to refuse to submit to a jury that part of the case upon which such equitable relief was to be based. In the first place, it is manifest that there is no basis in the answer for any affirmative relief of any kind; and, in the second place, even if the court should affirmatively adjudge, on the pleadings in this case, that the deed is a mortgage, and that plaintiff has no title, such judgment would add nothing in effect to the simple judgment "that plaintiff take nothing by the action." The only authorities cited to this point by counsel for respondent are People v. Mier, 24 Cal. 71; Arrington v. Liscom, 34 Cal. 375; and Canal Co. v. Kidd, 37 Cal. 304; but that none of these is in point for respondent seems so obvious that I think it needless to point out the distinctions. I think the order should be reversed, and a new trial granted.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed, and a new trial granted.

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108 Cal. 81

SABICHI et al. v. CHASE. (No. 19,575.)

(Supreme Court of California. July 11, 1895.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—OBJECTIONS BY CREDITORS.

1. Under Civ. Code, § 3449, regulating assignments by insolvents in trust for benefit of creditors, a conveyance by partners in failing circumstances of all their individual and partnership property, in trust to be collected, sold, and disposed of and converted into money, to be divided equally among certain designated creditors, the surplus, if any, to be returned to them in consideration of their release from all liabilities to such creditors, is an assignment.

2. Under Civ. Code, § 3457, making an assignment for benefit of creditors void as against any creditor not assenting thereto in certain cases, a creditor whose demand secured by mortgage is not due at the time of the assignment, and cannot be enforced till foreclosure of the mortgage, can object to the assignment.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Frank Sabichi and others against Delia W. Chase to set aside a sale of land under an execution. From a judgment for defendant, plaintiffs appeal. Affirmed.

E. E. Powers and Brewton A. Hayne, for appellants. C. W. Chase, for respondent.

BRITT, C. From the agreed statements of facts on which this case was submitted in the court below it appears that G. A. Clark and C. H. Humphreys, partners engaged in business at the city of Los Angeles under the firm name of Clark & Humphreys, being in failing circumstances, both as individuals and as a partnership, entered into a written contract of date December 15, 1892, with the plaintiffs, Sabichi, Minor, and Holt, as trustees, and 10 named creditors of Clark & Humphreys, by the terms of which contract Clark & Humphreys agreed to convey all their property, partnership and individual, to said trustees, "in trust to be collected, sold, and disposed of and converted into money and divided ratably" among said designated creditors; the surplus, if any, to be returned to Clark & Humphreys. By the terms of this agreement it was also stipulated that upon the execution of such conveyance Clark & Humphreys should be released from all liability to said creditors; that the trustees might borrow money on certain of the property; purchase outstanding claims against the partnership; carry on the business of the firm, and employ assistants for that purpose; sell real and personal property on such terms as they might deem best, call a meeting of creditors named every six months during the continuance of the trust, and report their proceedings to such meeting; and receive a reasonable compensation for their services. Such agreement was signed by all the said parties thereto, and by a number of other persons not named as parties therein, but who were also creditors of said partnership, and the trustees were chosen by Clark & Humphreys in conjunction with all the said creditors. Accordingly, on December 17, 1892, Clark & Humphreys, individually and as copartners, executed a conveyance (styled on its face a "deed of trust") of all their property, real and personal, to said trustees, the plaintiffs here. Such conveyance recited the said contract of December 15th, and purported to be made in consideration thereof, and to transfer the property described "in trust in accordance with" such contract. The deed was recorded in the recorder's office of Los Angeles county December 19, 1892. The plaintiffs accepted the trust, and took possession of all, or the greater part, of the property conveyed. Defendant, Chase, held the promissory note of Clark & Humphreys, secured by mortgage on land in Los Angeles county,—a parcel of that conveyed to said trustees,—which mortgage was of record in said recorder's office at the time of the transactions above stated. The note fell due August 15, 1893, and was not paid. The holder instituted an action to enforce payment and for the foreclosure of the mortgage. She obtained judgment and caused the mortgaged land to be sold for the satisfaction thereof. The proceeds of sale were insufficient for that purpose, and on January 15, 1894, judgment against Clark & Humphreys was docketed in said action for the deficiency, amounting to $1,532.51. Execution issued thereon, and under that writ the sheriff levied on and sold to said Delia W. Chase a portion of the other lands previously conveyed to said trustees by the deed of December 17, 1892. Defendant, Chase, never assented to such transfer in trust. The parties agree that the said instruments of December 15 and December 17, 1892, respectively, were executed upon valuable and adequate consideration, and without actual fraud. The consideration moving to Clark & Humphreys seems to have been the release of their debts owed to the preferred creditors. The dispute here relates to the land sold under said execution. The superior court declared by its judgment that the defendant has the better right to such land; that as to her the said agreement of December 15, 1892, and the deed made to plaintiffs in pursuance thereof, are of no effect. Plaintiffs appeal.

By the settled rule of the common law, now expressed in our Code, "a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another" (Civ. Code, § 3432); but parallel with this principle, and to be construed with it, is the rule of more recent legislative policy, that "an assignment for the benefit of creditors is void against any creditor of the assignor not consenting thereto, in the following cases: (1) If it give a preference of one debt or class of debts over another"; etc. Civ. Code, § 3457. The law virtually says to the embarrassed debtor, "You may pay or secure any creditor, and thus give him a preference; but your preferential payment or security must not be cast in the form of an assignment for his benefit." The question for decision, therefore, is whether the said instruments of December, 1892, constituted an assignment for the benefit of creditors within the meaning which the law attaches to those terms. If so, then plaintiffs concede that it was invalid, because violative of the statutory regulations of such transfers. Civ. Code, §§ 3449-3473. The statute attempts no definition of such assignments; but there are qualities (not so well ascertained, perhaps, as is desirable) which, when appearing in an instrument of transfer, characterize it as among those required to conform to the statute on the subject of those assignments or else be treated as void. It is the theory of the appellants that the trust deed here "was in the nature of a mortgage to secure the debts of the named creditors." The distinction between such an instrument and an assignment for the benefit of creditors has been thus stated: "If the conveyance is to a trustee, and the debtor intends to divest himself, not only of the title to the property, but of all control over it; if it is intended as an absolute conveyance of all of his property, and is made for the purpose of securing a distribution of its proceeds among his creditors, or a portion of them,—in legal effect it is an assignment for the benefit of creditors, no matter what name or designation the parties may have given it. On the other hand, if the intention of the debtor is merely to secure his debt to one or more of his creditors, and the conveyance is not intended as an absolute disposition of his property, but he reserves to himself a right therein, the conveyance will be treated as a mortgage, even though the debtor is insolvent at the time, and it covers all his property, and but a portion of his debts are secured by it." Bank v. Crittenden, 66 Iowa, 240, 241, 23 N. W. 646. And this seems to be a fair statement of the result of the authorities upon this much-vexed question, though great diversity is found in the adjudged cases, due largely to the differences which obtain in the statutes of the several states which have sought to regulate or suppress the evils supposed to arise from the unrestricted right to make preferential assignments allowed by the common law. See May v. Tenney, 148 U. S. 64, 13 Sup. Ct. 491. "The material and essential characteristic of a general assignment is the presence of a trust" (Brown v. Guthrie, 110 N. Y. 441, 18 N. E. 256; Burrill, Assignm. § 3); and while it cannot be said that every transfer of property to trustees for the benefit of creditors is an assignment within the statute (Lawrence v. Neff, 41 Cal. 566; Handley v. Pfister, 39 Cal. 283; cf. Priest v. Brown, 100 Cal. 626, 35 Pac. 323), yet, when a continuing trust is created, presenting the features prominent in this case, we think it must be held that the transfer is such an assignment as the legislature designed to regulate by the provisions of the Code (Civ. Code, §§ 3449-3473). If not, then those provisions would as well be repealed. It has been several times assumed in this court that such a trust indicates an assignment of that nature. Dana v. Stanfords, 10 Cal. 269; Wellington v. Sedgwick, 12 Cal. 469; Saunderson v. Broadwell, 82 Cal. 132, 133, 23 Pac. 36. The provision that a surplus of proceeds remaining after satisfaction of the claims of the creditors named should be returned to the grantors does not, as supposed by appellants, distinguish the contract as one of security only. Hall v. Denison, 17 Vt. 318; Lochte v. Blum (Tex. Civ. App.) 30 S. W. 925. The reservation of an interest in the possible surplus—not in the property itself—marks the transaction more clearly as an assignment for the benefit of creditors. Kenefick v. Perry, 61 N. H. 364.

Appellants argue that the defendant ought not to be considered a creditor having the right to object to the assignment, for the reason that at the date thereof her demand against the assignors was not yet susceptible of enforcement against them personally; she being required to first foreclose the mortgage. But the statute renders void such transfers "against any creditor of the assignor not assenting thereto." Civ. Code, § 3457. No exception of creditors secured by mortgage is expressed, nor does the reason assigned warrant the implication of one. The judgment should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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108 Cal. 95

WHOLEY v. CALDWELL et al. (No. 18,407.)

(Supreme Court of California. July 12, 1895.)

RIPARIAN RIGHTS.

A lower riparian proprietor has no right, independent of contract, to go on the land of an upper proprietor to return the stream to its original channel, when it has been diverted therefrom by natural causes.

Department 2. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by James Wholey against Leona J. Caldwell and others for an injunction. From a judgment denying the injunction, but granting plaintiff relief in other form, defendants appeal. Reversed.

James F. Farraher, for appellants. L. F. Coburn, for respondent.

HENSHAW, J. Plaintiff is a lower, defendants are upper, riparian proprietors. Parks creek for many years had flowed over the land of defendants to a point on that land known as "Batterton Crossing," where it divided into two branches, called the "North Channel" and the "South Channel." About one-third of the waters of the creek passed on the plaintiff's land through the North Channel, while the remaining two-thirds flowed down the South Channel. A third waterway, seemingly an ancient course of Parks creek, left the main stream about one-half a mile above Batterton crossing, and entered upon and extended over the land of plaintiff in a direction parallel with that of the North Channel. This last waterway was known as the "Spring Branch Channel." There was no direct surface flow from Parks creek into it, the point of separation being dammed by gravel, bowlders, and débris, but its bed was lower than the bed of the North Channel, and from North Channel by percolation and by small but defined surface streams water rose in this Spring Branch Channel and flowed over plaintiff's lands. The amount of water so rising bore direct relation to the amount of water flowing through the North Channel. Plaintiff relied upon the waters of the Spring Branch and North Channels for all beneficial purposes. Such were the conditions until the winter of 1890-91, when an extraordinary freshet deposited a bar of bowlders, gravel, and débris at the head of the North Channel, and thus prevented the waters from flowing into it as had been their wont. At the same time the waters cut a new bed for themselves. This "New Channel" (so named) left the original stream from the south about a mile above Batterton crossing, extended in a general course parallel with it, and joined the South Channel, still on the lands of defendants, above the point where South Channel entered plaintiff's property, and thence flowed on by the accustomed South Channel. During the first year after this change some of the water passed down the old way to Batterton crossing. The rains of the following year deposited a bar in the original stream at the point where the New Channel had been cut, and thereafter all the waters of the creek flowed down this New Channel into the South Channel, and so on to defendants' lands, leaving dry the original water course down to Batterton crossing, and, consequently, also the North Channel and the Spring Branch Channel. Plaintiff then commenced this action, avering that these changes were occasioned wholly by natural causes, and asserting the right to enter upon defendants' land, and to take such necessary and proper steps as might be required to return the water to the channels wherein it flowed prior to 1889, and asking that defendants be enjoined from preventing him from entering upon their land and doing such proper and necessary acts. He also pleaded a grant to himself, from defendants' predecessor, of his land and of "the waters accustomed to flow in the Spring Branch Channel." Defendants denied the asserted rights, and by cross complaint pleaded the construction and maintenance for 30 years last past of a dam across the head of the North Channel sufficient to divert all the water thereof, during ordinary low stages from the North to the South Channel, and also their prescriptive right to divert two-thirds of the water of the creek by ditches. He pleaded defendants' interference with these rights, and asked damages accordingly. Plaintiff was denied an injunction, but, as riparian proprietor and as grantee under the deed above mentioned, was decreed the right of "restoring and restraining the waters of Parks creek to the following channels: First, from the point where the New Channel cut from and left the former channel (original bed of the stream) down said former channel in a single body to the Batterton crossing; second, from the Batterton crossing in two channels in the following proportions, to wit: One-third through the said North Channel, and the remainder through said South Channel."

We cannot see that the rights of the parties in this action are in any way affected by the grant to plaintiff "of the waters accustomed to flow in the Spring Branch Channel." Aqua cedit solo. This grant accompanied the grant of the land bordering upon that channel. Whether the waters which flowed in it came from the North Channel by percolation and seepage, or by well-defined subterranean or surface channels, can here make no difference. For, in either case, the utmost that could be claimed for the grant would be that it gave plaintiff full right to the waters against any asserted right of the defendants to them, and protected him from any use which defendants might make of the waters of the creek after the grant to the injury of their right in these waters. But the complaint of plaintiff does not declare upon any such invasion or infringement by defendants. It asserts the right to go upon the land of an upper riparian proprietor, and return a stream to its original channel which has been diverted therefrom suddenly and sensibly by natural causes. And plaintiff's warrant in doing this rests not upon any contractual relations with defendants, but upon his prerogatives as a lower riparian proprietor. We do not attach importance to the contention of appellants that the right of the lower riparian proprietor is merely to have the water enter his land by its accustomed channels, without regard to the quantity which these channels are wont to carry. The lower proprietor, as against the unwarranted acts of the upper, is entitled not only to have the water enter his land by its accustomed channels, but to have each channel carry its due amount of water. Any other rule would lead to untold hardship and oppression.

But we are here concerned only with the rights of the lower proprietor where the change in the channel has been caused, not by the act of man, but by the act of God. Does the right of the riparian proprietor to have the water enter his land by its accustomed channels stand superior to changes wrought in the flow of a stream by the act of Providence? Has such a proprietor a paramount right over the forces of nature, as well as over the acts of man, to insist that water which has once flowed upon his land shall always flow upon it? A somewhat extended examination leads to the conclusion that the assertion of such a right is new to jurisprudence. The right finds no recognition by the commentators of either the civil or common law, and no case has come under our observation in which the question is considered. Even Sir Mathew Hale, whose De Jure Maris is declared by Chancellor Kent to have exhausted the learning on the subject, makes no mention of so important a topic. This silence is itself significant; for it is not easily to be believed that if this important right exists it would not have been asserted and announced in numerous instances. While thus lacking in authority, it is certain that the contention cannot find better support from principle or reason. The foundation of the riparian proprietor's rights rests upon the universally accepted maxim, "Aqua currit, et debet currere ut currere solebat ex jure naturæ." These rights thus draw their support from the laws of nature, but they do not arise superior to those laws. When, by their operation, the flow is lost the right is lost with it. The New Channel itself becomes the natural channel. Otherwise a riparian proprietor would hold all lands above him in extraordinary and perpetual servitude. If, by the forces of nature, the stream should change its course at a point miles above him, he would still be empowered to subject any and all of the intermediate territory to operations requisite to enable him to turn the water back upon his own premises, and this power would be his to the very fountain head of the stream. Such a doctrine could not be tolerated. If it be needed, however, the reasoning of the foregoing finds abundant support in analogous principles of the law which are firmly established. Says Sir Mathew Hale (De Jure Maris, c. 1): "A watercourse running between the lands of A. and B., which leaves its course and suddenly and sensibly makes its channel wholly upon the land of A. belongs wholly to A. This rule has been reannounced by all the later text writers, and has been adopted by the courts without suggestion of dissent. 3 Kent, Comm. 428; 2 Bl. Comm. 262; Ang. Water Courses, § 57; Gould, Waters, § 160, and cases thereunder. True, it has usually been invoked in cases of boundaries and of the accretion and reliction of land, but nevertheless, by necessary implication, it defines the riparian proprietor's right in the matter under consideration. Because, if the stream belongs wholly to A., thus depriving B. of all his riparian rights, this can only result because B. has no right to go upon another's land and restore to the old channel the water which has thus been diverted therefrom ex jure naturæ.

For the foregoing reasons the judgment is reversed, and the case remanded.

We concur: McFARLAND, J.; TEMPLE, J.

108 Cal. 124

In re BLYTHE'S ESTATE. (S. F. No. 30.)

(Supreme Court of California. July 12, 1895.)

WHO MAY APPEAL.

In proceedings for the distribution of a decedent's estate, appellant set up a claim as widow, and a judgment against her claim of widowhood was affirmed, on appeal, and also an order denying her a new trial. *Held*, that she thereby lost all interest in the proceeding, and could not subsequently appeal from an order directing distribution of the property.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Appeal by Alice Edith Blythe in the matter of the estate of Thomas H. Blythe, deceased. Dismissed.

Henry E. Highton, for appellant. T. I. Bergin, W. W. Foote, Garber, Boalt & Bishop, and W. H. H. Hart, for respondent.

HENSHAW, J. This is a motion to dismiss the appeal of Alice Edith Blythe, prosecuted from the order and decree of the court in probate, distributing certain property of the estate of Thomas H. Blythe to Florence Blythe Hinckley. The petition for distribution of Florence Blythe Hinckley was filed on the 18th day of June, 1894. Alice Edith Blythe appeared, and opposed the petition by demurrer and answer, and then appealed from the decree, which was rendered October 26, 1894. Notice of appeal was given upon November 3, 1894. The bill of exceptions was settled upon January 15, 1895, and upon February 25, 1895, appellant's transcript upon appeal was filed with the clerk of this court. At the time of the filing of the petition, the appeal of Alice Edith Blythe from the judgment made and given in the case, entitled "Florence Blythe v. Abbie Ayres and others," had been decided adversely to her contention, upon April 24, 1894 (Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522); but her appeal from the order denying her a new trial in the same matter was pending and undetermined. Upon January 2, 1895, the last-named order was affirmed, upon appeal. In re Blythe's Estate (Cal.) 38 Pac. 1108. The action of Blythe v. Ayres was a proceeding under section 1664, Code Civ. Proc., to determine heirship and the right of succession and distribution in the matter of the estate of Thomas H. Blythe. Alice Edith Blythe asserted her rights as the widow of the deceased. The findings and judgment of the court were against her claim of widowhood. This judgment and the order refusing a new trial of the issues having both been affirmed by this court, it is contended by respondent that appellant herein has ceased to be a party in interest, or to stand in a position to be in any wise affected by the questions involved upon this appeal, and that, therefore, it should be dismissed. The decision affirming the order denying the new trial was handed down after the commencement of the proceeding sought to be reviewed upon this appeal; but it will be considered by the court in deciding this motion. It is not only a matter of which we take judicial notice, being a part of the record proceedings in one and the same estate (Hollenbach v. Schnabel, 101 Cal. 312, 35 Pac. 872), but it is formally brought to our attention by suggestion and proof under affidavit (Bank v. Henderson, 101 Cal. 309, 35 Pac. 899). The affirmance of this judgment and order leaves this appellant a stranger in interest to the proceedings upon distribution. The judgment declared the rights of all persons to the estate, and to whom distribution should be made. It having been finally determined that appellant here is not one of those interested in or affected by the distribution, she cannot be beneficially or injuriously affected by any decree which the court might make in the matter; and, as was said by the supreme court of the United

States: "The court is not empowered to decide moot questions or abstract propositions, or to declare for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." California v. San Pablo & T. R. Co., 149 U. S. 308, 13 Sup. Ct. 876.

It is the theory of the law that a litigant seeks the aid of a court, not to succeed in a claim, whether it be well or ill founded, but to have the court determine whether in truth he have any right at all, and, if so, then to define its scope and limit. The present situation of the parties to this appeal differs but in one respect, hereafter considered, from that which would have existed had the appellant, coming before the court, formally disclaimed and renounced all pretensions to heirship or succession in the matter of the estate of Blythe. All interest in that estate, under such circumstances, and so far as this matter is concerned, would have been vested in respondent; there would have been no adversary rights awaiting determination; and it cannot be doubted but that the appeal would no longer be entertained. Arnold v. Woolsey, 4 C. C. A. 319, 54 Fed. 268. But, in principle, it matters not whether the relinquishment of the claim be voluntary, as by purchase, abandonment, or compromise, or involuntary, as by final judicial decree. In both cases, the interest of the appellant in the controversy has come definitively to an end, and the decision on the appeal "cannot affect the result as to the thing in issue in the case before it." The affirmance of the judgment and order has, as between these parties, terminated this controversy. There is a marked distinction between the case thus presented and that of Ricketson v. Compton, 23 Cal. 649. In the latter case plaintiff (respondent) moved to dismiss the appeal of Compton, whom he had made a defendant, upon the ground, with others, that the appeal was frivolous and groundless. Such rights as Compton had in the matter in controversy were upon the appeal precisely as they had been upon the trial of the cause. To determine, under these circumstances, that the appeal was frivolous and groundless, itself involved a consideration of the merits of the appeal. This court said, after setting forth the facts, that it was no proper ground to dismiss an appeal that it was sham and frivolous; and, as to the contention that defendant was not interested in the controversy, if this were true he should not have been made a party, and it was defendant's fault that he was. Under such circumstances, plaintiff could not hold a judgment against defendant and deny him the right to appeal from it. So, in Foscalina v. Doyle, 48 Cal. 151, upon a motion to dismiss an appeal as frivolous, the court simply decided that it would not examine the transcript and the merits of the appeal on such a motion, adding, obiter, that, if it could and should do so, still it would not dismiss such an appeal "if well taken in point of procedure,"—in other words, if it appear that appellant is still in the exercise of an existing right.

In one respect only, as above suggested, does the enforced relinquishment by judicial decree differ from the voluntary abjuration of a claim; that is, in the matter of costs upon this appeal. Appellant contends that her right to costs following a successful appeal, even if her right is found to be no greater than this, gives her such a substantial interest in the controversy as must compel the retention and determination of the questions presented by her appeal. But to this we cannot accede. Were an appellant, for example, to declare that he had surrendered his claim to respondent, and finally adjusted and disposed of the matter in controversy, saying that it had been agreed between them that the appeal should be pressed to a decision, solely to determine which of the two should bear the costs, it would present a case not different in principle from the present; and the costs being incidental to the judgment, the appeal would be dismissed as no longer being a contest involving the determination of adversary rights. So here, while at the time appellant joined issue with respondent in the matter of distribution she had a standing by reason of the fact that there was then no final adjudication of her status as Blythe's widow, which status alone warranted her appearance in the proceeding, yet, upon the other hand, she was bound to know that her standing was uncertain; that it would be lost by an adverse determination of her then pending appeal; and that, being lost, the right to further prosecute her litigation in the matter of the estate would be at an end. With this knowledge, she litigated in peril of the result, which having been adverse, leaves upon her the burden of costs. The motion to dismiss is granted.

We concur: GAROUTTE, J.; TEMPLE, J.; McFARLAND, J.; VAN FLEET, J.

108 Cal. 123

GREGORY et al. v. DIGGS et al. (Sac. No. 20.)

(Supreme Court of California. July 12, 1895.)

APPEAL—SUFFICIENCY OF BRIEF.

1. Where a brief is such that it can only be determined from an examination of its merits, whether it sufficiently presents its points and authorities, as required by rule 2, the sufficiency of the brief will not be examined on motion to dismiss for failure to file a proper brief.

2. Where an injunction is a part of the relief sought in a complaint, on appeal from an order denying the injunction and from a judgment for defendant on a demurrer to the complaint being sustained, a brief in support of plaintiff's right to an injunction is applicable to the appeal from the judgment.

Department 1. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by one Gregory and others against one Diggs and others. From an order refusing an injunction, and a judgment for defendants, plaintiffs appeal. Heard on motion to dismiss. Denied.

Armstrong & Bruner, for appellants. E. B. Mering and C. W. Thomas, for respondents.

PER CURIAM. The respondents have moved to dismiss the appeals herein, for failure on the part of the appellants to file their points and authorities within the time limited by rule 2. The notice of appeal shows that the appeal is taken from an order refusing an injunction, and also from a judgment in favor of the defendants. Although the plaintiffs have included three defendants in their action, they seek from them different relief,—an injunction against Diggs alone, and damages against them all. The order refusing the injunction, and the judgment in favor of the defendants, were made at the same time and in the same entry, upon the records of the court, with the order sustaining the defendants' demurrer to the complaint; and the appeals therefrom have been brought here upon a single record. A document entitled "Opening Brief for Appellants" was filed within due time after the transcript was filed; but it is now claimed by the respondents that this brief applies to only the appeal from the order refusing the injunction, and that it has no reference to the appeal from the judgment. We cannot, however, determine whether the brief is so limited without an examination of its merits; and it can be readily seen that, if we should countenance this practice, a respondent would be able to obtain a decision of the court upon the sufficiency of the appeal without being required to file his brief, unless such decision should be adverse.

As one of the grounds of relief sought by the complaint herein was an injunction against Diggs, if the complaint is sufficient to show that the plaintiff is entitled to this relief, an argument in support thereof would be applicable to the appeal from the judgment, as well as from the order. The motion is denied.

(108 Cal. 135)

GAROUTTE v. WILLIAMSON et al.[1] (No. 15,955.)

(Supreme Court of California. July 15, 1895.)

CONVERSION BY BAILEE—INSTRUCTIONS.

1. To prevent a recovery by a bailee for the conversion of wheat in a warehouse, on the ground that, at the time of the alleged conversion, plaintiff had transferred the receipt, which is by statute negotiable, defendant must show that plaintiff indorsed the certificate, and that money was advanced thereon which remained unpaid. Evidence that the receipt was placed in a bank to secure advances at a time prior to the conversion, and that it remained until after the conversion, is insufficient.

2. Error in an instruction is not ground for reversal where exception was not taken thereto until the jury returned, after deliberation for some time, for further instructions.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco, Charles W. Slack, Judge.

Action by C. H. Garoutte against Stephen Williamson and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

W. S. Goodfellow, Page & Eells, and Edward R. Taylor, for appellants. John T. Greany, Dunne & McPike, and Robert Y. Hayne, for respondent.

BELCHER, C. This is an action to recover damages for the conversion of 2,168 sacks of wheat. The complaint is in the usual form, alleging the conversion by defendants on the 13th day of October, 1892; and the answer denies all of its material averments. The case was tried before a jury, and the verdict and judgment were in favor of the plaintiff. Defendants moved for a new trial, and their motion was granted, on condition that they pay to the plaintiff, within a time named, his costs of suit, amounting to $226. They refused to comply with the condition imposed, and as a consequence their motion "must be regarded as having been denied." Garoutte v. Haley (Cal.) 38 Pac. 194. In due time they appealed from the judgment and the order.

The facts proved on behalf of the plaintiff were in substance as follows: The wheat in controversy was a portion of a crop of 13,460 sacks of wheat which, during the year 1892, was raised on a farm in Yolo county by a firm known as Hays & Garoutte, of which the plaintiff was a member. All of the wheat was taken to and stored in the Phœnix Warehouse at Knight's Landing, then owned and controlled by one W. P. Merrill. On September 5, 1892, a warehouse receipt for said wheat, in the statutory negotiable form, signed by Merrill, the warehouseman, was issued to Hays & Garoutte; and from that time up to and including October 6, 1892, there was no wheat in the warehouse except that so placed there by Hays & Garoutte. At some time after Merrill gave the said warehouse receipt to Hays & Garoutte, he issued another negotiable warehouse receipt, in the ordinary form, for 2,168 sacks of wheat, to one Nelson, as the depositor thereof, but in fact Nelson had not then and never had any wheat in the warehouse. Subsequently Nelson indorsed and delivered the receipt so received by him to one McGlaufiin, and on the 6th of October, 1892, by direction of McGlaufiin, and under the superintendence of Merrill, the 2,168 sacks of wheat in controversy were taken from the warehouse and loaded on a barge, and thence shipped to Port Costa. "The said wheat was thereafter, and while in transit to Port Costa, in this state, sold by the said McGlaufiin to the defendants in this action, and the said wheat was thereafter delivered to the defendants, and received by them into their warehouse at Port Costa on the 13th day of October, 1892." This wheat was taken without the knowledge or consent of Hays & Garoutte, and immediately after its shipment Nelson and Merrill left Yolo county and disappeared. On the 24th of February, 1893, Hays & Garoutte assigned and transferred to the plaintiff all their right, title, and interest in and to the wheat in controversy, and in and to any cause of action which they then had against the defendants for the conversion thereof; and thereafter, on the 24th of March, 1893, the plaintiff commenced this action.

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[1] Rehearing denied. See 41 Pac. 413.

It was proved by defendants that in the latter part of September, 1892, Hays & Garoutte placed their warehouse receipt in the Bank of Woodland as security for advances, or for a loan, and that it remained there until January 4, 1893, when it was returned to them. The court instructed the jury that if, at the time the wheat was taken by defendants, if it was taken as claimed by plaintiff, a warehouse receipt for the same had been indorsed and delivered to the Bank of Woodland by Hays & Garoutte, and at that time was held by the bank, under said indorsement, as security for an indebtedness not then paid, then plaintiff could not recover. "If, however, the indebtedness to the Bank of Woodland was paid at the time the wheat in controversy came into the possession of the defendants, if you find it did so come, then Hays & Garoutte were entitled to the possession of the same, and they, or their assignee, have a right to maintain this action." Appellants contend that the verdict was not justified by the evidence, and was contrary to the instructions of the court, because there was no evidence showing that, at the time of the alleged conversion, their indebtedness to the bank had been paid by Hays & Garoutte. We do not think the judgment can be reversed on this ground. It is true that on the back of the warehouse receipt, as presented in evidence, there was written the name "Hays & Garoutte"; but the record entirely fails to show when it was written, or that it was written by, or by authority of, any member of the said firm. And the record also entirely fails to show that there were any advances or that there was any loan made by the bank to Hays & Garoutte, or that there was any existing indebtedness from them to the bank on the 6th of October, or from that time to and including the 13th day of the same month. But if there was such indebtedness, secured by a pledge of the wheat, the burden was upon the defendants to show it. The ownership of the wheat by Hays & Garoutte was clearly established, and from that ownership the presumption that they had a right to its present possession followed as a necessary sequence. That presumption was not overcome by the showing made by defendants. To sustain their theory, they should have gone further, and should have shown that the receipt was indorsed by Hays & Garoutte, or by their authority, and that under and on the security of it money was advanced or loaned to them by the bank, which had not been repaid at the time of the conversion. Counsel for appellants suggest that it is immaterial whether the receipt was indorsed or not, but this cannot be so. The receipt was negotiable, and, under the statute in relation to warehouse receipts (St. 1877-78, p. 949), the property was transferable by the indorsement of the party to whose order it was issued. In solving questions on appeal only the record presented can be looked at; and, in view of the record here presented, the appellants' contention that the verdict was not justified by the evidence, and was contrary to the instructions of the court, cannot be sustained.

The point is made that the court erred in refusing to give to the jury several instructions requested by defendants, and in modifying some of their instructions and giving them as modified. This point cannot, in our opinion, be considered. It is well settled that errors in the giving or refusing instructions are "errors in law occurring at the trial," which must be excepted to, or they cannot be reviewed on appeal. And "the exception must be taken at the time the decision is made." Code Civ. Proc. § 646. In Collier v. Corbett, 15 Cal. 183, it was held that where instructions to the jury are not excepted to at the time they are given or refused, and a motion for new trial is made for error in giving or refusing such instructions, they cannot be considered on appeal from the order denying the motion. And in Mallett v. Swain, 56 Cal. 171, it was held that an exception to the instructions of the court, taken after the retirement of the jury, is too late. Here the bill of exceptions does not show any attempt to take an exception to the action of the court in regard to the instructions until after the jury had retired and deliberated for some time on their verdict. Subsequently, it is said, the jury twice returned into court for further information; and after that is found the statement that "the defendants then and there excepted to the refusal of the court to give to the jury the instructions requested by them, and excepted, also, to the action of the court in modifying the instructions requested by the defendants." The record, in our opinion, cannot be construed as showing that the exceptions were taken before the jury retired. They were therefore too late, and must be disregarded.

There was no error in admitting in evidence the statements of the warehouseman, Merrill, as to the ownership of the wheat loaded on the barge. The statements served simply to identify the wheat removed, and, being made at the time of the removal, they were a part of the res gestæ. Besides, if it was error to admit the statements, it was harmless, as it was otherwise shown beyond controversy that the wheat removed was the wheat of

Hays & Garoutte. The judgment and order should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

HENSHAW and McFARLAND, JJ. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

TEMPLE, J. I concur in the judgment. Even if it be admitted that there was evidence that the warehouse receipt was indorsed by Hays & Garoutte, and deposited with the bank as collateral security for a loan, still the loan—if there was one—had been paid and the warehouse receipt redelivered before this action was commenced. The forms of action having been abolished there is little to be gained now by a discussion of the distinction between trespass, trover, and case. So far as our system can be assimilated to the common-law forms, every action for damages under the Code has more resemblance to an action on the case than to any other. "It is not true, however, that in any proper sense an action for a conversion is for a tort to the possession." In trover, the plaintiff sues in respect to his property, while in trespass he sues in respect of his possession. Balme v. Hutton, 9 Bing. 471. It was owing to this distinction that a title acquired by relation was deemed sufficient to support an action of trover, though not of trespass. 26 Am. & Eng. Enc. Law, 765. It is true the plaintiff must have the right of possession, because the tort consisted in the refusal to deliver to the plaintiff property to which he was entitled, but which the defendant acquired lawfully. The whole thing depended upon a fiction which is no longer kept up. Conversion is an act which deprives the owner of the property, and whether he can maintain an action for it should logically depend upon the question as to whether he is entitled to get the damages which may be recovered in lieu of it. If the property was hypothecated, naturally the creditor would be first considered, but, if the owner pay the debt, no reason exists why he may not then sue for the conversion. He is the real party in interest. At best it is in this case a barren technicality. Had Garoutte demanded the wheat, if defendants had failed to deliver it, he would have had an undoubted right of action. After judgment, when it appears that a demand would have been unavailing, and that no injury has been done, a judgment should not be reversed for that reason. In regard to the instruction, I think the presumption is that the jury obeyed it, and found the facts to be such that plaintiff should recover upon that view of the law. The objection really is that the verdict is against the evidence. In this view the learned judge of the trial court agrees, but still seems to think plaintiff ought to have recovered, and would have done so upon proper instructions. It is a correct verdict and a proper and just judgment, although the case was tried upon a wrong theory. Ordinarily,—in fact, always, where there is any chance to doubt whether proper relief has been obtained,—a new trial should be granted. But here the facts are few and undisputed. There is really no issue except in regard to the question of law first alluded to. I do not think a new trial necessary to determine that. If plaintiff could maintain the action without a new demand and refusal, a new trial would be unavailing. I therefore concur in the conclusion reached.

108 Cal. 143

BRENOT v. ROBINSON. (No. 19,526.)

(Supreme Court of California. July 16, 1895.)

CLAIM AND DELIVERY—PLEADING—DEMAND—JUDGMENT.

1. In an action of claim and delivery, an allegation in the complaint that plaintiff has, prior to the beginning of the action, made demand upon the defendant for the property, although it is not alleged that such demand was in the form prescribed by Code Civ. Proc. § 689, as amended in 1891, is good against general demurrer.

2. Where the claimant's demand for property, prior to bringing an action of claim and delivery, was not in the form prescribed by Code Civ. Proc. § 689, as amended in 1891, for such cases, the defendant may set up such fact in his answer, or object to the admission of evidence of demand.

3. Where, in an action of claim and delivery for the recovery of several specific articles, the defendant, in his answer, did not set forth the value of the articles separately, but took issue as to the total value, and no evidence of the value of any of such articles was offered on the trial, failure of the court to find the value of several of the articles did not invalidate the judgment in favor of the plaintiff.

Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by one Brenot against one Robinson for the recovery of specific personal property. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. S. McKelvey, for appellant. R. Melrose and Jas. G. Scarborough, for respondent.

HARRISON, J. Action of claim and delivery. The complaint alleges: That the plaintiff is the owner and entitled to the possession of four mules, of the value of $400; two double sets of harness, of the value of $75; one farm wagon, of the value of $60; and one pair of lead bars, of the value of $5; all of said property being of the aggregate value of $540. That on October 9, 1893, the defendant, as constable of Santa Ana township, in Orange county, without the plaintiff's consent, and against his will, took said articles of personal property from the possession of the plaintiff. That before the commencement of this action the plaintiff demanded of the defendant the possession of said articles of personal property, but the defendant refused to deliver the same. Upon the trial of the action the court found that the plaintiff was the owner of the property, and that the aggregate value of said property at the time it was taken was $425; but did not find the particular value of each article. Judgment was rendered in favor of the plaintiff for the possession of the property, and, in case delivery thereof could not be had, that he have and recover from the defendant the sum of $425.

1. The defendant filed a general demurrer to the complaint, and now urges that the demurrer should have been sustained on account of the absence of an averment that the plaintiff had made a claim for the property in the form prescribed by section 689, Code Civ. Proc., as amended in 1891 (St. 1891, p. 20). It is unnecessary to determine whether the owner of property from whose possession it is taken by the officer under a writ against another is a "third person," within the meaning of this section, or whether in such case any demand is essential to maintaining the action. See Wellman v. English, 38 Cal. 583; Sharon v. Nunan, 63 Cal. 234. The provisions of the section prescribe only the form in which the claimant is to make a demand in those cases in which the demand is requisite; and the allegation in the present case, that before commencing the action the plaintiff made a demand upon the officer for the property, is, as a matter of pleading, a statement of the fact of demand. If the form of the demand did not comply with the section of the Code, the defendant could traverse the allegation in his answer, and could also object to the proof when offered at the trial. In Paden v. Goldbaum (Cal.) 37 Pac. 759, it was held that, even in the absence of an averment in the complaint that any demand had been made upon the officer, evidence of the demand might be given at the trial, upon the ground that the provisions of the section are intended for the benefit of the officer, and that a failure to comply with the section is a matter of defense to be pleaded by him.

2. The failure of the court to find the specific value of the several articles did not render the judgment invalid. In Whetmore v. Rupe, 65 Cal. 237, 3 Pac. 851, it was held that this omission did not authorize a reversal of the judgment, the court saying: "By section 627, Code Civ. Proc., the jury are to find the value of any specific portion of the property only 'if so instructed.' Error can, therefore, only arise in a case where such instruction would be pertinent and proper, and the instruction was asked and refused." The defendant herein did not, in his answer, set forth the value of the several articles, and took issue with the plaintiff only upon the aggregate value of all of the articles, and it does not appear that any evidence was offered at the trial regarding the value of any of the property. The judgment and order are affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

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108 Cal. 148

CALIFORNIA NAT. BANK OF SAN DIEGO v. GINTY et al. (No. 19,353.)

(Supreme Court of California. July 16, 1895.)

SURETIES ON NOTES — LIABILITIES — APPLICATION OF COLLATERAL—NATIONAL BANKS—RATE OF INTEREST.

1. One signing a note as principal with a debtor will be such as to the payee, though the payee knew that as to the debtor such signer was only a surety.

2. Rev. St. U. S. § 5197, prohibits a national bank from charging a higher rate of interest than that fixed by the law of the state in which it is located. Civ. Code, § 1918, makes a rate of interest greater than the rate fixed by law as the legal rate, viz. 7 per cent., valid when agreed on by the parties. *Held*, that a national bank may contract for any rate of interest.

3. A debtor pledged certain logs to secure a note signed by himself and his sureties, as principals. On payment of part of the note, two new notes were executed, one by the original parties and the other by the debtor alone, but no new contract was made as to the purpose of the pledge. The logs were pledged to secure both the creditor and the sureties. *Held*, that the creditor was entitled to have the security first applied to payment of the renewal note executed by the debtor alone.

4. A motion for a new trial is not necessary to entitle a party to a review of an error arising on the face of the findings.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the California National Bank of San Diego against John Ginty and others on two promissory notes, and to foreclose a lien on logs securing them. From a judgment for plaintiff, and an order denying a new trial, defendants Ginty and Luce appeal. Plaintiff appeals from the application made by the judgment of the security. On defendants' appeal, affirmed. On plaintiff's appeal, reversed.

C. H. Rippey and Luce & McDonald, for appellants. Hunsaker, Britt & Goodrich, for respondents.

VAN FLEET, J. Action to recover on two promissory notes,—one for $7,350, dated December 20, 1890, due in six months, with interest at 10 per centum, per annum, signed by Livingston, Clarke & Co., John Ginty, and M. A. Luce; and the second for $5,000, of even date with the first, and like rate of interest, due three months from date, signed by Livingston, Clarke & Co. only,—and to subject certain primavera logs, pledged as security for the payment of said notes, to sale, and the application of the proceeds to the satisfaction of the indebtedness. Judgment went for plaintiff for the amount of the notes and interest, as stipulated, and directing a sale of the logs. There are cross appeals, the defendants Ginty and Luce appealing from the judgment and an order denying them a new trial, and the plaintiff appealing from that part of the judgment which directs the manner in which the proceeds of the pledged property shall be applied.

The appeal of Ginty and Luce involves but two questions: First, whether they were correctly held to be principals upon the note signed by them; and, second, whether the court below ruled properly in allowing interest on said note. The defense relied upon by them was that they signed the note for $7,350, as sureties for Livingston, Clarke & Co., with the knowledge of that fact by plaintiff, and with the understanding that plaintiff was to hold them as sureties only; that plaintiff had released Livingston, one of the principals on said note, and that they, as sureties, were thereby discharged of any liability. The court found that, as to plaintiff, Ginty and Luce executed the note as principals thereon, and that plaintiff dealt with them as principals, and not as sureties; that as between Livingston, Clarke & Co. and Ginty and Luce, the latter were sureties, and that this fact was known to plaintiff at the time of the execution of the note. The court also found that the release of Livingston was with the consent of Ginty and Luce. It is contended by these appellants that the evidence is insufficient to support the finding that they executed the note as principals, and that the plaintiff dealt with them as such. An examination of the evidence satisfies us that this contention cannot obtain. Indeed, taking all the circumstances attending upon the transaction from its origin into consideration, and it is doubtful if an opposite conclusion by the trial court could find substantial sanction in the evidence. However that may be, there is at least a substantial conflict on the point, and under the well-settled rule of this court the finding cannot be disturbed. It is further urged, however, that the fact that plaintiff was aware, at the execution of the note, that these defendants were merely sureties for Livingston, Clarke & Co. was sufficient of itself, independently of any agreement by plaintiff to that effect, to make said defendants sureties as to the plaintiff. We do not understand such to be the law. To the contrary, we understand the rule to be that where one signs as principal he will be held as such, notwithstanding the creditor knew that, as between the one thus signing and the principal debtor, the former was in fact only a surety. This principle is well settled. Harlan v. Ely, 55 Cal. 340; Aud v. Magruder, 10 Cal. 282; Damon v. Pardow, 34 Cal. 278; Shriver v. Lovejoy, 32 Cal. 575. Ginty and Luce having signed as makers, and being such, as between themselves and the plaintiff, it becomes immaterial to discuss the question as to what effect the release of Livingston by plaintiff would have had upon their rights as sureties.

The objection that the court erred in allowing plaintiff interest upon its notes is based upon the contention that, under section 5197 of the Revised Statutes of the United States, it is not competent for a national bank to charge or reserve a higher rate of interest upon its loans than that fixed by the law of the state as the legal rate,—7 per cent.; and that by contracting for a higher rate the plaintiff forfeited its right to the entire interest provided for. This question depends upon whether a national bank can lawfully charge a rate of interest in excess of that allowed by the federal statute, when such excess can be lawfully contracted for under the statute of the state in which the bank is situated and doing business. The question has been expressly decided in the affirmative by this court. Hinds v. Marmolego, 60 Cal. 229; Bank v. Stover, Id. 387. In Hinds v. Marmolego it is said "that the true interpretation of the act of congress is that, in those states and territories having no statute upon the subject of interest, the national banks are allowed a rate not exceeding 7 per centum; while in those states and territories having a statute on the subject, they are authorized to charge and receive interest at the rate allowed other banks and individuals." And it is held that in view of section 1918 of our Civil Code, giving parties the right to contract for a higher rate, national banks are also at liberty to receive such rate as may be agreed upon. This doctrine was affirmed in Bank v. Stover, supra, and is in accord with decisions elsewhere. Tiffany v. Bank, 18 Wall. 409; Wiley v. Starbuck, 44 Ind. 298; Rockwell v. Bank (Colo. App.) 36 Pac. 905. The cases cited by defendants do not sustain a contrary view.

The appeal by plaintiff involves the question of the proper application of the proceeds of the pledged property. The prayer of the complaint was that such proceeds be applied first to the payment of the principal and interest of the $5,000 note executed by Livingston, Clarke & Co., and secondly to the satisfaction of the $7,350 note and interest executed by Livingston, Clarke & Co. and Ginty and Luce. The judgment directed the application of such proceeds to be made first to the liquidation of the latter note, and of this plaintiff complains as error. The logs were the property of Livingston, Clarke & Co., and were originally pledged as security for a debt of $16,640, owing to plaintiff from said Livingston, Clarke & Co., evidenced by a note for that amount signed by Livingston, Clarke & Co. and Ginty and Luce. This note was subsequently renewed by the same makers, but thereafter, on the 20th day of December, 1890, by an arrangement between the parties thereto, the last-mentioned note was retired by the payment thereon of $5,000 in cash, and the making of the two notes in suit. After the first delivery of the logs in pledge, no new arrangement or contract was made by the parties, as to the purposes or conditions upon which they were to be held, but they continued to be held in the same manner as when first delivered. Upon these facts plaintiff contends that it was entitled, under the law, to have the proceeds of the pledged property applied first to the liquidation of the unsecured $5,000 note signed only by Livingston, Clarke & Co., and in this we think plaintiff must be sustained. The logs were originally hypothecated as security for the whole debt due from Livingston, Clarke & Co. to the bank. This security was not affected by the giving of the new notes in renewal or extension of the indebtedness. As urged by plaintiff, there being no new contract between the parties as to the purposes of the pledge, it remained as security for the debt, which was the same debt, although evidenced by new notes. Collins v. Dawley, 4 Colo. 138; Shrewsbury Appeal, 94 Pa. St. 309; Dayton Nat. Bank v. Merchants' Nat. Bank, 37 Ohio St. 208. The pledge stood, therefore, as security for both notes, and the case falls within the doctrine invoked by plaintiff,—that where a creditor holds two notes or obligations, one better secured than the other, and has collateral security for both alike, he has a right, in the absence of any modifying agreement, to have the collateral applied upon the obligation which is most precarious by reason of being least secured. Murdock v. Clarke, 88 Cal. 384, 26 Pac. 601; Field v. Holland, 6 Cranch, 8; Wood v. Callaghan, 61 Mich. 412, 28 N. W. 162; Morrison v. Bank, 65 N. H. 253, 20 Atl. 300. The fact that by the terms of the pledge the logs were intended to be security for the protection of Ginty and Luce, as sureties for Livingston, Clarke & Co., as well as for the plaintiff, cannot affect the rights of the latter in the premises. As between plaintiff and Ginty and Luce, the latter being makers of the note, the plaintiff is entitled to the same protection in all respects as against Livingston, Clarke & Co.

It was not essential for plaintiff, in order to avail itself of the objection made to the judgment, to move for a new trial. The error arises upon the face of the findings.

The superior court is directed to modify its judgment so as to direct the proceeds to be derived from a sale of the logs to be first applied to the satisfaction of the amount found due for principal and interest on the $5,000 note, and, as thus modified, the judgment will stand affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(108 Cal. 146)

RIVERSIDE LAND & IRRIGATING CO. v. JENSEN. (No. 19,496.)

(Supreme Court of California. July 16, 1895.)

QUIETING TITLE—PLEADING—RES JUDICATA.

1. It is not necessary for plaintiff in an action against an executrix to quiet title to land to plead a former judgment against defendant's testator for possession of the land in order to entitle him to put it in evidence.

2. The successor in interest of one against whom a judgment for possession of land has been made is estopped by such judgment from asserting adverse possession of such land anterior to the date of entry of the judgment.

Department 1. Appeal from superior court, San Bernardino county; John Campbell, Judge.

Action by the Riverside Land & Irrigating Company against Mercedes Alvarado Jensen, executrix, to quiet title. From a judgment for plaintiff, defendant appeals. Affirmed.

Paris & Allison and Rolfe & Rolfe, for appellant. Frank F. Oster, J. W. Curtis, and R. E. Houghton, for respondent.

VAN FLEET, J. Action to quiet title. Plaintiff had judgment, from which, and an order denying her motion for a new trial, defendant appeals.

1. The objection of defendant to the introduction in evidence of the judgment roll in the action of Riverside Land & Irrigating Company v. Cornelius Jensen was properly overruled. That was an action brought by the plaintiff here against the testator and predecessor in interest of this defendant to quiet plaintiff's title to certain lands, including the premises in controversy in this action, and in which final judgment was entered quieting plaintiff's title to the land in suit. It was not required of plaintiff to plead said judgment in order to be entitled to prove it. The complaint was in the usual form, and was sufficient (Rough v. Simmons, 65 Cal. 227, 3 Pac. 804; Heeser v. Miller, 77 Cal. 192, 19 Pac. 375; Castro v. Barry, 79 Cal. 447, 21 Pac. 946); and such an allegation would have been improper, as it is never necessary in such an action to plead deraignment of title. That is matter of evidence purely. While, as a general rule, it may be necessary to plead estoppel by former judgment, that rule does not apply when, as under our system, no opportunity is afforded the plaintiff to plead it. It had no proper place in the complaint, but plaintiff could not be precluded from the benefit of it as matter of evidence on that ground. He was entitled to give it in evidence with the same effect as if given an opportunity to plead it specially. Clink v. Thurston, 47 Cal. 27; Wixson v. Devine, 67 Cal. 345, 7 Pac. 776.

2. The evidence in the case entirely failed to establish the defense of the statute of limitations, and the court below correctly found against defendant upon that issue. The effect of the judgment against Cornelius Jensen, defendant's predecessor, was to estop the latter, and the defendant, who claims under him, from asserting title adverse to plaintiff anterior to the entry of that judgment (Freem. Judgm. §§ 300, 309; Marshall v. Shafter, 32 Cal. 195; People v. Center, 66 Cal. 559, 562, 5 Pac. 263, and 6 Pac. 481); and the period that elapsed intermediate the final judgment in the action of Riverside Land & Irrigating Company v. Cornelius Jensen and the commencement of the present action was not sufficient to ripen the adverse holding of this defendant into title by limitation. It follows also that the court below did not err in its rulings upon questions of evidence affecting this plea.

3. Nor did the court err in refusing defendant leave to amend her answer by set-

ting up that the premises in dispute were included in the former judgment by mistake. Assuming that such defense could have availed defendant in avoiding the otherwise conclusive effect of that judgment, there was an entire want of any such showing as would have justified the court in granting such leave. Judgment and order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(108 Cal. 211)

GRADY v. DONAHOO et al. (No. 18,455.)

(Supreme Court of California. July 22, 1895.)

JUDGMENT BY DEFAULT—VACATION—SURPRISE AND EXCUSABLE NEGLECT.

Immediately before removing from town, defendant's attorney left the papers in the case with defendant's bookkeeper, tied in a bundle, with instructions to tell defendant that he would have to get another attorney on account of the intended departure. The bookkeeper, being busy, supposed the papers were certain other papers which the attorney had been asked to return, and failed to give defendant the attorney's message. The case was set for trial, and judgment rendered therein, without either defendant or the attorney knowing of it. *Held*, that the judgment should be set aside, on the ground of surprise and excusable neglect, under Code Civ. Proc. § 473.

Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by W. D. Grady against M. J. Donahoo and others. From a judgment for plaintiff, and an order denying a motion to vacate the same, defendants appeal. Reversed.

Sayle & Caldwell, for appellants. W. A. Grady, for respondent.

VAN FLEET, J. Defendants failed to appear at the trial, and judgment was taken against them in their absence. They moved to vacate and set it aside, immediately upon learning of the fact, upon the ground of surprise and excusable neglect. The motion was denied, and defendants appeal from the judgment and the order refusing to vacate it.

It appeared that one D. M. Seaton had been retained by defendants as their attorney in the case, and he had put in an answer; but thereafter, and before the case was set for trial, Seaton removed from Fresno, where the parties reside, and the case was pending, to San Francisco. Before leaving Fresno, Seaton took his office copies of pleadings and papers in the case, and the papers in several other matters in which he was acting as attorney for the defendants, to the place of business of the latter, and, none of the defendants happening to be in at the time, he delivered all the papers, which were in one large bundle, to the bookkeeper of defendants, with the statement, among other things, that he was about removing to San Francisco, and that defendants would have to get another attorney to attend to this case and the other matters. The bookkeeper, being busy at the time, did not pay particular attention to what was said by Seaton, but, knowing that the latter had a short time before been requested to return some papers called the "Donahoo Papers," he assumed that the bundle handed him was the papers in the Donahoo estate which had been wanted, and later, when Mr. Emmons, a member of the firm, and one of the defendants, came in, handed the bundle to the latter with the remark that they were the Donahoo papers left by Mr. Seaton, but did not deliver Seaton's message about the case or the latter's intention to leave Fresno. Mr. Emmons, not having immediate use for the Donahoo papers, did not open the bundle, but laid it away and paid no further attention to it. Subsequently, after the removal of Seaton, and in his absence, and without his knowledge or that of defendants, the case was set down for trial, and was thereafter tried, and a judgment rendered against defendants, before the latter knew that the case had been set or that Seaton had ceased to attend to it. Upon these facts, we think the lower court should have set aside the judgment. It is not a case disclosing neglect or omission on the part of either counsel or party, nor any one connected with the case. The attorney had taken at least reasonable precaution to bring notice to his client of the fact of his removal and the necessity of procuring other counsel, but, through the inadvertence or neglect of an employé of defendants, for which we think they were, under the circumstances, in no way chargeable, knowledge of the fact never reached them. It does not appear that the case had ever been neglected by defendants in any way; but they were proceeding to defend it in good faith and upon the merits, and had done all that they were called upon to do, so far as knowledge of the necessities had been conveyed to them. Under such circumstances, and where, as here, the application is made so immediately after the default as that no considerable delay or injury is to be occasioned to plaintiff, we think defendants should be given an opportunity to defend upon the merits. "The exercise of the mere discretion of the court ought to tend, in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and, where the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application." Watson v. Railroad Co., 41 Cal. 17. In Dodge v. Ridenour, 62 Cal. 263, the facts fell very far short of making as strong a showing for relief as is made here, but the order refusing it was reversed, the court holding that the case was within section 473 of the Code of Civil Procedure. We think this such a case. The facts clearly establish an instance of "surprise and excusable neglect." The judgment and order are reversed.

We concur: GAROUTTE, J.; HARRISON, J.

108 Cal. 224

COWAN et al. v. GRIFFITH et al. (No. 18,438.)

(Supreme Court of California. July 22, 1895.)

MECHANIC'S LIEN—DWELLING HOUSE—LAND SUBJECT TO LIEN.

Under Code Civ. Proc. § 1185, declaring subject to mechanics' liens on a building the land on which it is situated, together with so much of the land about it as may be required for the convenient use and occupation thereof, the whole 40-acre tract on which a dwelling is located is not subject to liens, it not being meant that sufficient land about the dwelling to support the owner while living there shall be subject to the lien.

Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by D. A. Cowan and others against Annie T. Griffith and others. Judgment for plaintiffs. Defendant the Fresno Loan & Savings Bank appeals. Reversed.

Horace Hawes, for appellants. Frank H. Short, L. L. Cory, Sayle & Coldwell, and Tupper & Welsh, for respondents.

GAROUTTE, J. This is an action to foreclose certain mechanics' and material men's liens. Plaintiffs recovered judgment, and the Fresno Loan & Savings Bank, a mortgagee and defendant, has appealed. The building upon which the liens were foreclosed was a dwelling house, situated some five miles from the city of Fresno, and the only question of any importance involved in this appeal relates to the amount of land necessary for the convenient use and occupation of this dwelling. It is situated upon a tract of land described as lots 21 and 22 of the Easterby Rancho, the entire tract containing 40 acres, and each lot 20 acres. After hearing evidence, the court made a finding of fact to the effect that all the land was necessary for the convenient use and occupation of the dwelling house, and ordered the same to be sold. The land was planted to fig trees and vines. For the convenient use and occupation of this dwelling house it is very evident that 40 acres of land is not necessary. The statute does not contemplate anything of that kind. It means exactly what it says,—a sufficient space around the dwelling for its convenient use and occupation. It does not contemplate that sufficient land around the dwelling house to support the owner while living there be set apart. Very possibly 40 acres would not be sufficient for such a purpose; and, if the dwelling house was situated upon a section of farming land, upon the same line of reasoning as has been here adopted, the entire section should be set apart. Neither the productiveness or nonproductiveness of the soil, nor the profit derived from the cultivation of the land, is a material element to be considered in determining the amount of land to be set apart with the dwelling house, under this section (1185) of the Code of Civil Procedure. If this dwelling house was situated upon a 5-acre lot, and the remaining 35 acres of this tract was situated near, but upon the opposite side of, a public highway, it could hardly be contended that the entire 40 acres were necessary for the convenient use and occupation of the building; yet it is wholly immaterial upon the question here presented that the tract is in one body, rather than divided, as suggested, by a public highway. In Tunis v. Association, 98 Cal. 285, 33 Pac. 63, a mechanic's lien was foreclosed upon a hotel and saloon, and a tract of land containing about 60 acres was declared by the court necessary for the convenient use and occupation of these buildings, and ordered sold. The tract was known as the "Fair Grounds Tract," and had upon it a race track, racing stables, and other improvements. This court held that the trial court erred in setting aside the entire tract, and reversed the judgment, saying: "In the present case it is easy to see that the race track, with its training stables, grand stand, corrals, and other improvements, may be necessary to create business for the hotel, club house, and saloon, for which the building in question was constructed; but it is not at all apparent that they are necessary to the convenient use and occupation of the building for the purposes indicated. Their uses are foreign to its purposes, except as they may tend to bring custom to its doors." And here it may be said the use of this land is foreign to the owner's purposes, except that it may furnish him an income by which he may sustain himself in the dwelling. The statute simply allows him the dwelling house and a quantity of land around it sufficient for its convenient use. As to his income or source of support, the statute does not concern itself. It is not our purpose to indicate to the trial court the quantity of land necessary for the convenient use and occupation of this dwelling-house, but it is entirely evident that 40 acres is too much, and we think it equally evident that an entire 20-acre tract is too much. We see no objections to the complaint of sufficient merit to demand a reversal of the judgment. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

RECLAMATION DIST. NO. 307 v. GLIDE.
(Sac. 10.)

(Supreme Court of California. July 31, 1895.)

RECLAMATION ASSESSMENT—APPORTIONMENT—CONCLUSIVENESS.

In an action to collect a reclamation assessment, an order of the commissioners apportioning the assessment is not conclusive on the legality of the apportionment. Reclamation Dist. No. 531 v. Phillips (Cal.) 39 Pac. 630, followed.

In bank. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by Reclamation District No. 307 against J. H. Glide to collect an assessment. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

McKune & George, for appellant. Armstrong & Bruner, for respondent.

TEMPLE, J. This action was brought to collect an assessment in the plaintiff district. Plaintiff appeals from the judgment. In its opening brief it is said: "This appeal presents for decision the sole question, can a court, at such a trial, on evidence concerning a matter of judgment confided by the statute to a board of commissioners, set aside the judgment of such commissioners, and determine that they erred in judgment in apportioning the assessment among the several tracts of land in the district?" Reducing the abstract question to the actual controversy, and applying it to a reclamation district under the Code, it has been answered adversely to the appellant in the recent case of Reclamation Dist. No. 531 v. Phillips (Cal.) 39 Pac. 630. The judgment must therefore be affirmed, and it is so ordered.

We concur: HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.

108 Cal. 303

STODDARD, Collector, v. SUPERIOR COURT OF STANISLAUS COUNTY et al. (S. F. 114.)

(Supreme Court of California. July 31, 1895.)

CERTIORARI—ORDER GRANTING INJUNCTION—APPEAL.

Under Code Civ. Proc. §§ 1086, 1103, providing that certiorari will lie when there is no appeal, nor any plain, speedy, and adequate remedy, certiorari will not lie to review an order of the superior court staying a sale of land, pending appeal from a judgment, on the ground that an appeal from the order would not be a plain, speedy, and adequate remedy.

In bank.

Certiorari by G. R. Stoddard, collector, to review an order of the superior court of Stanislaus county granting a stay pending appeal. Demurrer to petition sustained, and proceeding dismissed.

E. S. Butterworth, C. C. Wright, and R. Percy Wright, for petitioner. C. W. Eastin, for respondents.

McFARLAND, J. This is an application of petitioner, Stoddard, for a writ of certiorari to review and annul an order of the superior court restraining petitioner from selling certain property; and it has been submitted upon a demurrer of the respondents to the petition.

The demurrer must be sustained. The petition shows these facts: One Underwood and others brought an action in the said superior court against the petitioner here, Stoddard, as collector of the Modesto Irrigation District, for a perpetual injunction restraining Stoddard from selling certain land for delinquent assessments due said district. A temporary restraining order was granted by the court; but, upon the hearing, a final judgment was rendered in said action in favor of Stoddard, defendant therein and petitioner here. The plaintiffs in said action took an appeal from said judgment to this court; but, after the said appeal had been taken, the court, upon plaintiff's motion, made an order enjoining and restraining Stoddard from selling the property described in the complaint, during the pendency of the appeal. It is this last order that petitioner Stoddard seeks to have reviewed and annulled in this present proceeding, upon the ground that said court had no jurisdiction to make it. The demurrer is upon the ground, among others, that the said order is an appealable order, and therefore cannot be reviewed on certiorari. Petitioner, in his brief, does not contest the proposition that the order is appealable, either as an order made after final judgment or as an order granting an injunction. He directs his argument to the points that the court had no jurisdiction to make the order, and that an appeal would not be a plain, speedy, and adequate remedy. It may be readily admitted that the court had no jurisdiction to make the order; but, as the order is appealable, certiorari will not lie, because it lies only where "there is no appeal." Code Civ. Proc. § 1068. In this respect it differs from mandamus and prohibition, which lie "in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." Sections 1086, 1103. With respect to certiorari, the language of the Code is: "When * * * there is no appeal, nor in the judgment of the court any plain, speedy and adequate remedy." Section 1068. In Stuttmeister v. Superior Court, 71 Cal. 322, 12 Pac. 270, the authorities on the point are collated; and it was there declared that: "The writ [certiorari] will not lie when there is an appeal from the action complained of;" and, "The writ is not given in lieu of an appeal, but only to review errors in excess of jurisdiction, for which an appeal does not lie." See cases cited in opinion of Searls, C.; also, In re McConnell, 74 Cal. 219, 15 Pac. 746; Hayne, New Trial & App. § 307. We have been referred to no case in which it has been held that, under our Code, a writ of certiorari will lie to reverse an appealable order. That the appeal does not afford a plain, speedy, and adequate remedy makes no difference. The provision of the statute governs. The demurrer to the petition is sustained, and the proceedings dismissed.

We concur: TEMPLE, J.; HENSHAW, J.; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.

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108 Cal. 58

DREYFUS v. BADGER. (No. 19,450.)

(Supreme Court of California. July 11, 1895.)

PATENTS—CONFLICTING CLAIMS—ESTOPPEL—COLLATERAL ATTACK.

1. One who has taken no appeal from the action of the United States land department, in canceling his declaratory statement to pre-empt land, and who, after the land had been listed to the state, made no formal objection to the issuance of a patent to another under a claim that the land was not suitable for cultivation, though he had also made application therefor to the state, has no status from which to hold the patentee as his trustee, on the ground that the land was suitable for cultivation, and that he and not the patentee has been in possession as required by law.

2. A land patent, valid on its face, cannot be collaterally attacked by one whose only claim to the land is possession, by showing that the land was not of the character for which it was patented.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Ejectment by Dreyfus, as executor, against Badger. Plaintiff had judgment, and defendant appeals. Affirmed.

B. T. Thomas, for appellant. Richards & Carrier, for respondent.

McFARLAND, J. This was an action of ejectment, in which judgment went for plaintiff. Defendant appeals from the judgment and from an order denying a new trial. The land in contest was listed to the state in lieu of certain school land, and a patent thereto was issued by the state to plaintiff's testator in pursuance of a certificate of purchase issued to one C. F. Wilson. Wilson filed his application for the land in the state land office on December 31, 1886; his application was approved August 30, 1889; a certificate of purchase was issued to him September 11, 1889; he assigned his certificate to Isadore Dreyfus (respondent's testator) on October 28, 1889; and on February 24, 1892, the state of California issued its patent for the land to said Isadore Dreyfus. On January 27, 1887, appellant who was a qualified pre-emptor residing on the land, filed in the local United States land office his declaratory statement of his intention to pre-empt said land, but, prior to that, the state surveyor general had made application to have said land listed to the state of California in lieu of certain other land; and on or about July 8, 1889, the said application was approved, and the said declaratory statement of appellant canceled. Appellant did not appeal from the order canceling said statement, or take any other proceeding in the United States land department; but, on the other hand, appellant on August 15, 1889, made application to the surveyor general of California to purchase said land as land belonging to the state, which application was rejected "on account of the said previous application of said C. F. Wilson," and also upon the further ground that the surveyor general had not received information that the land had been listed. It may be noticed here that appellant's said application contained the statement "that said land is not suitable for cultivation, except only small portions thereof being suitable for that purpose," but he avers in his pleadings that it was suitable for cultivation. Appellant took no step in the state land office towards having a contest over his right to purchase said land. He resided on the land, and had improvements thereon. He filed in this action an answer and a cross complaint, and in the latter, in which he set up the foregoing facts, he prayed that respondent be declared to be a trustee of appellant for said land, and that he convey the same to appellant. A demurrer to the cross complaint was sustained. In his answer, in addition to a general denial and the averment of the facts above stated, appellant averred that the land was suitable for cultivation, and that neither Wilson nor Dreyfus resided on the land. At the trial the court heard some evidence as to the character of the land,—that is, whether it was suitable for cultivation,—and then instructed the jury that, under the law, it was their duty to find a verdict for respondent. Appellant asked two instructions,—one generally, to the effect that if at the time of Wilson's application the land was suitable for cultivation, that is, if more than one-half of all the legal subdivisions would, without artificial irrigation, produce ordinary crops, etc., and Wilson was not an actual settler on the land, then the verdict should be for appellant; and the other to the effect that if Wilson made a false affidavit in his application, as to the land being unsuitable for cultivation, and the evidence showed that it was suitable for cultivation, and Wilson was not a resident on the land, but that appellant was such resident and otherwise qualified to purchase, then the verdict should be for appellant. These instructions were refused, and the verdict was for respondent.

A reversal of the judgment could be based only upon these two propositions, or one of them: (1) That upon the facts averred in the cross complaint appellant can hold respondent as trustee for him of the land in contest; (2) that, in defense to the action of ejectment, appellant can attack respondent's patent collaterally by showing the character of the land in contest. A person seeking to have a patentee of land declared his trustee, in the absence of any contract between the parties, must connect himself with the paramount source of title, and also show that he has prosecuted his claim with diligence. Burling v. Thompkins, 77 Cal. 257, 19 Pac. 429; Doll v. Meador, 16 Cal. 295; Damrell v. Meyer, 40 Cal. 166; Kentfield v. Hayes, 57 Cal. 409; Bank v. Hynes, 50 Cal. 195; O'Connor v. Frasher, 56 Cal. 499; Moore v. Wilkinson, 13 Cal. 478; Chapman v. Quinn, 56 Cal. 266; Buckley v. Howe, 86 Cal. 596, 25 Pac. 132. Nearly all the cases cited by appellant were cases where contests as to the right to purchase had been referred by the land department to the superior court under section 3414 of the Political Code, or where each party had in some other way acquired a status. In Hollinshead v. Simms, 51 Cal. 158, the court discusses mainly the alleged fraudulent acts of one Woods, who was the agent of Hollinshead, and does not discuss the status of Simms. As to the latter it is merely said, generally, that he had "the right as against the government to acquire the legal title," and that Simms was not "lacking in diligence in the assertion of his rights." If the case can be taken as having been decided with the status of Simms fully in view and thoroughly considered, it is not in accord with the other decisions, or with the case of Burling v. Thompkins, supra, in which it is referred to. In the case at bar appellant has no status as claimant of the land under the United States government. After his declaratory statement had been canceled and the land listed to the state, he took no appeal, but recognized the land as state land, and made application to purchase it from the state. Neither has he any status as claimant of the premises as state land. When his application to purchase was rejected, he took no step to contest the prior application of Wilson, of which he was informed, but slept upon whatever rights he may have had for some years until Wilson's application had progressed, first into a certificate of purchase, and afterwards into a patent. It does not appear that he was kept in ignorance of his rights by any fraud of respondent or his predecessor. In Kentfield v. Hayes, 57 Cal. 409,—a case very similar to the one at bar,—it was expressly held that an application by defendant to purchase the land in contest which had been presented to and rejected by the state land department did not give him a status from which to hold the patentee as his trustee.

2. A defendant may defeat an action of ejectment by showing that plaintiff has no title. But where a patent, regular on its face, has been issued by the government (federal or state) for land which it owns, under a law providing for the disposal of the land patented upon the ascertainment of certain facts, the officers of the land department of the government have jurisdiction to determine such facts, and the issuance of a patent is, upon collateral attack, a conclusive declaration, as against all claiming under said government, that the facts have been found in favor of the patentee. "And this rule applies to the determination of the particular character of the land which is the subject of the patent." This was expressly held in Gale v. Best, 78 Cal. 235, 20 Pac. 550, where we alluded to the authorities at some length, and, basing our conclusion on decisions of the supreme court of the United States in Refining Co. v. Kemp, 104 U. S. 636, Steel v. Refining Co., 106 U. S. 447, 1 Sup. Ct. 389, and French v. Fyan, 93 U. S. 169, we declared the law to be as above stated. It would be useless to here repeat the views there expressed. See, also, the late case of Barden v. Railroad Co., 154 U. S. 288, 14 Sup. Ct. 1030, and Irvine v. Tarbat, 105 Cal. 237, 38 Pac. 896. These cases involved patents of the general government; but, upon principle, the rule applies with equal force to a patent of the state government. Moreover, it has been so expressly held by this court in Doll v. Meador, 24 Cal. 341, where it was decided that "the patent is the record of the state that the land was subject to location under the grant of the United States, and has been located," and in Ah Yew v. Choate, Id. 562, where it was held that the patent is also "a record of the judgment of the state, by its officers duly appointed for that purpose, that the conditions and characteristics of the land were not such as to constitute it mineral within the meaning of the provisions of the statute," etc. In the case at bar appellant seeks collaterally to assail respondent's patent by showing the character of the land. The law provides that if the land be suitable for cultivation,—that is, if each 40-acre tract will produce ordinary crops without artificial irrigation, etc.,—then it is to be sold only to an actual settler. The

respondent's predecessor sought to purchase the land upon the theory that it was not suitable for cultivation, and made an affidavit that it was not so suitable, as required by statute. Now, the contention of appellant is that he may show the patent to be void by showing that said affidavit was false, because the land was suitable for cultivation. But this he may not do, because the patent is conclusive as to the "conditions and characteristics of the land." If in ejectment the plaintiff relies on a patent, it is a defense to show that the patent is void on its face, or that "there is no law which authorizes such a patent under any state of facts"; but if the law provides that those parts of a large body of lands which are of a particular character shall be disposed of in a certain way, "then the land department has jurisdiction to determine the character of any part thereof, and a patent is conclusive evidence that such jurisdiction has been exercised." Gale v. Best, supra. And so, in the case at bar, the patent is conclusive to the point that the land was of such character as not to be suitable for cultivation within the meaning of the law, and therefore patentable to respondent. Otherwise, the possessor of a patent would have no muniment of title, and the evils depicted by Mr. Justice Field in Steel v. Refining Co., supra, would ensue.

Counsel for appellant has cited some cases where it has been held that evidence was properly allowed on the point whether certain land was swamp or overflowed or dry; but it is very evident that questions as to swamp lands are very different from those arising in the case at bar. It has always been held that the act of congress of September 28, 1850, by which the swamp lands were given to California (and the other states) was a grant in præsenti, and at its date passed the title to the state, although it also provided that it should be the duty of the secretary of the interior to afterwards send lists and plats of such lands to the governor of the state, and also, at the latter's request, issue patents of such lands to the state. Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. 985. As the title passed by said act of 1850 to California to all the swamp land within her borders, she was not compelled to wait for the platting and patenting of the same by the land department of the general government; and, as the action of said department was tardy, she proceeded herself to assert her ownership of said lands by providing for their survey and sale, and the issue of patents to the purchasers. Wright v. Roseberry, supra. But under these circumstances it happened sometimes that, before any listing to the state, the United States and the state each issued a patent for the same land to a different person,—the former upon the theory that it was dry land and had not passed to the state, and the latter upon the theory that it was swamp and passed to her by the said act of 1850,—or preemptors under the United States claimed against patentees of the state. Nearly all the contests about swamp lands have arisen in this way,—that is, between those who claimed the land under the United States as dry land, and those who claimed it under the state as swamp land; and in such cases the contestants did not claim under the same source of title, but the claim of each was hostile to the source under which the other claimed. If the land was swamp the title had passed to the state in 1850, and a patent for the same land afterwards by the United States was as worthless as a conveyance by A. of the land of B.; and the same was true of a patent by the state if the land was not swamp. It is evident, therefore, that the principle of the conclusiveness of a patent can have no application to such a case; for that principle applies only to those claiming under the government which issued the patent,—under the same source of title. But, of course, the land department of one government cannot conclude those claiming under the other government,—under an independent and hostile source of title. And in such a case the only means of determining the controversy is an inquiry into the character of the land. And that means was properly applied in Read v. Caruthers, 47 Cal. 181, and in other cases cited. Where, however, the United States, through proper officials, had listed or patented lands to the state as swamp, then subsequent claimants under the United States were concluded from showing that the land was not swamp. French v. Fyan, 93 U. S. 169; Wright v. Roseberry, supra.

The judgment and order are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

108 Cal. 8

PEOPLE v. YOUNG. (No. 21,155.)

(Supreme Court of California. July 5, 1895.)

CRIMINAL LAW — USE OF INTERPRETER — DEPOSITIONS.

1. Under Code Civ. Proc. § 1884, providing that an interpreter must be sworn when a witness does not understand the English language, the court is necessarily vested with a discretion which is not abused in refusing an interpreter to a foreigner charged with murder who appeared to sufficiently understand the language.

2. Defendant, on trial for murder, asked for a commission to take testimony in Germany, to show that the father and sister of defendant died insane, and that defendant is subject to epileptic fits, adding in his affidavit that he verily believed that said witness will testify "that they believe and are of the opinion that the defendant is of unsound mind." The people stipulated as a fact that the father and sister of defendant died insane. The evidence showed that defendant had been a resident of the state for the seven years preceding the trial, and had but one epileptic fit in that time. *Held*, under Pen. Code, § 1354, providing that if the court is satisfied that the examination of an absent witness is necessary an order for a commission must issue, that the court was justified in refusing to order a commission.

3. Defendant cannot challenge the panel because the names of two jurors were not found on the assessment roll for the preceding years, when they were excused for cause, and no possible harm could have resulted to defendant from their names being placed in the list.

4. Defendant cannot challenge the panel because no certified list of trial jurors, as provided in Code Civ. Proc. § 208, was ever placed in the possession of the county clerk, it appearing that 300 jurors were regularly drawn, their names entered on paper by the clerk of the board of supervisors, the paper placed in the possession of the county clerk, and the names taken from this paper and placed in the jury box, when the clerk of the county and of the board of supervisors was the same person, and offered at the trial to attach the certificate.

5. An elisor may be appointed when it appears the sheriff and coroner are both disqualified.

6. It is not error, on a trial for murder, to allow a witness to testify that defendant, after his arrest, was brought in the presence of the wounded man, who stated that a purse found on defendant was deceased's, and that defendant neither affirmed nor denied the statement.

In bank. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

William Young was convicted of murder, and appeals. Affirmed.

Wallace M. Pence, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. This is an appeal from a judgment sentencing the appellant to suffer the death penalty, upon a conviction for murder, and from an order denying his motion for a new trial.

1. A motion was made to set aside the information, upon the ground that the defendant had not been legally committed by a magistrate. In support of the motion, the defendant, Young, presented his affidavit to the effect that he was a native of Germany, and had a very limited knowledge of the English language; that he did not know or understand that he had a right to counsel at the preliminary examination, and that he did not hear or understand the magistrate inform him that he had such right. As opposed to the motion, the prosecution introduced a part of the record of the proceedings of the preliminary examination, from which it appeared that the defendant was fully informed of his rights, and thereupon stated to the committing magistrate that he desired no counsel, and was then ready to have the examination proceed. The answers of the defendant to the interrogatories put to him at the time by the magistrate indicate a full comprehension upon his part of the nature and character of the proceedings that were about to take place, and a full understanding of the facts, at the time he declined the aid of counsel. Neither did the trial court commit an error in denying his application for an interpreter. Under section 1884 of the Code of Civil Procedure, the court is necessarily vested with a discretion in granting or refusing such an application, and we see no abuse of that discretion in this case.

2. Appellant, upon affidavits, asked for a commission to take testimony of certain witnesses residing in Berlin, Germany. In such affidavits it was proposed to show, by the testimony of said witnesses, "that the father of defendant was insane, was confined in an asylum and died insane; that his sister was subject to epileptic fits, and died insane; and that the defendant is subject to epileptic fits. And he verily believes that said witnesses will testify that, from their knowledge of him, his conduct, his conversation with them, and observation of his conduct, that they believe and are of the opinion that he, defendant, is of unsound mind." As opposed to the issuance of the commission, the people stipulated as a fact "that the father of defendant was insane; was confined in an asylum and died insane; that his sister was subject to epileptic fits, and died insane." And thereupon the court refused to issue the commission. In relation to the issuance of commissions, section 1354 of the Penal Code declares: "If the court to whom the application is made is satisfied of the truth of the facts stated, and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take testimony. * * *" The prosecution admitted all that the appellant desired to prove as to the mental condition of his father and sister. Hence, we deem the object and purpose of a commission to take testimony as to them was gone; and, as to the balance of the showing made, we are satisfied the trial court was justified in holding it insufficient. We think the court could well say that it was not convinced that the examination of these witnesses was necessary to the attainment of justice. We think this true for many reasons, for the showing was inherently weak. It appears, by other portions of the record, that the appellant had been a resident of the state of California for seven years immediately prior to the trial. By his own evidence, he had been afflicted with but one epileptic fit in this state. Hence, the evidence of these witnesses as to epileptic fits could only refer to a time many years ago, when he was but a youth, and he appears to have practically outgrown his affliction as age came upon him. As to the remainder of the showing, wherein affiant "believes that said witnesses will testify that * * * he is of unsound mind," we think the court was right in rejecting his belief upon the matter. Something more than his mere belief as to what the witnesses would testify to was demanded.

3. The appellant challenged the panel of trial jurors upon various grounds. The fact that the names of two of the jurors upon the panel were not found upon the assessment roll for the preceding year does not invalidate the panel. That fact being brought to the attention of the court, they were excused for cause, and no possible harm could have resulted to appellant by the mistake of

the board of supervisors in placing their names upon the list of jurors for the year. It is further insisted that no certified list of trial jurors, as provided in section 208 of the Code of Civil Procedure, was ever placed in the possession of the county clerk. It appears, by the testimony of the clerk of the board of supervisors, that 300 trial jurors were regularly drawn, under the order of the court, to serve for the ensuing year; that these names were entered upon a piece of paper by the clerk of said board, and this paper placed in the possession of the county clerk, without the certificate contemplated by the statute; and from this paper the names were taken and placed in the trial jury box. These matters all came under the personal knowledge of the witness, and he further testified that he was then and there ready to attach to the list the certificate required. The procedure here practiced is not a commendable one, and should never be resorted to. It might result in the total miscarriage of justice; but in this case we see nothing whatever infringing upon appellant's rights. There is no question but that the list of jurors, as drawn by the board of supervisors, was the same list that went into possession of the county clerk, and from which the names were taken and placed in the trial jury box. If there was the slightest doubt as to the identity of the list, we would not hesitate a moment in ordering the entire panel set aside; but there is no such doubt. The county clerk and the clerk of the board of supervisors are the same. Hence, these facts were essentially within the knowledge of the official having possession of the uncertified list, and we see no reason why he could not now attach the certificate contemplated by the law to the list. In State v. Greenman, 23 Minn. 209, there appeared to be a doubt as to the identity of the list.

4. A special venire was challenged, upon the ground that it was summoned by an elisor, to the exclusion of the sheriff and coroner. From extreme caution, the district attorney made a showing which, in the opinion of the court, disqualified both of these officers, and for that reason the elisor was appointed. There is no error in this action of the court.

5. The appellant, after his arrest, was brought into the presence of the wounded man, and a conversation then occurred between the deceased and a witness, as to the ownership of a certain purse found upon the appellant at the time of his arrest. This line of examination is claimed to be error, but we think it authorized under the law. The appellant was present at the time, in a position to hear and see all that occurred, and neither affirmed nor denied the statement of the deceased to the effect that the purse was his property. His conduct, under the circumstances, is a fact to which the jury were entitled. People v. Mallon, 103 Cal. 513, 37 Pac. 512. It might be further suggested, in answer to appellant's claims that this evidence was all the evidence offered at the trial, as to the ownership of the purse, that appellant's own admissions placed the possession of the purse in the deceased at the time he was shot.

6. We see nothing objectionable in the character of the cross-examination of the appellant, and the verdict of the jury is fully supported by the evidence. The theory of the prosecution pointed to a murder for the purpose of robbery. The theory of the defense outlined an accidental killing by defendant, while under the influence of liquor. These two theories were squarely and fairly presented to the jury, and by the verdict the jurors rejected appellant's defense as one not true, but manufactured for the occasion. This defense had nothing to support it, save appellant's own testimony. This the jurors disbelieved, and the credibility of his evidence was a matter essentially resting with them.

7. We have carefully examined the law given by the court to the jury, and consider it a full and fair charge, when considered in connection with the evidence. We see nothing in the remaining specifications and assignments of error demanding a reversal of the judgment and a new trial of the case. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: McFARLAND, J.; HENSHAW, J.; HARRISON, J.; VAN FLEET, J.

108 Cal. 154

DIGGINS v. HARTSHORNE. (No. 15,757.)

(Supreme Court of California. July 16, 1895.)

EVIDENCE—JUDICIAL NOTICE—PUBLIC IMPROVEMENTS—DESCRIPTION OF PROPERTY.

1. St. 1858, p. 56, making the Van Ness map the official map of San Francisco, does not enable the court to take judicial notice of the correct location on the ground of the streets therein platted.

2. St. 1871–72, p. 804, authorizing the board of supervisors to order the improvements of streets of San Francisco laid down on the Brooks and Potter map "and" the Humphreys map, does not require that the street to be improved be laid down on both maps, as the conjunction "and" will be construed as a disjunctive.

3. The grading of Seventh street between B. and C. streets was contracted for. On the official map C. street intersected Seventh street at right angles. The true location of C. street was in dispute, such street being platted on some maps as though it intersected Seventh street diagonally. In fixing the limits of the work, C. street was considered as crossing Seventh street diagonally. *Held* that, in an action to enforce an assessment, the defense that the work was not completed as contracted for could not be raised, as the acceptance of the work by the superintendent, in the absence of an appeal, is conclusive on such question.

4. Under St. 1871–72, p. 804, providing that the expense of street improvements shall be assessed against each lot, the lots fronting thereon being assessed in proportion to their frontage, if the frontage of the lot is correctly given in the assessment, the fact that the interior lines are incorrect is immaterial, as the owner cannot

be aggrieved thereby, the depth of the lot not affecting the assessment.

5. In a suit to enforce an assessment against a corner lot for a street improvement, the location of one of the streets was in dispute,—one map giving it as intersecting at right angles, the other as intersecting diagonally. The complaint, after describing the lot by boundaries commencing at the intersection of the street, added, "And is the same lot shown as lot 3" on the assessment diagram, which showed the streets as intersecting diagonally. *Held*, that the judgment should describe the property with reference to the diagram, and not merely as commencing at the intersection of the street, with the boundaries given in the complaint.

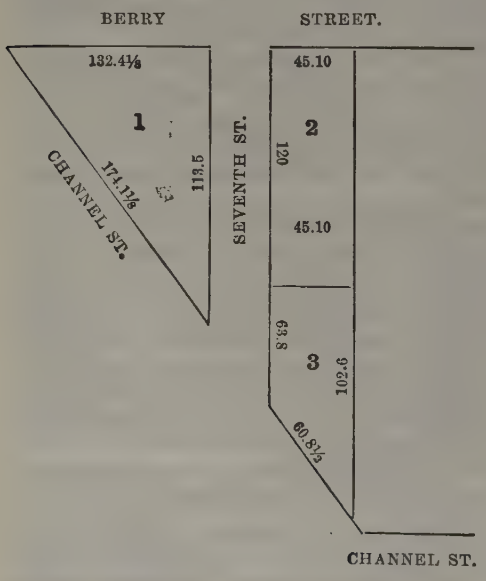
6. An action to foreclose an assessment for a street improvement is properly brought in the name of the person to whom it is assigned as security, and who is authorized by the assignment "to demand, sue for, settle, and compromise" the same.

Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by A. C. Diggins against B. M. Hartshorne to enforce a street assessment. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Boyd, Fifield & Hoburg, for appellant. J. M. Wood, for respondent.

HARRISON, J. Action to foreclose the lien of a street assessment in the city and county of San Francisco. Under proceedings properly taken therefor by the board of supervisors of the city and county of San Francisco, the superintendent of streets entered into a contract, November 28, 1879, with Buckman, the plaintiff's assignor, for grading Seventh street from the northerly line of Berry street to Channel street, and, after the work had been completed to his satisfaction, issued an assessment therefor. The following is a copy of the diagram which is attached to the assessment, so far as the present action is affected:



The present action was brought to foreclose the lien of the assessment against lot 3. It is contended by the appellants that, upon the official map of San Francisco, Channel street runs from Third to Eighth streets at right angles with Seventh street, and parellel to and 275 feet southerly from Berry street, and that as, by the above diagram, Channel street intersects Seventh street diagonally, the assessment shows upon its face that the work contracted for has not been performed, and that the expense of the work done has not been assessed upon all the property liable to be assessed therefor. This contention is supported by the further contention that the court will take judicial notice of the location of Channel street upon the official map of the city and county. It was held in Whiting v. Quackenbush, 54 Cal. 306, that, inasmuch as the Van Ness map had been made official by an act of the legislature (St. 1858, p. 56), the streets designated thereon had been "established by law," and that the court would take judicial notice of them (Code Civ. Proc. § 1875, subd. 2); and in Brady v. Page, 59 Cal. 55, it was further held that, in taking judicial notice of these streets, courts would take judicial notice of their relation to each other, and of the directions in which they run. It has never been held, however, that a court would by its judicial knowledge determine whether the space set apart upon a map for a street is correctly located upon the ground, or, when the line of such street as a boundary is disputed, fix it, without evidence. The owner of a tract of land in a city may offer to dedicate a portion thereof for a street, either by throwing the space open for use, or by an actual grant to the public, or by selling lots bordering thereon, or he may record a map of the tract, with streets delineated thereon. In such cases the question of dedication may be disputed, and courts do not take judicial notice of the existence and location of the streets, but determine the fact of dedication upon the sufficiency of the evidence to establish it. Neither can courts take judicial notice of the existence of a street that has been opened or adopted by a municipal ordinance, without proof of the passage of such ordinance. In the present case the defendants introduced at the trial a witness from the office of the city and county surveyor, who produced from the records of that office several maps upon which Channel street was delineated, upon no two of which was it delineated alike, and who also testified that in that office there were four different authorities for the lines of Channel street, and four sets of lines for the street. One of the maps so produced was the above-named Van Ness map, and, although on this map there is no street designated by the name of Channel street, yet in the space to the east of Seventh street, which on other maps is designated as Channel street, there are two parallel lines which are deflected before reaching Seventh street, and cross the block at that corner of Seventh street in nearly the same direction as upon the above diagram. Between these two deflected lines are written the words "Proposed Canal Channel." The Brooks and Potter map, sometimes called the "Engineer's Map," which was adopted as the official map in 1866, represents Channel street at its intersection with Seventh in the same form in which it is represented upon the aforesaid diagram, and in the deflected portion of the street are written the words "Channel Street." Upon the map of 1870, usually called "Humphreys' Map," Channel street is delineated as lying parallel with Berry street, and as projecting beyond Seventh as far as Eighth street; but, as it approaches Seventh street from the east, it is delineated with two lines which deflect in the same manner as on the Brooks and Potter map, and are projected beyond Seventh street in the line of the deflection. There is no designation given to it after it leaves Seventh street. Upon the assessor's map the street is delineated in the same manner as on the diagram. It was shown by the witness that upon these several maps the distance along the easterly line of Seventh street, from Berry to its intersection with Channel street, was as follows: On the Brooks and Potter map, 181 feet; Humphreys' map, 209 feet; block book, 185 feet; assessor's book, 192 feet. And on the westerly side of Seventh street the distances from Berry to its intersection with Channel street are as follows: Brooks and Potter map, 110 feet; Humphreys' map, 138 feet; block book, 114.6 feet; assessor's block book, 121 feet 1¼ inches. These distances are not the result of an actual survey upon the ground, but are measurements made upon the several maps with a scale. It does not appear that either Berry or Channel street was ever located by monuments upon the ground, and at the time of the proceedings for the improvement of the street the whole of this region was covered with water. From these items of evidence it is seen that, if the actual location of Channel street, as an official street, is an essential fact in determining the validity of the assessment, the conflict of evidence which was presented by the appellant himself is so great that the finding of the court cannot be disturbed.

We do not, however, consider that the determination of this question is essential to the determination of the validity of the assessment, but that the correctness of the judgment appealed from must rest upon the consideration of other facts and legal propositions. Section 1 of the act under which the proceedings were had (St. 1871–72, p. 804) declared that all the streets laid down on the maps in the office of the city and county surveyor which are commonly known as the "Brooks and Potter Map" and the "Humphreys Map" were public streets "for the purpose of this law"; and gave to the board of supervisors jurisdiction to order the improvement of any of these streets. By section 3 of the same act the board of supervisors is authorized to order the grading of "the whole or any portion of the said streets." We have seen that Channel street, as laid out upon the Brooks and Potter map, corresponds to the diagram annexed to the assessment under consideration, and that there is laid out upon the Humphreys map an open space corresponding to a portion of said street. The terms of section 1 of the act do not require that the streets laid down upon the maps shall have been actually opened and dedicated to public use before the supervisors could order their improvement. If, in fact, the supervisors should attempt the improvement of a street that had not been so opened and dedicated, but which was in reality private property, their action would fail, not by reason of a want of statutory provision, but because of the inability of the legislature to confer authority to make such an improvement. No question of this character is, however, presented in the present case. It is conceded that Seventh street, upon which the grading was done, was at all times an open street, dedicated to public use. The objection of the appellant rests upon the proposition that it appears upon the face of the assessment that the work contracted for had not been performed by reason of the fact that the true position of Channel street is different from its position as shown by the diagram. This objection, however, is obviated when it is shown that the work "contracted for" is not to be determined by the actual location of Channel street upon the ground, as it may have been originally laid out and dedicated to public use, but by its location as intended by the board of supervisors. The section of the statute above referred to gave the supervisors authority to order the grading of "any portion" of Seventh street. While the declaration in the statute that the streets laid down upon the designated maps are open, public streets, "for the purpose of this law," did not of itself make them in fact public streets, if they were not so already, yet these spaces upon the maps were thereby identified as objects of reference by which to describe the limits of any improvement which might be made. The "portion" of a street which the supervisors could order improved was entirely within their discretion. It would have been within their power to order that Seventh street be graded for a distance of 200 feet southerly from Berry street, or to a point 200 feet distant upon the easterly side, and 100 feet distant upon the westerly side, of Seventh street. They had also the power to limit the portion of the street to be graded by the line of Channel street as laid down upon these maps, and this, it must be held, is what they intended to do. If the resolution ordering the work had been in terms to grade Seventh street from the northerly line of Berry street to Channel street, as said streets are laid down upon the Brooks and Potter map, referred to in section 1 of the statute, their power to order that portion of Seventh street to be graded could not be questioned, and we are of the opinion that the resolution adopted by them should receive the same construction as if it had been thus expressed. The proposition of the appellant, that only the streets which are laid down upon the Brooks and Potter map and upon the Humphreys map are subject to be improved by the supervisors, cannot be maintained. This construction would exclude from their jurisdiction every street that is on the Humphreys map which had not been previously delineated upon the Brooks and Potter map, and thereby prevent the public improvement of a large portion of the streets in the city and county of San Francisco. The word "and" is, in this connection, to be construed as "or." Suth. St. Const. § 252.

If, however, the work ordered by the supervisors and described in the contract was not thus limited, but required that Seventh street should be graded to the line of Channel street contended for by the appellant, there is presented the simple case of the superintendent of streets having accepted the work before the completion of the contract; and in that case it was incumbent upon the owner to first appeal to the supervisors, and seek from that body a correction of the error, before he could make such defense to the enforcement of the assessment. It was for the superintendent of streets to determine, in the first instance, whether the contractor had completed his contract, and this included the determination by him of the line of Channel street that was intended by the board of supervisors in the description of the work ordered to be done. If the true line of Channel street were not a matter of dispute, and the superintendent had accepted the work before the grading had been completed to that point, and issued an assessment therefor, under repeated decisions of this court the error would have been one which should have been corrected on appeal. Much more is this rule applicable where the limit of the work is susceptible of different locations. The determination of this question called for the exercise of judgment by the superintendent, and, in the absence of any appeal from his decision, his judgment thereon must be accepted as conclusive. In such a case the contractor may rely upon his decision, and the acquiescence of the owners therein by their failure to appeal. In Warren v. Riddell (Cal.) 39 Pac. 781, the contractor had graded the street to a line entirely at variance with the official grade, and it was held that, unless an appeal had been first taken to the board of supervisors, the owner could not make that defense to a suit upon the assessment. When the assessment in the present case is examined in connection with the statute authorizing the work and the maps therein referred to, it cannot be said that, "upon its face," the work contracted for has not been performed. Neither does it appear upon the face of the assessment that any property liable to be assessed for the expense of the work has been omitted. The appellant does not contend that if Channel street is properly located on the diagram any other property than that designated therein is assessable. His contention in this respect is based upon his claim that Channel street is erroneously located thereon. The precise distance from Berry street at which Channel street is laid down on the maps named in the statute has never been officially declared, and the different distances given at the trial were reached by measurement with a scale. One of these distances was less, and the others more, than is shown upon the diagram. These discrepancies, however, do not of themselves invalidate the assessment. They are ascertained only by evidence outside of the assessment itself, and in such a case the assessment is not felo de se, but, if defective, is to be remedied upon an appeal.

The statute does not specify the depth to which the lands fronting on the work shall be assessed, or the shape or boundaries of such lots; its language being that the expense shall be assessed upon the lots and lands fronting thereon, "each lot" being separately assessed "in proportion to its frontage." The basis of the assessment is the frontage upon the work, and the frontage of each lot determines the amount of the assessment against that lot, irrespective of its shape, size, or depth. There is no requirement that the lots to be assessed shall be rectangular with the street on which they front, nor can this direction for the assessment impair the owner's right to dispose of his lands as he may desire. If the superintendent does not properly delineate an owner's lot upon the diagram, or includes with it property which should be included in another lot, his act can be corrected on an appeal to the supervisors; but an owner cannot be said to be "aggrieved" merely because the superintendent, while correctly giving the frontage of his lot and assessing the proper amount thereto, has incorrectly delineated its interior lines, since the amount of the assessment is in no wise affected thereby.

In an action for the foreclosure of the lien of a street assessment, the plaintiff must describe the land with sufficient definiteness to enable the purchaser under a decree for its sale to obtain possession thereof; and, as the description in the assessment is by reference to the diagram, it is evident that, unless the diagram contains such a delineation of the lot that a definite description thereof can be embodied in the complaint, there can be no foreclosure of the lien of the assessment. It is only the lot assessed which is subject to the lien, and the judgment directing the sale, as well as the complaint for its foreclosure, must be limited to the description of the lot as found in the assessment. The complaint in the present case alleges the making of the assessment and diagram, and the volume and page in which they are recorded in the office of the superintendent of streets, and then describes the lot of the defendant assessed thereon, and which he asks to have sold in satisfaction of the lien, as commencing at the northeast corner of Seventh and Channel streets, and, after giving its several boundaries, adds, as a further description, "and is the same lot shown as lot No. 3 on said assessment and diagram." This was a sufficient identification of the lot assessed, and confines the particular description by streets and distances to those which are delineated upon that diagram, as fully as if they had been made so by express reference. In the judgment, however, which was entered in the action, the description of the property which is ordered to be sold in satisfaction of the lien is given as a lot commencing at the northeast corner of Seventh and Channel streets, with the same boundaries and distances as are given in the complaint, but there is no reference to the assessment or diagram, or to any map upon which those streets are delineated. As one of the main issues in the case was the proper location of Channel street, and as there was evidence before the court tending to show that Channel street on the official map of the city is not located as it is delineated upon the diagram, and as it was also shown that the land at the northeast corner of Seventh street and the line of Channel street, as contended for by the appellant, is owned by him, the court, in its judgment, should have given such a description of the lot to be sold as would identify it with the lot assessed, and thus prevent any controversy between the purchaser under the judgment and the appellant regarding the property purchased.

The action is properly brought in the name of the plaintiff. Buckman had assigned the assessment to him, and in express terms had authorized him to "demand, sue for, settle, and compromise the same, as in his judgment may be best." This authority was not made nugatory by reason of the assignment having been made to secure an obligation from Buckman to Mrs. Dorland. It was in the nature of a power of sale in a deed of trust, and could be exercised by the grantee of the power. See Works v. Meritt (Cal.) 38 Pac. 1109. Foley v. Bullard, 99 Cal. 516, 33 Pac. 1081, has no application. In that case Lang and Ruggles, to whom the owners of the assessment had assigned it as security for their indebtedness, had reassigned it to one of the owners, and it was held that by this reassignment their lien was terminated.

Other points presented in the appellant's brief do not require any special consideration. The statute required the person to whom the contract was awarded to enter into the contract within 10 days after the award. The award to Buckman was made November 17th, but, as the 27th of November was Thanksgiving day, he had the whole of the next day into which to enter into the contract. The requirement that the superintendent shall cause the contract to be recorded in the office of the county recorder is an official duty imposed upon that officer, but his failure to perform this duty does not impair a valid contract previously entered into. The statute of 1878 (page 231) is irrelevant to the proceedings for the improvement of the street, except to deprive the owners of any right of protest.

The superior court is directed to modify the judgment by changing the description of the land therein directed to be sold in conformity with this opinion; and, as so modified, the judgment and order will stand affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

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108 Cal. 166

WILLIAMS et al. v. BERGIN. (No. 15,689.)

(Supreme Court of California. July 18, 1895.)

STREET IMPROVEMENTS—ASSESSMENTS—APPEAL TO SUPERVISORS—NOTICE OF APPEAL—SUFFICIENCY.

1. St. 1885, p. 156 (street-improvement act), provides that, in case of appeal to the board of supervisors from any act of the superintendent of streets, "notice of the time and place of hearing, briefly referring to the * * * acts, determinations or proceedings objected to or complained of, shall be published for five days." *Held*, that such notice must include all persons affected by the appeal, and that a notice fixing the time and place of hearing, and reciting only that "all appellants" are required to appear, was insufficient to give the board jurisdiction.

2. A direction by the board of supervisors that a resolution, which does not contain the essentials of a statutory notice of appeal from the action of the superintendent of streets, shall be published "as and for the notice required by law," does not render it sufficient as such statutory notice.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by one Williams and others against one Bergin to recover upon a street assessment which had been increased by the superintendent of streets, under direction of the board of supervisors, upon appeal by plaintiffs from the former assessment. Judgment for plaintiffs, and defendant appeals. Reversed.

T. I. Bergin, for appellant. J. C. Bates, for respondents.

HARRISON, J. Action upon a street assessment. After the work had been completed to the satisfaction of the superintendent of streets, that officer made an assessment therefor May 6, 1892, by which the land described in the complaint was assessed in the sum of $614.30. Within 30 days thereafter, viz. May 14th, the contractors to whom the assessment was issued, deeming that they were entitled to receive a larger sum, appealed therefrom by filing in the office of the clerk of the board of supervisors a notice of their appeal, in which their objections were stated in writing; and the board of supervisors fixed Monday evening, June 6th, as the time for hearing the appeal, at which time they passed a resolution setting aside the assessment, and directing the superintendent of streets to make and issue a new assessment in accordance with the claim of the contractors. The present action is brought upon the assessment made under this direction of the board of supervisors.

Section 11 of the street-improvement act (St. 1885, p. 156), after providing for an appeal from any act of the superintendent, declares: "Notice of the time and place of the hearing, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations or proceedings objected to or complained of, shall be published for five days." In the present case the board of supervisors fixed the time and place for hearing the appeal by the following resolution: "Resolved, that Monday evening, June 6, 1892, at 8 o'clock p. m., be fixed as the time for hearing said appeal by this board, in their chamber at the new city hall, at which time and place all appellants are required to appear, when they will be heard in relation to said appeals. And the clerk is hereby directed to publish this resolution in the San Francisco Daily Report newspaper for five days, as and for the notice required by law." This resolution was published as therein directed, and was the only notice of the hearing of the appeal authorized or given by the board of supervisors. The act of the superintendent in making the assessment is in the nature of a judgment by a tribunal of special and limited jurisdiction. After its judgment has once been exercised, its power is exhausted, and, in the absence of statutory authority for its revision, cannot be changed. By the original assessment the land of the owner is charged with a lien of a specified amount, and, if the amount of this lien is to be increased, it is essential that the owner shall have notice thereof, and have an opportunity to be heard thereon. This notice is in the nature of process by which the board of supervisors may acquire jurisdiction to act upon the appeal and change the assessment. It is the only means which the law has provided to warn the owner of the intended increase of the lien upon his property, and must be followed in order to effect such increase. Cruger v. Railroad Co., 12 N. Y. 201; Scammon v. Chicago, 40 Ill. 146. The mode which the statute prescribes for a revision of the assessment is the measure of the power, and, unless that mode is followed, any attempted revision will be nugatory. Where a statute prescribes the mode of acquiring jurisdiction, the mode must be complied with, or the proceedings will be a nullity. In Durant v. Jersey City, 25 N. J. Law, 309, under a provision in the charter of Jersey City requiring notice to be given, in terms similar to those of the statute under consideration, the notice specified that the council would hear any objections that might be presented "in writing." It was held that by reason of this departure from the direction of the charter the council did not acquire jurisdiction to pass the ordinance, saying: "It may be that this departure from the direction of the charter was not calculated seriously to interfere with the rights of the property holders whose lands were to be taken; yet, in point of fact, the power delegated to the common council was not strictly pursued in this particular, and their jurisdiction to pass the ordinance therefore fails." In City of Lowell v. Wentworth, 6 Cush. 222, the officer was required, before making an assessment, to give to each person liable to be assessed a notice in writing, appointing in the notice a time and place in which all persons interested might appear and be heard in relation to the assessment. Instead of so doing, he notified some of the persons interested to appear at one time and place, and others at a different time. This was held to be such an omission to comply with the ordinance as to render the assessment void. Notice, when required by a statute, is not the equivalent of knowledge, and the supervisors gain jurisdiction to act upon the appeal only by giving the notice that the statute requires, and in the manner that is required, and not by the fact that the parties interested may have knowledge of their intended action. The term "notice" of itself imports that the information given thereby comes from an authentic source, and is to be directed to some one who is to act or refrain from acting in consequence of the information contained in the notice. See Fry v. Bennett, 7 Abb. Prac. 355; Minard v. Douglas Co., 9 Or. 210. A notice which, by its terms, is directed to A., is ineffectual as a notice to B., even though it is delivered to B., and he is thereby informed of its contents.

In the absence of any provision in the statute for the mode of giving the notice, it would be necessary that every person who might be affected by the appeal should receive personal notice of the matter appealed from, as well as of the time and place fixed for hearing the same. The provision that the notice shall be given by publication for five days merely changes the mode of giving the notice, but does not change the character of the notice to be given. The publication of the notice takes the place of personal notice, but can have no greater effect as a notice than would a similar one if personally delivered to him who is to receive it. In either case it must indicate the person who is to be notified, as well as the matter of which notice is given; the object of giving the notice being to enable those to whom it is to be given to be heard upon the appeal. "It must be very plain language which will justify the court in holding that the legislature meant to substitute, by way of a published advertisement, anything less explicit than would be required in a written notice, actually delivered to the person whose property was meant to be affected." Peters v. City of Newark, 31 N. J. Law, 364. The only "notice" that was given in the present case is that contained in the resolution aforesaid, and the only portion of this resolution that has any of the qualities of a notice is contained in the clause, "all appellants are required to appear, when they will be heard in relation to said appeals." All else is only the fixing the time and place for hearing the appeal, and directing the clerk to publish the resolution. Although the statute merely declares the manner in which the notice shall be given, and does not indicate the persons who are to be notified, yet it is a rule of universal application, in all proceedings by which a person's property is to be taken or to be charged with a burden, that he shall have notice of the proceedings; and the notice which is here required to be given necessarily includes every one who is to be affected by the appeal. A notice which by its terms is limited to a portion of those who may be so affected cannot be held to extend to others who may be also interested in the appeal, and is not a compliance with the statute. The direction to the clerk to publish the resolution "as and for the notice required by law" can have no effect to enlarge the notice which was actually published, or to change its character from the terms in which it is expressed. The direction in this clause limited the notice to the appellants, and cannot be construed as a notice to all persons interested in the subject-matter of the appeal. It was an express notice to the appellants alone, and by its terms implied that they only would be heard; and it must be construed as a notice only to them. By reason of its limitation to the "appellants," it failed to be a notice to the defendant, and the supervisors acquired no jurisdiction to act upon the appeal. The effect of the appeal was to suspend all action for the collection of the assessment until after its determination (People v. O'Neil, 51 Cal. 91; Mahoney v. Braverman, 54 Cal. 570); and until the confirmation of the assessment by the board of supervisors, or the making of a new one under its direction, the contractors had no right of action against the owner. It follows that the assessment sued upon was made without authority. The judgment and order are reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

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108 Cal. 179

FREEMAN et al. v. BELLEGARDE et al.

(No. 15,606.)

(Supreme Court of California. July 18, 1895.)

Boundaries—Thread of Stream—Shore Line.

1. A description in a mortgage extending the boundary line of the mortgaged land from a given point, by certain courses and distances, "to the mouth" of a certain creek, and "thence ascending said creek" by certain courses and distances, made the thread of the creek the boundary line, regardless of the last-named courses and distances, even though the creek was a tidal stream, the grantor having title to its bed.

2. A deed conveying land bordering on a stream, and defining its boundaries as "commencing at the intersection" of a certain ditch "with the shore line," and extending by courses and distances named to the "S. shore" of the same stream, "thence along said shore as it winds and turns, to commencement," made the shore line the boundary, and did not convey the land lying between the low-water mark and the thread of the stream.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Freeman and others against Bellegarde and others to quiet title to lands lying between the shore line and thread of a stream. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Reversed as to part of the defendants, and affirmed as to others.

Freeman & Bates, for appellants. Warren Olney, Harding & Forbes, Grant & Cushing, and Charles F. Hanlon, for respondents.

HARRISON, J. Action to quiet title to certain lands in San Francisco. The lands described in the complaint are a portion of the Bernal Rancho, and the controverted question in the action is the title of the plaintiffs to that portion of the lands described in the complaint which lies between the south shore of Islais creek and the thread of the stream. Islais creek empties into the Bay of San Francisco, and the tidal waters of the bay ebb and flow in the creek for some distance above its mouth. At the line of the land claimed by the plaintiff nearest the bay the creek is at ordinary high tides 300 feet wide, and the ground at that point that is covered and uncovered by the ebb and flow of the tides has a width of 150 feet between the bank of the stream and the line of ordinary low-water mark. At high tide the water nearest the bay is about 3 feet deep, and at a point below the lands in controversy there is at low tide no water in the creek, thus rendering the creek a mere basin which is filled and emptied by the ebb and flow of the tide. The patent for the Bernal Rancho covers the bed of Islais creek and the land on both banks thereof, and includes all the lands described in the complaint. The title of the plaintiffs to the land in controversy is derived through the foreclosure of a mortgage given by the Bernals to J. Mora Moss, and a subsequent conveyance from the grantees of Moss to John Hewston, and depends upon the construction to be given to the description in the mortgage and sheriff's deed thereunder, and to the description in the conveyance from Moss' grantees to Hewston. The plaintiffs had judgment in the court below, and defendants have appealed therefrom, and from an order denying a new trial.

1. The description of the property in the mortgage to Moss, so far as the same af-

fects the present action, is as follows: "* * * Thence along margin of the bay (giving four courses and distances) * * * 11 chains to mouth of creek; thence ascending said creek (giving thirteen courses, with their distances) * * * N. 45°, W. 9 chains, 50 links, crossing the creek to the end of the old wall on N. side of marsh, * * * containing area of 1,958 acres, more or less, according to a survey by N. Scholfield, deputy U. S. surveyor general." This description in the mortgage was carried into the sheriff's deed issued upon the sale under the foreclosure, and the title to the land thus conveyed afterwards became vested in Pioche and Robinson. In Spring v. Hewston, 52 Cal. 442, the description in this mortgage was before the court, and it was held that the creek, rather than the line determined by the courses and distances, was the true boundary of the land embraced in the mortgage. The call in the mortgage "to mouth of creek" rendered the thread of the creek the boundary of the land mortgaged. In the absence of any qualifying term, the designation in a conveyance of any physical object or monument as a boundary implies the middle or central point of such boundary, as, for example, if the boundary be a road or highway or a stream, the thread of the road or stream will be intended; if a rock, a heap of stones, or a tree be the boundary, the central point of such tree or rock or heap of stones will be intended. A private grant is to be interpreted in favor of the grantee, and, if the grantor is the owner of the monument or boundary designated in his grant, his conveyance will be held to extend to the middle line or central point of such monument or boundary. This rule is not changed by reason of the fact that a stream which is designated as the boundary is a tidal stream, if the grantor of the land is the owner of the bed of such stream. "When riparian estates are conveyed, the owner may reserve the land under water, but the general presumption is that the purchaser's title extends as far as the grantor owns, in both tidal and fresh waters." Gould, Waters, § 195. The title to the beds of tidal streams is ordinarily vested in the sovereign, and in such case a grant from the sovereign which is bounded by tidal waters will be construed to extend only to high-water mark. Water Co. v. Richardson, 70 Cal. 206, 11 Pac. 695. A grant from the sovereign is to be interpreted in favor of the grantor, contrary to the rule for interpreting grants between private individuals; but if, as in the present case, the sovereign has parted with the title to the land beneath the stream, a grant of the riparian tidal lands by the owner must receive the same construction as a grant by him of any other riparian lands. It is unnecessary to determine whether the provisions of section 830, Civ. Code, and of section 2077, Code Civ. Proc., were intended to change the rules of construction then existing, inasmuch as the mortgage to Moss, and the conveyances by which the lands in question became vested in Pioche and Robinson, were executed prior to the enactment of the Codes. The further call in the mortgage and subsequent conveyances, "thence ascending said creek," must prevail over the courses and distances. The creek is the boundary of the land conveyed, and the courses and distances, being only approximate estimates of the direction and length of the boundary, must yield to the actual line of the creek. When a meandering stream is a boundary, it is impracticable for a surveyor to fix monuments in the channel of the water, or to define the actual line of its windings and courses; and in attempting to define its banks it would be impossible for two surveyors to give the courses and lengths of its several meanders alike. Yates v. Van De Bogert, 36 N. Y. 526; Ang. Water Courses, §§ 29, 30; Middleton v. Pritchard, 3 Scam. 510; Railroad Co. v. Schurmeir, 7 Wall. 272. This construction is not overcome by the fact that, after "ascending the creek" for several courses, the next course is given as "crossing the creek to the end of the old wall." This call is not inconsistent with holding that the previous call, "ascending the creek," follows the thread of the stream, but merely shows that in going from that point the next course is in a direction which crosses the creek from the thread of the stream towards the end of the wall. Nor is the construction to be given to these calls in the mortgage qualified by the subsequent reference therein to a survey by Scholfield. The defendants offered in evidence a plat of a survey made by Scholfield and approved by the United States surveyor general September 23, 1853, and it was testified that this was a preliminary survey of the Bernal Rancho, made under instructions from the land commission. A comparison of this plat with the description in the mortgage shows, however, that this cannot have been the survey referred to in the mortgage. The plat is of the entire rancho, containing 4,341 acres, and has upon its face several subdivisions, no one of which corresponds with the tract of 1,958 acres which is described in the mortgage. The plat, however, contains upwards of 100 courses,—more than double the number in the mortgage,—and only 11 of these courses are the same as those in the mortgage.

2. Pioche and Robinson conveyed December 6, 1866, to John Hewston, a tract of land "commencing at the intersection of a ditch (dividing land of Haley and O'Neill) with the shore line, and running thence along said ditch * * * to E. line of 15th avenue; thence along the easterly line of said 15th avenue, N. 45° 15', W. 2 chains 60 links, to S. shore of Islais creek; thence along said shore, as it winds and turns, to commencement." Whatever title passed by this deed was vested in the plaintiffs at the commencement of the action. By virtue of conveyances

subsequently executed by Pioche and Robinson, the defendants Luty and Thomas claimed title to the land, "commencing at a point where the northwesterly line of Fourth avenue intersects the southerly shore of Islais creek, and running thence in a northwesterly direction along the northeasterly line of said Fourth avenue, extended to the center of Islais creek; and thence ascending said Islais creek along the center line thereof to the northeasterly line of Fifteenth avenue, if extended in a northwesterly direction, as said avenue is delineated on said map; and thence in a southeasterly direction, and along the northeasterly line of Fifteenth avenue, if extended as aforesaid to the southerly shore of Islais creek; and thence in a northeasterly direction along said southerly shore, as it winds and turns, to the point of commencement." With reference to their title to this land the court finds "that the lands described in the conveyance to Hewston include all the property described in plaintiffs' complaint, unless such deed is to be construed as including no part of the lands covered by the waters of Islais creek, in which event the said deed includes all the lands described in plaintiffs' complaint, except that lying in Islais creek"; and "if Pioche and Robinson retained any title to any part of the lands described in plaintiffs' complaint, after the making of the conveyances hereinbefore set out, then such title thereafter, and prior to the commencement of this action, became vested in the defendants Thomas and Luty as to the lands described in their answer." The conclusion of law that "the plaintiffs are the owners of all the real property described in their complaint" must be regarded as a finding that Pioche and Robinson did not retain any title to any portion of the lands described in the complaint. The term "shore," in its ordinary use, signifies the land that is periodically covered and uncovered by the tide, but it is sometimes applied to a river or pond, as synonymous with bank. In the absence of any qualification, a grant bounded by the "shore" of a river, when the grantor is the owner of the river, conveys the land up to the lowest point of the shore at any time, in order that the grantee may at all times have access to the stream by which the land is bounded. It is competent, however, for the grantor to so designate the line on the shore which shall constitute the boundary that there shall be no uncertainty in its location, and in such case the line of high or low water mark would be immaterial in determining the extent of the grant. In the present case the starting point of the description in the grant to Hewston is "the intersection of the ditch with the shore line." This starting point may be susceptible of exact location, and from some of the evidence offered at the trial it would appear capable of ascertainment, although the court does not find its location. The only land of which plaintiffs have title is that embraced within a line drawn from this starting point, around the various courses, to the "south shore of Islais creek," and "thence along said shore, as it winds and turns, to commencement." The point in the "south shore," from which the last course is to be drawn, must be the same point in the shore as is the starting point; that is, at whatever point between high and low water mark was the intersection of the ditch with the shore line, there must be the point in the "shore line" to which the course along the easterly line of Fifteenth avenue is to be extended. The term "shore" must be construed with the same meaning wherever it is used in the same conveyance, and its definite location in the first course requires the same location in the last. This is a fixed boundary or monument to which the distance "two chains, sixty links," must yield. Whatever land lies between this boundary and the center of the creek is vested in the defendants Thomas and Luty, and the finding of the court that the plaintiffs were the owners of this portion of the demanded premises was erroneous.

3. The defendants other than Thomas and Luty claim title under Harvey S. Brown to certain lots in gift map No. 4, upon the theory that the Moss mortgage did not include any part of the bed of Islais creek. As Brown had conveyed to Moss all the lands described in the mortgage before he made the conveyance under which these defendants claim, it is evident that the plaintiffs' title, derived from Moss, is superior to theirs.

The judgment and order denying a new trial are reversed as to the appellants Thomas and Luty. As to the other appellants they are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.

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108 Cal. 189

CITY OF SAN DIEGO v. LINDA VISTA IRRIGATION DIST. et al. (No. 19,485.)

(Supreme Court of California. July 19, 1895.)

ASSESSMENT FOR IRRIGATION PURPOSES—EXEMPTION OF CITY LANDS.

An assessment, for purposes of irrigation, against the pueblo lands of a city, which are vacant, unoccupied, and, when irrigated, susceptible of cultivation, by an irrigation district, under Act March 7, 1887, an act providing for the organization and government of irrigation districts, is not a tax, within Const. art. 13, § 1, which exempts property belonging to municipal corporations from taxation, and such an assessment is valid.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the city of San Diego against the Linda Vista Irrigation District and others to quiet title. From a judgment for plaintiff, defendants appeal. Reversed.

Gibson & Titus, for appellants. William H. Fuller and Clarence L. Barber, for respondent.

HAYNES, C. The city of San Diego brought this action against said irrigation district, and its directors and officers, to quiet its title to several parcels of land, containing in all nearly 3,000 acres. The defendants answered the complaint, alleging its organization under the act of March 7, 1887, "to provide for the organization and government of irrigation districts," etc. (St. 1887, p. 29), and the acts amendatory thereof. The district was organized August 24, 1891, and in 1892 it made an assessment upon all the lands in said district, including those of the plaintiff, described in the complaint, and, plaintiff having failed to pay the assessment so made upon its said lands, the same were sold, on February 23, 1893, to the said irrigation district. These lands were described in the complaint as pueblo lands of the said city; and the answer alleged "that said real property, consisting of lands owned by said plaintiff, was acquired by it as pueblo lands, and held as such until the sale thereof, as hereinafter stated, and that said lands now are, and at all the times herein referred to were, dry, vacant, unoccupied, and uncultivated agricultural lands, susceptible to cultivation by irrigation, and would be largely benefited by irrigation; that they could not and cannot be profitably cultivated without irrigation, and are practically valueless for any other uses than agricultural and horticultural." Plaintiff demurred to defendants' answer. The demurrer was sustained, and, defendants declining to amend, judgment went against them, and they appeal therefrom.

The question to be determined is whether such lands as are described above, situated within an irrigation district, are exempt from assessment by such district, because they are owned and held by a municipal corporation. Respondent contends that said assessment is a tax, and that these lands are exempt from taxation, under section 1 of article 13 of the constitution, which reads as follows: "All property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership; provided, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this state, or to any county or municipal corporation within this state, shall be exempt from taxation. * * *" Section 3607 of the Political Code repeats the above exemption; but we are not referred to any other statutory provision exempting property from taxation. But the assessment to satisfy which the lands in question were sold is not a tax, within the meaning of said provision of the constitution. The act under which the Linda Vista District was organized authorizes the formation of districts where the lands of the different owners are "susceptible of one mode of irrigation from a common source, and by the same system of works." The district, when formed, is a local organization, to secure a local benefit, to be derived from the irrigation of lands from the same source of water supply, and by the same system of works. It is, therefore, a charge upon lands benefited, or capable of being benefited, by a single local work or improvement, and from which the state, or the public at large, derives no direct benefit, but only that reflex benefit which all local improvements confer. In Taylor v. Palmer, 31 Cal. 241, 255, the court defined the term "assessment," as distinguished from "taxation," thus: "It is not a power to tax all the property within the corporation for general purposes, but the power to tax specific property for a specific purpose. It is not a power to tax property generally, founded upon the benefits supposed to be derived from the organization of a government for the protection of life, liberty, and property, but a power to tax specific property founded upon the benefits supposed to be derived by the property itself from the expenditure of the tax in its immediate vicinity." In Emery v. Gas Co., 28 Cal. 346, 357, the court spoke of "the long and well established meaning of the words 'taxes' and 'assessments,' as used in the statutes and in the ordinary language of the several states, to indicate different classes of public burdens,—the one imposed for general revenue for the purposes of the ordinary expenses of the state, county, and town governments, and the other to raise a special fund to defray the expenses of public improvements, mainly locally beneficial." See, also, Doyle v. Austin, 47 Cal. 353, 358. It cannot be doubted, in view of the well-recognized distinction between a tax and an assessment, not only in common parlance, but in repeated decisions of this court prior to the adoption of the constitution of 1879, that if it had been intended to restrict the power of the legislature in regard to assessments for local purposes, or that the proviso contained in section 1 of article 13 should extend to assessments as well as taxation, apt words to express such intention would have been used. If this be true, it follows that there is at least no express exemption of any property from local assessments, while the act under which said irrigation district was organized provides for an annual assessment upon the real property of the district; "and all the real property in the district shall be and remain liable to be assessed for such payments, as hereinafter provided." St. 1887, p. 37, § 17. In Cooley, Tax'n (2d Ed.) p. 650, in speaking of property subject to assessment, the learned author says: "It has been shown in another place that, while these local assessments are laid under a taxing power, they are not taxes in the ordinary understanding of that term, and that, consequently, the usual exemptions from taxation will not preclude the property exempted being subjected to them." And, at page 653, the same author adds: "Even public property is often subjected to these special assessments; there being no more reason to excuse the public from paying for such benefits than there would be to excuse from payment when property is taken under the eminent domain." In Hassan v. City of Rochester, 67 N. Y. 528, the state owned lands on Oak street, and it was held that an assessmen for the improvement of the street which omitted said state lands was invalid. Among the exemptions from taxation, under the statutes of that state, were enumerated "all lands belonging to the state or the United States." The court said: "The exemption thus stated evidently relates to general county and state taxes, and has no reference to assessments for improvements made under special laws and of a local character;" citing Mayor, etc., of Troy v. Mutual Bank, 20 N. Y. 390, and People v. Mayor, etc., of Brooklyn, 4 N. Y. 419. The court further said: "The collection and enforcement of assessments made for local improvements has never been the subject of general regulation by statute, and there is no provision which exempts the property of the state from liability for such assessments. Not being excepted by the statute law of the state, it is left for the legislature, which is vested with ample power for that purpose, to make such enactments on the subject as may be considered needful and proper."

Respondent suggests that to give the Wright act, under which the Linda Vista District was organized, the literal interpretation contended for by appellants, would make state and United States lands, if there were such in the district, liable to assessment, and authorize the sale of them if the assessment should not be paid. To this it may be replied that, as to state lands, it is undoubtedly within the power of the legislature to subject them to any just liability of the character in question; but the legislature has no such power over the public lands of the United States.

It is also said that "the city of San Diego is not engaged, nor can it engage, in an agricultural enterprise." Under subdivision 50 of section 1 of its charter (St. 1889, p. 656), the city is empowered to provide for the sale and conveyance, or lease, of all its lands not dedicated and reserved to public use. The demurrer admits that the lands in question are pueblo lands, agricultural in character, and not used for any municipal purpose. They may be sold, and the proceeds paid into the city treasury, or leased and an income derived therefrom. In either case, the city would reap a benefit at the expense of the other landowners of the irrigation district, if it be true that the assessment in question cannot be lawfully made and enforced. These lands are held and devoted to the private uses of the city, and are not incidental to the performance of any public or municipal function. They derive an equal benefit with all other lands in the district from the expenditures made by the district, and no reason is perceived why they should be exempt from its proportion of such expenditure. As we have seen, there is no express exemption covering this property, and implied exemptions should not be extended to property which is not held or used for municipal or governmental purposes. In Essex Co. v. City of Salem, 153 Mass. 141, 26 N. E. 431, it was said: "We are of the opinion that, in the absence of any express exemption of the property of counties from taxation, an exemption can be implied only when the property is actually appropriated to public uses." In Ames v. City of San Diego, 101 Cal. 390, 35 Pac. 1005, it was held that the title of the city to its pueblo lands which have not been devoted to a specific public use, and which may be alienated by the city, may be lost by adverse possession for the period of time prescribed in the statute of limitations. If the legislature may impower the city to sell its pueblo lands, and if the title to such lands may be lost by adverse possession under the statute of limitations, no reason is perceived why the legislature may not make it liable for an assessment which is not imposed as a burden, but as its proportion of the expense incurred to secure a local benefit which, in contemplation of law, equals or exceeds the charge imposed. The judgment appealed from should be reversed, with directions to overrule the demurrer to defendants' answer.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the court directed to overrule the demurrer to defendants' answer.

108 Cal. 197

STEWART v. SEFTON. (No. 19,470.)

(Supreme Court of California. July 20, 1895.)

REMOVAL OF TREES—MEASURE OF DAMAGES—ERRONEOUS DIVISION LINE.

Under Code Civ. Proc. § 733, providing that one who removes trees from land of another, without lawful authority, is liable to the owner in treble damages, and Civ. Code, § 3346, providing that the measure of damages for the wrongful removal of trees from land of another, except where the trespass was committed under the belief that the land belonged to the trespasser, is three times the compensation for the actual detriment, where one of two owners of adjoining tracts of land, the division line between which was unascertained, after having the line fixed by a surveyor, held the land up to the line adversely, and planted trees thereon, with the acquiescence of the other owner, and where, on having another survey made a year later, he learned that the line was erroneous, and that the trees were on his neighbor's land, and thereupon removed the same, he was not liable for their removal, though the adjacent owner protested.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Julia V. Stewart against J. W. Sefton to recover damages for the removal of trees from land. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Sweet, Sloane & Kirby, for appellant. E. W. Britt, for respondent.

VANCLIEF, C. It is alleged in the complaint that on March 15, 1893, the plaintiff was the owner and in possession of the northwest quarter of the southwest quarter of section 28, township 16 south, range 1 west; on which day, and for a long time prior thereto, there were growing upon said land 72 lemon trees, the property of the plaintiff. That on said day "the defendant wrongfully entered upon said land, and willfully, knowingly, and maliciously, with full knowledge of the ownership of said property by plaintiff, dug up, removed, carried away, and converted to his own use the said lemon trees which were then and there growing upon said land," whereby plaintiff lost said trees, and the said land was greatly damaged and lessened in value to the extent of $1,000; "and thereby the defendant, under and by force of section 733 of the Code of Civil Procedure of the state of California, has become liable to pay the plaintiff treble the amount of said damage, and that no part of said damages has been paid. Wherefore, plaintiff prays judgment for said sum of one thousand dollars damages, and that the same be trebled under and by virtue of said section of the Code, and for costs of suit."

In his answer the defendant denies that plaintiff owned or possessed the land or the trees; denies that defendant maliciously, or with knowledge of plaintiff's ownership, dug up or removed said trees; and denies all the allegations of damage. During the trial by the court, without a jury, the defendant, by leave of the court, amended his answer by adding thereto the following: "For another and separate defense to plaintiff's alleged cause of action, the defendant avers that at the time of the digging up, removal, and carrying away of the lemon trees mentioned in the said complaint, the defendant was, and for the period of one year and upwards theretofore had been, in the actual, exclusive, notorious, and adverse possession of the lands and premises upon which the said lemon trees, and all of them, were situated. That while the defendant was so in such possession of the said premises, to wit, about the month of June, 1892, the defendant brought upon the said land, and there planted and set, the said lemon trees, and all of the same, and that such lemon trees were at the time and before they were so planted the property of defendant. That the defendant cultivated, irrigated, and cared for said trees on the said land from the time of the planting thereof, as aforesaid, in the usual and customary manner, until the same were removed by him on or about the 15th day of March, 1893. That the defendant took possession of the said land on which the said lemon trees were planted and grew, and from which the same were removed, and planted the said trees thereon, and cultivated the same in good faith, believing himself to be the owner thereof, and that the plaintiff well knew of the defendant's said possession and the planting of the said trees and cultivation of the same, and made no objection thereto, but acquiesced therein. That defendant is, and was at all the times herein mentioned, the owner of a tract of land about forty acres in area, adjacent on the east to the land on which said lemon trees were so planted and cultivated. That previously to taking possession of the said lands on which the said trees were planted as above alleged, defendant caused a survey thereof, together with the said lands of defendant adjacent thereto on the east, to be made by a competent surveyor, and that such survey so made included the said lands with those of defendant adjacent thereto, and showed the same to be part and parcel of defendant's lands. That afterwards, and about the 14th day of March, 1893, defendant caused another survey to be made of all the lands above described, as well as other lands of defendant adjacent thereto, and that in and by such last-mentioned survey it appeared that the said lands on which the said lemon trees were then planted were not within the boundaries of defendant's land; and that, in consequence of such last-mentioned survey, the defendant was in doubt as to his ownership of the land on which the said trees were situated, and being so in doubt, and while he was in possession of the said land on which the said trees were planted and grew and were situated, on the said 15th day of March, 1893, as aforesaid, he removed the same, and that such removal so made by the defendant, and none other, constitutes the acts of trespass alleged by the plaintiff in her complaint. That defendant removed such trees as above shown in good faith, believing himself to be the owner thereof, and while in possession of the same, and while in the actual, adverse, and exclusive possession of the land on which the same stood, and with no desire or intention to injure the plaintiff."

The court found as facts that the plaintiff was the owner of the land, as alleged in the complaint; but that on March 15, 1893, and for the period of about one year prior thereto, the defendant had been in the exclusive, adverse possession of the land, claiming title thereto in good faith; that while in such adverse possession the defendant had planted said lemon trees, and cultivated them for the period of about nine months immediately preceding March 15, 1893; that on March 15, 1893, the defendant, being in doubt as to whether he owned the land on which said trees were then growing, dug them up and removed them to other land, believing them to be his property; and that the land from which he removed them was not thereby damaged or lessened in value; and further found substantially, all the facts alleged in defendant's amendment to his answer, as above set out; and, as a conclusion of law, found that the plaintiff should take nothing by her action, and that defendant recover his costs.

The plaintiff has appealed from the judgment, and from an order denying her motion for a new trial.

It appears by the findings of the court, justified by the evidence, that in March, 1892, the plaintiff owned the 40 acres of land described in her complaint, and that defendant owned a lot of 40 acres adjoining the same, but neither plaintiff nor defendant then knew or pretended to know the location of the division line between their lots, although plaintiff, by her agent, had pointed out to defendant about where she had been informed and believed the line ran. Thereupon defendant employed a surveyor (Hawley) to survey both lots, and to locate the division line between them. Hawley made the survey, and located the division line as running to a corner about 80 feet west of the true corner, as afterwards established; thus adding to defendant's lot the triangular strip of plaintiff's land on which the trees in question were planted. The plaintiff knew of the survey by Hawley at the time it was made, and also then knew where Hawley located said corner and the division line; and then, and during about a year thereafter, accepted and acquiesced in that line as the true division line. At the time of the Hawley survey, the land on which the lemon trees in question were afterwards planted was unimproved by inclosure or otherwise. Soon after that survey, the defendant cleared it by grubbing the growing bushes and removing the stones therefrom; and during the months of April and May, 1892, plowed and smoothed it, and planted thereon said lemon trees. In August of the same year defendant built a wire fence on a considerable portion of the Hawley line, but did not entirely inclose the land on which the lemon trees were planted. The plaintiff was cognizant of all this work upon and improvement of the land by defendant, without objecting to any part of it, and furthermore affirmatively manifested her acquiescence by removing and adjusting a portion of her fence to the Hawley line. Mr. W. B. Prentice, plaintiff's son-in-law and agent, testified for plaintiff: "I never suggested to Mr. Sefton that he had planted his trees too far west, for we knew Mr. Sefton had had Mr. Hawley survey the line, and afterwards took it for granted that the survey was correct, and that Mr. Sefton knew what he was doing; and we did not know that it was not correct until Mr. Sefton had Harris and King make another survey last March" (1893). About March 12, 1893, the defendant had occasion to have all his land, including the 40-acre tract adjoining plaintiff's land, resurveyed, and employed Messrs. Harris and King to make the survey. By this resurvey he first discovered the error in the survey by Hawley, and immediately thereafter ordered his foreman to remove the lemon trees from the land between the Hawley line and the line run by Harris and King, and also to remove the fence which he had built on the Hawley line. On the morning of March 15, 1893, his foreman, with other servants, commenced to take the trees from the ground, and when they had taken up only seven or eight trees they were ordered by plaintiff's agent to desist, and did so for the time being, but later on the same day, in obedience to orders from defendant, removed the remainder of the trees, against the protest of the plaintiff's agent. On the same day (March 15) defendant wrote Mr. Prentice, who was then in charge of plaintiff's land, informing him of the survey by Harris and King, completed the day before, and of defendant's instruction to his superintendent to remove the lemon trees and fence, and asking Prentice to accept the division line as located by Harris and King, or to have it verified by a surveyor of his own choice; and it appears that plaintiff did procure a resurvey by a Mr. Wheaton, which verified that by Harris and King to her satisfaction, and that she accepted the line run by Harris and King as the true division line. There is no question that both plaintiff and defendant, in good faith, believed the Hawley line to be the true division line, until after the survey by Harris and King; nor that plaintiff acquiesced in, and thereby impliedly consented to all that defendant did upon her land, except the removal of the lemon trees. Nor is there any evidence that defendant was even negligent in selecting Hawley as a reputable and competent surveyor, nor that Hawley was not such.

Appellant contends that the action is not of the nature of a common-law action of trespass, but is a special action founded upon section 733 of the Code of Civil Procedure, of which the following is a copy: "Any person who cuts down or carries off any wood or underwood, tree or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village or city lot, or cultivated grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction." And further claims that, if plaintiff is entitled to recover any damages, such damages must be trebled by the court. While it may be conceded that the complaint states a cause of action in which the alleged damages may be trebled, it, nevertheless, includes a cause of action for damages which should not be trebled; and whether the plaintiff is entitled to recover at all depends upon whether either of these causes of action was proved. To entitle the plaintiff to treble damages under section 733 of the Code of Civil Procedure she must have proved her allegation that defendant willfully or maliciously removed the trees, knowing them to be the property of plaintiff. Section 251 of the late practice act, which is substantially the same as section 733 of the Code of Civil Procedure, was construed in the case of Barnes v. Jones, 51 Cal. 303. In that case it was averred in the complaint that the defendants, "without leave of the plaintiff, wrongfully" entered upon plaintiff's land, cut down and carried off the timber, whereby plaintiff was damaged in a specific sum, "contrary to the form, force, and effect of section 251 of the practice act." But there was no averment that the trespass was committed knowingly, willfully, or maliciously; and for this reason it was held that the complaint failed to state a cause of action entitling the plaintiff to treble damages, though it entitled him to actual damage. The court said: "While the statute does not so state in terms, it is clear, we think, that it was not intended to apply to cases in which the trespass was committed through an innocent mistake as to the boundary or location of a tract of land claimed by the defendant,"—citing several cases in which similar statutes of other states have been so construed. That the defendant, in the case at bar, entered upon plaintiff's land, planted the lemon trees thereon, and cultivated them, until his second survey of the land, through an innocent mistake as to the true location of the division line between his land and that of plaintiff, and that plaintiff acquiesced in all these acts of defendant through a like mistake, is clear and undisputed. But it is claimed by appellant that the act complained of—the removal of the trees—was committed after defendant discovered the mistake, and, therefore, was a willful severance and removal of the trees from what he then knew to be the property of plaintiff, in the sense of section 733 of the Code of Civil Procedure, as qualified by section 3346 of the Civil Code, as follows: "For wrongful injuries to timber, trees or underwood upon the land of another, or removal thereof, the measure of damages is three times such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of highway officers for the purposes of a highway; in which cases the damages are a sum equal to the actual detriment."

Conceding that after plaintiff regained possession she was entitled to treat the defendant as a trespasser, ab initio, for the purpose of recovering all actual damages suffered by her in consequence of his entry and subsequent acts upon her land, the important remaining questions are: (1) What were the actual damages so suffered by plaintiff? (2) If no actual damage, is she entitled to a reversal of the judgment, to the end that she may recover merely nominal damages?

First. No damage is claimed for mesne profits; nor for any injury to the substance of the estate, unless the removal of the lemon trees may be deemed such. And, under the facts and circumstances of this case, I think the plaintiff is estopped from claiming that the lemon trees ever became a part of her estate in the land, and consequently that she suffered no actual damage in consequence of their removal by the defendant. While the adverse possession of the defendant was not of sufficient duration to give him title to the land, and though there was no express agreement that the Hawley line should be adopted as the true division line, yet, as was said by this court in Helm v. Wilson, 76 Cal. 486, 18 Pac. 604: "It has been held that, even without any agreement more than is implied from their acts, if two persons trace their dividing line, and, both recognizing it as such, one goes forward with the knowledge and acquiesence of the other, and makes valuable improvements, so valuable as to work great injury to the party making them if the line be disturbed, the other will be estopped from afterwards alleging such mistake as will deprive the builder of his improvements, and especially if the party seeking to disturb the line knew at the time the improvements were made all that he subsequently learned, or if he had the means of knowledge. Dolse v. Vodicka, 49 Mo. 98; Wait, Act. & Def. 718, and cases cited." The foregoing quotation is substantially a quotation from the opinion of the court by Bliss, J., in the case cited (Dolse v. Vodicka), wherein the learned justice further said: "The kind of possession necessary to give title under the statute of limitations is not necessary to be considered, and though the decisions in regard to estoppel in pais in cases of this kind are not entirely harmonious, yet the doctrine as here announced is founded in equity, and cannot be controverted in principle." The action was ejectment for a strip of plaintiff's land on which the defendant had built a portion of a valuable brick house, through an innocent mistake of both parties as to the true location of the division line between their adjoining lots, induced by an erroneous survey by their common vendor. McKelway v. Armour, 10 N. J. Eq. 115, is a case in which the complainant was relieved from the consequence of a similar mutual mistake of the parties. In that case "complainant erected a valuable dwelling house, by mistake, on the land of the defendant; defendant lived in the vicinity, saw complainant progressing from day to day with the improvements, and admitted that he did not suspect the erections to be on his lot until some time after their erection, when by actual measurement, to his surprise, he discovered the mistake." The court of errors and appeals, by the chancellor, said: "Under such circumstances it would be most unjust to permit Armour to take these improvements, and to send the complainant away remediless. It is very true, as was urged upon the argument, the complainant is the most to blame in this matter. A diligent examination of the deed to Armour, and an actual measurement of the land, would have decided the difficulty. But it was a vacant lot of land, plotted out upon a map only, and the mistake was one which might occur to the most careful and diligent man. The fact of Armour's standing by and participating in the mistake is an important feature in the case." In Wickliffe v. Clay, 1 Dana (Ky.) 586, it was held by the court of appeals that "where one in the possession of land, held bona fide as his own, has erected buildings thereon, he (or those claiming under him) may remove them without incurring any responsibility to the owner of the paramount title." In that case the building erected and removed was a stable. The court, by Chief Justice Robertson, said: "There is no reason to doubt that Lytle took possession of the lot, not as a willful trespasser, but in good faith (not then knowing or apprehending that it was the property of Philips and wife), and that, whilst thus possessed, he erected the stable in equal good faith; and, therefore, he, or any other person claiming under him, had a perfect right, according to the doctrines of the civil law, altogether consistent in this respect with the principles of the common law, to remove the stable, without doing any injury to the lot itself, whilst he was in possession; and, consequently, by such a removal no liability was incurred to the true owners of the lot." As to estoppel by tacit acquiescence, see, also, Scott v. Jackson, 89 Cal. 258, 26 Pac. 898. But, aside from the doctrine of estoppel, there are at least two classes of decisions utterly inconsistent with the allegation that plaintiff suffered actual damage in consequence of the removal of the lemon trees; namely, decisions as to the grounds and measure of damage suffered by persons whose lands are condemned for public use, in which it has been held that, although the owner is entitled to full compensation for the land taken, and for all permanent improvements thereon made by himself or by those from whom he derived title, yet he is not entitled to damages for improvements made by the party at whose suit the land is afterwards condemned, though made by such party without authority of law or the consent of the owner of the land (Railroad Co. v. Hesser, 84 Cal. 435, 24 Pac. 288, and cases there cited; Railroad Co. v. Taylor, 86 Cal. 246, 24 Pac. 1027); and decisions allowing the value of permanent improvements made by an adverse possessor in good faith to be set off against the actual damages suffered by the owner of the land (Sedgw. Dam. § 915 et seq.; Code Civ. Proc. § 741). All the reasons advanced in support of the decisions in these classes of cases seem equally applicable to the case at bar, and quite sufficient, without aid from the doctrine of estoppel, to warrant the conclusion that plaintiff suffered no actual damage in consequence of the removal of the lemon trees. Whatever might be the effect of sustaining the contention of appellant that plaintiff had regained possession of the land before defendant removed the trees, it is enough to say the court found that the plaintiff was not in possession of the land at the time the trees were removed, but that the land was then, and for about one year next before that time had been, in adverse possession of the defendant, and that this finding is justified by the evidence.

Second. In actions ex delicto nominal damages are often given, though no actual damage has been suffered; but a judgment for such damages is justified only on the ground that it conserves some right of the plaintiff which has been nominally infringed, and which might else be lost by acquiescence and lapse of time. Sedgw. Dam. §§ 99, 100. In this case, however, no right or title of the plaintiff is jeopardized by denying her nominal damage, since defendant acknowledged her title and right of possession, and voluntarily surrendered to her the exclusive possession of the land before the commencement of this action. Besides, appellant makes no point here relating to nominal damages. If the views above expressed are correct, they obviously answer all points made by appellant, though some of them have not been expressly noticed.

I think the order and judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are affirmed.

(108 Cal. 227)

O'BRIEN v. NEW ZEALAND INS. CO.

(No. 18,349.)

(Supreme Court of California. July 24, 1895.)

INSURANCE—UNAUTHORIZED CONTRACT.

An insurance company is not liable for loss on a building burned before the application for insurance was mailed to it, merely because the local agent, when application was made, told applicant that his insurance would begin at the time; he having no actual or ostensible authority to make a contract, and the building being one of a class which the company did not insure; and it makes no difference that at the time of the application the special agent of the company, who had no authority to enter into contracts, was present and approved of it.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Thomas H. O'Brien against the New Zealand Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed.

W. S. Goodfellow and L. L. Cory, for appellant. J. D. Meux, for respondent.

GAROUTTE, J. This is an action upon a contract of fire insurance, and defendant is appellant, as is usual in that class of cases. One Peters was defendant's local agent in the town of Reedly, Fresno county, and under his commission as agent he had no authority to enter into a contract of insurance. But he was appointed subagent "to receive proposals for insurance, and fix rates of premium, and to receive money for policies and certificates of insurance." Upon July 2, 1892, plaintiff, O'Brien, made a written application to Peters, upon one of defendant's blanks, for insurance upon his saloon, building and fixtures. This application, accompanied by a letter from Peters, was deposited in the postoffice July 5th, addressed to defendant at San Francisco. The letter referred to the inclosed application, with the suggestion that the company should place the insurance, if it was deemed advisable. The plaintiff's building was occupied as a liquor saloon, and defendant did not take insurance upon saloons, and the agent, Peters, knew this fact. When the application was made, the agent informed plaintiff that he was insured from that time. Upon July 4th, which was between the time of the making of the application and the time when the application was mailed to defendant, the property was destroyed by fire. It thus appears that the building was destroyed, not only before the application for insurance was passed upon by the defendant, but before the application was ever heard of by the company.

As suggested, the agent, Peters, had no authority to enter into a contract of insurance with plaintiff. His powers did not go to that extent. Under a commission of authority in all material respects similar to the authority possessed by Peters, it was held in Stewart v. Insurance Co., 102 Cal. 218, 36 Pac. 410, that the agent had no actual authority to enter into a contract of insurance. In that case it was an application for the renewal of a policy, and the court said: "The proposal of plaintiff made to such agent for a renewal of said policy was, until communicated to and accepted by defendant, nothing more than a mere offer upon the part of plaintiff to renew such policy." That there was no actual contract of insurance in this case, as far as defendant is concerned, is apparent at a glance, for the contract could only be made with the defendant, and the defendant knew nothing of it. The defendant had the right to reject the application when presented, and until it was presented and granted no contract was possible. If there was a contract of insurance in force from July 2d until the application reached the defendant, then it was equally in force after that time and during the entire period covered by the policy; but such a construction would deprive the defendant of the right to reject unsatisfactory applications, and place the power of contracting in the hands of agents like Peters, a result diametrically opposed to its purposes and practices. Peters was not only lacking in actual authority to enter into a contract of insurance with plaintiff, but the evidence fails to show any ostensible authority in him. Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess. Civ. Code, § 2317. Certainly in this case the company did not intentionally cause plaintiff to believe that Peters had authority to make a contract of insurance, and there is not a word in the evidence to indicate a want of ordinary care upon defendant's part, which caused or allowed plaintiff to believe that Peters was clothed with any such authority. It would seem to follow inevitably that, this agent having neither actual nor ostensible authority to make a contract of insurance, plaintiff must fail of recovery.

The agent, Peters, told plaintiff that he had no power to write policies, and that the application would have to be forwarded to defendant at San Francisco. This statement would indicate that Peters did not attempt to enter into a contract of insurance with plaintiff, and that plaintiff probably so understood it. If this were all the evidence, there could hardly be a question about it, but it appears that Peters, at the time of the application, told plaintiff that his insurance would begin at that time. While this statement may have resulted in misleading plaintiff, it could have no possible binding effect upon the company defendant. At best, it was but the agent's conclusion as to the legal effect of the transaction, and any loss suffered by plaintiff by reason of this mistake of the agent is a matter to be settled between them. A reasonable view of the meaning of the agent's language would seem to be that the policy would take effect as of the date of the application, if the application were accepted, for, until action upon it by the company, it was impossible to say whether or not it ever would take effect.

It is attempted to bring this case within the principle declared in Harron v. Insurance Co., 88 Cal. 16, 25 Pac. 982, but the facts do not justify it. Borchers, the special agent of the company, was not authorized to enter into contracts of insurance. He had no more authority in this regard than the subagent, Peters, and, not having power to enter into contracts himself, he necessarily had no authority to delegate such a power to Peters. His appearance upon the scene, pending the negotiations for this insurance, fails to strengthen the plaintiff's case. Looking at the case from all sides, we think it would be a manifest injustice to require defendant to pay the loss suffered by plaintiff. This company did not insure saloon buildings, and the application would most probably have been rejected, as far as defendant was concerned, upon presentation. We conclude the defendant assumed no risk, and is liable for no loss.

For the foregoing reasons the judgment and order are reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

108 Cal. 240

RIVERSIDE WATER CO. v. GAGE. (No. 19,529.)

(Supreme Court of California. July 26, 1895.)

DENIAL OF NEW TRIAL—REVIEW ON APPEAL—PLEADINGS AND EVIDENCE—STATEMENT ON APPEAL—SPECIFICATIONS OF ERROR.

1. On appeal from the denial of a new trial in a case tried by the court, the record being brought in a statement of the case, the sufficiency of the findings to support the judgment, or whether they correspond to the issues presented by the pleadings, or what issues the pleadings present, cannot be considered.

2. Evidence in a case cannot be considered on an issue not presented by the pleadings.

3. It is not to be assumed that, because the statement of a case on appeal does not show that objection was made to evidence therein outside the issues before the court, it was received without objection.

4. Specifications as to insufficiency of evidence will not be considered unless the parts of the record showing it are pointed out.

Department 1. Appeal from superior court, San Bernardino county; James A. Gibson, Judge.

Action by the Riverside Water Company against Matthew Gage. From an order denying a new trial, defendant appeals. Affirmed.

Fox, Kellogg & Gray and Byron Waters, for appellant. R. E. Houghton, for respondent.

HARRISON, J. An appeal from the judgment in this action has been heretofore heard and determined. 89 Cal. 410, 26 Pac. 889. The present appeal is from an order denying the defendant's motion for a new trial, made subsequent to the affirmance of the judgment. The main portion of the argument on behalf of the appellant is that, inasmuch as the evidence before the court showed that the defendant is the owner of lands riparian to the Santa Ana river above the plaintiff's point of diversion, the plaintiff could not acquire a right of diversion by prescription against defendant, as such riparian proprietor, and that the decree, in so far as it deprives him of any riparian rights, is erroneous. We are of the opinion, however, that this question does not arise upon the present appeal.

Upon the appeal from an order denying a new trial, when the cause was tried by the court, and the record of its action is brought here in a statement of the case, the only questions to be considered are the sufficiency of the evidence to justify the findings of the court, and whether any errors of law occurred at the trial. Whether the findings are sufficient to support the judgment, or correspond to the issues presented by the pleadings, as well as what issues the pleadings present, are questions which can be considered only upon an appeal from the judgment, and do not arise upon an appeal from an order denying a new trial. Brison v. Brison, 90 Cal. 323, 27 Pac. 186. "A new trial is a re-examination of an issue of fact in the same court, after a trial and decision by a jury or court." Code Civ. Proc. § 656. And only those matters applicable to the determination of that issue are proper to be considered upon a motion for a new trial. If the finding upon the issue is in accordance with the evidence, it is irrelevant to the motion for a new trial that the finding has not been given proper effect in the judgment, since upon another trial the same evidence must result in the same finding.

Upon the appeal from the judgment herein, one of the questions before the court was a determination of what issues were presented by the answer of the appellant, and whether his right as a riparian owner to divert any portion of the stream was one of those issues; and it was held that this issue was not presented by his answer, the court saying in its opinion: "In short, we think the answer insufficient to raise any issue as to the extent of defendant's right, as a mere riparian proprietor, to divert and exhaust any portion of the waters of the stream. * * * It was not necessary, therefore, to support the conclusions and judgment of the court, to find that the plaintiff had gained a prescriptive right, or that the defendant was barred of his riparian right; and, conceding these findings to be as insufficient as appellant contends they are, we think the other findings cover all the material issues, and fully support the judgment." With this decision upon the character of the answer, we are precluded from considering whether the evidence shows that the defendant was a riparian proprietor above the point at which the plaintiff diverts the waters of the stream, or, conceding that he was, whether the plaintiff could acquire a prescriptive right against him to divert any of the waters of the stream. It is urged by the appellant, however, that, inasmuch as some of the evidence which he introduced at the trial shows that he was such riparian proprietor, it must be held that the cause was tried upon the theory that this issue was before the court, and therefore is proper to be reviewed upon this appeal. It has been held that when an issue has been tendered by the plaintiff, and evidence upon that issue has been introduced at the trial by both parties, without objection, upon the assumption that an answer, though defective in form, raises the issue, the parties would not be permitted to contend for the first time upon an appeal that such issue was not before the court. This rule, however, has no application to a case where, at the trial, evidence is introduced which is outside of any issue presented in the pleadings; and, under the decision of this court that the issue contended for by the appellant is not presented in his answer, it cannot be held that this evidence was received at the trial in support of such issue. Nor is it to be assumed that, because the statement contains evidence outside of the issues before the court, it was received without objection. The party preparing the statement is required to place therein only such errors as he desires to have reviewed, and any objections or exceptions to the introduction of evidence that may have been made by the prevailing party have no place in such statement. In re Gates, 90 Cal. 259, 27 Pac. 195; Klauber v. Car Co., 98 Cal. 105, 32 Pac. 876. If the appellant would rely upon the fact that no objection was made to such evidence, he should make it clearly to appear that such was the case. It is frequently the case that evidence which is admissible to establish one issue may tend to establish another issue than that for which it is offered, and it is a rule that evidence so introduced is available to establish any of the issues in the case. This rule is, however, limited to the issues which are to be tried. If the other issue that the evidence may tend to establish is not before the court, the evidence must be limited to the actual issue. The fact of its introduction cannot be used to establish an issue that the parties have not made in their pleadings. The court would not be authorized to consider it as establishing an issue that was not before it for trial. Even a finding upon such evidence would be disregarded in determining the correctness of the judgment. We hold, therefore, that, as it has been once determined in this case that the right of the appellant, as a mere riparian proprietor, to divert any portion of the waters of the stream was not an issue before the court, any evidence offered at the trial which would tend to establish such issue did not authorize the court to make a finding upon that issue, and its failure to make a finding thereon was not error. As the issue was not in the action, the court was not authorized to make a finding thereon; and, if it had made such finding, it could not have been considered as a basis for the judgment.

In the statement prepared by the appellant he has specified 19 errors of law as committed at the trial, and 22 points in which the evidence is insufficient to sustain the decision of the court. In his brief, however, he has referred to only 2 of these errors of law, and has disposed of the insufficiency of the evidence as follows: "The specifications of insufficiency of the evidence to justify the decision are ample to cover the discussions above written. Those specifications are found on folios 3943 to 3972, and we refer to numbers 1, 2, 6, 7, 15, 16, and 17." The statement of the case is contained in two volumes of upwards of 500 pages each, but, as counsel has not deemed it of sufficient moment to call our attention to the portions of the record which would illustrate these specifications, we can only infer that he was unable to do so. We have frequently stated that, if counsel do not point out the errors in the record, we shall not search it to ascertain if there are any.

The errors of law to which he has directed our attention do not require extended consideration. The objection to the instruments offered went to their effect as evidence, and not to their admissibility. The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(5 Cal. Unrep. 99)

LUDY v. COLUSA COUNTY. (No. 18,403.)

(Supreme Court of California. July 27, 1895.)

ROAD OVERSEER—AUTHORITY TO DO WORK.

1. Under Pol. Code, § 2645, providing that road overseers, under the direction and supervision of the road commissioners, and pursuant to orders of the board of supervisors, must take charge of the highways in their districts, and shall employ the necessary help and keep the highways in good repair, the order of the road commissioner of a district is sufficient authority for the overseer to have repairs done on the road and materials furnished therefor.

2. A road overseer has sufficient authority to make repairs on roads and obtain material therefor, he having kept within the directions of the road commissioner, who, speaking to him in reference to work on the roads, told him not to work in excess of the funds of the district.

Department 1. Appeal from superior court, Colusa county; E. A. Bridgford, Judge.

Action by W. W. Ludy against the county of Colusa, for work done as road overseer. Judgment for defendant. Plaintiff appeals. Reversed.

M. J. Keys, for appellant. Ernest Weyand, for respondent

GAROUTTE, J. Plaintiff was road overseer of road district No. 6, Colusa county. As such road overseer, during the fiscal year 1890–91, he individually performed work upon the roads of that district and employed others to do the same, and, at his instance and request, materials were furnished to be used, and which were used, in the repair of the roads of such district. Claims in proper form for the amounts due for this labor and these materials were presented by the various parties to the board of supervisors of Colusa county. These claims were rejected, and thereafter, being assigned to this plaintiff, action was brought to recover judgment thereon. Judgment went for defendant, and this appeal is from such judgment and from the order denying the motion for a new trial.

Defendant, by its answer, admits that the labor was performed upon the roads of road district No. 6, and that the materials were furnished for the benefit and repair of such roads, and that said labor was done and materials furnished at the special instance and request of plaintiff, as road overseer; but defendant denies that this labor was done and materials furnished upon the order of the board of supervisors. The court found as a fact that the work done, money expended, and materials furnished were not in pursuance of any order of the board of supervisors of Colusa county, or of the road commissioner of road district No. 6. Judgment for defendant appears to have been based largely upon the foregoing finding of fact, and we think the evidence fails to support it, for the reasons hereafter stated.

Section 2645 of the Political Code provides: "Road overseers, under the direction and supervision of the road commissioners, and pursuant to orders of the board of supervisors, must take charge of the highways within their respective districts, and shall employ all men, teams, watering carts, and all help necessary to do the work in their respective districts, * * * keep them clear from obstructions and in good repair." Under this statute, there is no question but that the road commissioner of this district was authorized to order the work done and the materials furnished which were charged for in the claims presented to the board of supervisors, and which form the basis of this action. The road commissioner, Herd, was the only witness whose testimony in any way bore upon the finding of fact heretofore quoted. He testified, in effect, that he spoke to plaintiff Ludy in reference to work upon the roads, and told him not to "do work in excess of the amount of money apportioned; that is, not to run the district in debt in excess of the funds of the district." The court made an additional finding that "the entire indebtedness incurred against said road district No. 6, prior to the 12th day of May, including the claim of plaintiff, in the complaint alleged, for the fiscal year ending June 30, 1891, did not equal the receipts from said district for said year"; and, when we consider this finding, in connection with the evidence of the road commissioner, we have no doubt whatever but that Ludy was clothed with ample authority to do this work, and contract for this material.

The question as to the transfer of certain moneys from the common fund to this road-district fund during the previous fiscal year, and retransfer thereof to the common fund during the year when these liabilities were created, appears to be an immaterial matter. Neither is it material that the territory comprising road district No. 6 was subsequently lost to Colusa county by the creation of Glenn county. The court made an additional finding, to the effect that plaintiff, as road overseer, did not procure this work to be done or the materials to be furnished. This finding is in direct conflict with the admissions of the pleadings, and this fact, of itself, would appear to necessitate a new trial of the case. While a general demurrer to the complaint was overruled, we think, upon a new trial, the issues would be more clearly defined by an amendment to the complaint, alleging authority in the road overseer to enter into these various contracts; and we recommend an amendment to the pleadings to that effect. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: HARRISON, J.; VAN FLEET, J.

(108 Cal. 264)

GORDON v. CITY OF SAN DIEGO. (No. 19,574.)

(Supreme Court of California. July 29, 1895.)

DEED FROM CITY—PRESUMPTION OF DELIVERY—AUTHORITY TO EXECUTE—PAROL EVIDENCE—DEED BY TENANT IN COMMON—PARTITION—ACQUIESCENCE OF COTENANT.

1. The presumption, declared by Civ. Code, § 1055, that a deed duly executed was delivered on the day of its execution, is not overcome by the fact that it was not acknowledged until six months after its execution.

2. Where the records fail to show that a deed by the city was authorized by the board of trustees empowered to sell the land, a member of the board may testify to the genuineness of the trustees' signatures to the deed, and that whenever a deed of city land was made by the trustees it was by order of the board.

3. Where a city conveyed an undivided half of a lot to one person, and then conveyed the west half of the lot to another person, evidence that, after the execution of the second deed, the east half of the lot was assessed to the grantee in the first, who paid the taxes thereon for several years, and that, after his death, his administratrix inventoried it as the property of the estate, is sufficient to warrant a finding that the first grantee elected to treat the deed of the west half as a partition of the lot.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by H. C. Gordon against the city of San Diego to quiet title. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Wm. H. Fuller and Clarence H. Barber, for appellant. Cassius Carter and Withington & Carter, for respondent.

HAYNES, C. This is a second appeal. Upon the former appeal the judgment against the city was reversed, and a new trial ordered, and upon such new trial the plaintiff again obtained judgment. The action is to quiet title to the east half of pueblo lot 1215, containing about 45 acres, situate in said city. For a general statement of the facts, see the opinion rendered upon the first appeal, reported in 101 Cal., at page 522, 36 Pac. 18. Only such different or additional facts as were developed upon the second trial need be stated here.

1. As affecting the validity of the deed to Whaley, it is now shown that, though the deed bears date February 27, 1869, it was not not acknowledged until August 21, 1869; and at the time it was acknowledged Schiller and Sloane, two of the trustees who were in office at the date of the deed, and who had joined in its execution, had ceased to be trustees. A deed signed and delivered, except where a married woman is the grantor, is good, and operates to convey the title, though not acknowledged. The object of an acknowledgment is twofold,—to entitle the instrument to be used as evidence without further proof, and to enable it to be recorded. Fogarty v. Finlay, 10 Cal. 239. Estudillo, the president of the board of trustees at the date of the deed, was still a trustee at the time it was acknowledged, and as to him, at least, it was properly acknowledged. There is no question in the case, however, which makes it necessary or important to determine whether the acknowledgment by the trustees whose term of office had expired was authorized or not, and that question is therefore not considered. It is contended by appellant, however, that the deed was not delivered until at or after the date of its acknowledgment, and that as the resolution of the trustees adopted June 8, 1868, prescribing the "only way in which pueblo lands will be granted," was repealed after the date of the deed, and before the date of its acknowledgment, and consequently before its delivery, there was no power to deliver the deed; or that, if it could then have been properly delivered, it could only be done by the trustees then in office. If the deed was delivered at its date, this contention cannot avail appellant. Counsel cite authorities, however, from seven or eight sister states, to the proposition that, when the date of acknowledgment is different from the date of the deed, the court must presume that the deed was not delivered until after it was acknowledged. It is not necessary to review these cases, or to question their correctness in the several jurisdictions in which they were decided. They merely state the presumption there indulged in the absence of proof; but here the presumption is declared by statute. Section 1055 of the Civil Code is as follows: "A grant duly executed is presumed to have been delivered at its date." See, also, Treadwell v. Reynolds, 47 Cal. 171, where it was said: "That the date found in the body of the deed is presumptively the date at which it was delivered is not questioned. That this presumption, however, is not conclusive, but that the true date of delivery may be proved aliunde, is also clear." In appellant's brief it is stated: "In the case at bar there is no proof of when the Whaley deed was delivered, only that which arises from filing it for record." There is, therefore, nothing to overcome or affect the presumption declared by the statute.

2. Appellant further contends that upon the second trial it was shown that the recitals in the Whaley deed were untrue, and that the city never sold any portion of pueblo lot 1215 to Whaley or to Babcock. This contention is based upon the fact that the minutes of the board of trustees contain no record of the sale to Whaley, nor of any meeting of the board held at the date of the deed to him, nor of any resolution or order directing the execution of that deed. It is not disputed that an election was duly held authorizing the sale of pueblo lands under the provisions of the statute, and a resolution passed by the board of trustees on June 8, 1868, prescribing the way and terms upon which pueblo lands would be granted, was read in evidence. Beyond this it does not appear that the statute, or charter of the city, prescribed any special action, proceeding, or formality to be observed in making sales or conveyances of these lands. Of course, the price and the particular parcel of land to be conveyed were left to be determined whenever any one applied to purchase, and these matters required official action by the board of trustees. It was held upon the former appeal that "the recitals in the deed, coupled with the law, are sufficient evidence to bind the parties, and show that title passed by the deed"; the objection then being that there was no showing by the plaintiff that the city ever passed a resolution authorizing the sale or transfer of the property described in the deed, appellant then assuming that it was necessary for respondent to assume the burden of showing that such resolution was passed. Upon the second trial it simply appeared that no such resolution appeared of record. But parol evidence is admissible to prove facts omitted from the record, unless the law expressly and imperatively requires all matters to appear of record, and makes the record the only evidence. Dill. Mun. Corp. (4th Ed.) § 300; Bank v. Dandridge, 12 Wheat. 64. Marcus Schiller, one of the trustees who executed the deed to Whaley, was examined as a witness, and, while he had little or no recollection of this particular matter, testified to the genuineness of the signatures of all the trustees, and that "whenever we sold a piece of property and made a deed to it it was ordered by the board of trustees." It is true he also tes-

tified that a record was kept of these things by the secretary; but such omission, as we have seen, does not invalidate the action of the board. The court found "that said several deeds and the execution thereof were authorized by the defendant," and this finding, I think, is fully justified by the evidence.

3. The deed to Whaley, through whom plaintiffs claim, was executed February 27, 1869, and purported to convey "the undivided one-half" of pueblo lot No. 1215. On the next day after the execution and delivery of said deed to Whaley, the city, by the same trustees, conveyed to one Babcock "the west half of the same pueblo lot." Babcock's deed was first recorded. It is claimed by respondents, as it was upon the former appeal, that by the execution and delivery of the deed to Whaley, he and the city became tenants in common of said lot 1215; that by the conveyance to Babcock the city in effect made a partition of said lot, which, though not binding upon him, Whaley was at liberty to accept under or in analogy to section 764 of the Code of Civil Procedure, which is quoted in the former opinion, 101 Cal., at page 530, 36 Pac., at page 21, where also several authorities are cited. Following these citations it was said: "All the authorities are to the effect that a sale by a tenant in common by specific bounds of a portion of the land in common is not binding upon his cotenant unless ratified by him. I fail to find in the record any evidence of ratification by Whaley, or those holding under him;" and upon that ground alone the former judgment was reversed. Upon the first trial, the deeds to Whaley and Babcock, respectively, were put in evidence, and it was stipulated at the trial "that the plaintiff in this action succeeds by proper mesne conveyances to any title or interest in and to said pueblo lot No. 1215, which was conveyed to Thomas Whaley by the deed dated February 27, 1869." Upon the second trial, plaintiff obtained leave to file a supplemental complaint, in which it was alleged, among other things, that since the commencement of the action the plaintiff had obtained from the estate of Thomas Whaley, deceased, a deed dated September 17, 1892, conveying to the plaintiff the east half of said pueblo lot, and that plaintiff had subdivided said east half into specific lots; and by a subsequent amendment it was alleged that the plaintiff, Gordon, had conveyed one of the four lots into which said east half of the pueblo lot had been subdivided to Flora R. Young, and the other three to Cassius Carter, who were then the owners of said property, and who were substituted as plaintiffs in the action. The defendant's demurrer to the supplemental complaint was properly overruled. It was a general demurrer, and all the allegations necessary to be stated in a complaint, in an action to quiet title, were repeated therein. The defendant then answered, and put in issue, by specific denials, each and every of the allegations of the supplemental complaint. Instead of relying upon the stipulation, which upon the first trial was the only evidence of plaintiff's title, and which showed no act of ratification by Whaley or his successors in interest, in the partition claimed to have been effected by the conveyance of the entire west half of the lot to Babcock, it was shown upon the second trial that in 1886 the taxes on the east half of said pueblo lot 1215 were paid by T. E. Whaley; in 1887 said east half was assessed to Francis E. Whaley, and the taxes were paid by Whaley and Dalton; in 1888 the said east half was assessed to T. F. Whaley and paid; in 1889 and 1890 it was assessed to Thomas Whaley and he paid the taxes; and in 1891 it was assessed to the estate of Thomas Whaley. All these assessments were upon the east half of said lot, and said taxes were paid to the city. Thomas Whaley, the original grantee of the city, died without having made any conveyance of said east half, or of any interest in said pueblo lot. After his death, his widow was appointed administratrix of his estate, and in the inventory, which was filed before any conveyance to Gordon, the interest of the estate in said pueblo lot 1215 was described as the east half thereof; and, by the same description, proceedings were afterwards taken by her, in probate, to sell the same, and by the same description said premises were afterwards sold and conveyed to plaintiff, Gordon, under said proceedings. Appellant does not contend that plaintiff did not, at the commencement of the action, have all the title Whaley ever had, but contends that Whaley never had any title, for the reasons hereinbefore stated; or that, if he had any title or interest in the east half of said pueblo lot, it was only of the undivided half of said east half; and that the court erred in admitting evidence of facts transpiring after the commencement of the action. It is true that, if there was no cause of action at the time the suit was commenced, the plaintiff could not, under a supplemental complaint, give evidence of a cause of action which accrued afterwards. In Gleason v. Gleason, 54 Cal. 135, it was said that, as a general rule, the right to file a supplemental complaint can be exercised only with reference to matters which may be consistent with and in aid of the case made by the original complaint, and it is not allowable to substitute a new and independent cause of action by way of a supplemental complaint. See, also, Jacob v. Lorenz, 98 Cal. 332, 337, 33 Pac. 119.

If there were any question as to the correctness of the rulings of the court in admitting in evidence matters occurring after the suit was commenced, inasmuch as, for many years prior to the death of Thomas Whaley, the east half of said pueblo lot was assessed to him by the city, that he paid the taxes thereon, thus assenting to the conveyance to Babcock as a partition of said lot; that his wife, who must be presumed to have been familiar with the manner in which her husband had treated the property up to the time of his death, described said property in the inventory filed by her as administratrix as the east half of said lot, and not as an undivided half of the entire lot,—are quite sufficient to sustain the findings and judgment. And that being true, even if the court erred in admitting the evidence touching occurrences after suit began, such error would be harmless. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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107 Cal. 602

RANKIN v. NEWMAN et al. (No. 15,731.)

(Supreme Court of California. July 29, 1895.)

In bank.

Petition for hearing in bank. Denied.

For former report, see 40 Pac. 1024.

PER CURIAM. In this cause the petition for hearing in bank is denied, but the judgment hereinbefore entered in department is modified by adding thereto: "The respondent to recover his costs on this appeal."

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108 Cal. 285

HOTCHKISS v. SMITH. (No. 18,378.)

(Supreme Court of California. July 29, 1895.)

COSTS—EXPENSE OF KEEPING ATTACHED PROPERTY—FAILURE TO INCLUDE IN COSTS.

Under Code Civ. Proc. § 1033, providing that a party in whose favor judgment is rendered, and who claims costs, must deliver to the clerk and serve on the adverse party a memorandum of his costs and disbursements, sheriff's fees, and expenses for keeping attached property, not included in the memorandum, are waived.

Department 1. Appeal from superior court, Modoc county; G. F. Harris, Judge.

Action by Sarah Hotchkiss against V. L. Smith. Judgment was rendered for plaintiff, and from an order denying defendant's motion that it be satisfied, he appeals. Reversed.

Spencer & Raker and Clarence A. Raker, for appellant. D. W. Jenks, for respondent.

VAN FLEET, J. This is an appeal from an order denying defendant's motion, made under section 675, Code Civ. Proc., to have satisfaction of judgment entered. The only question involved is whether plaintiff is entitled on execution, as a part of her judgment, to be paid an item of sheriff's fees and expenses for keeping property held under a writ of attachment, when such fees and expenses were not claimed by plaintiff in her memorandum of costs, and consequently not included in the judgment. Section 1033, Code Civ. Proc., provides: "The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk and serve upon the adverse party, within five days after the verdict, a notice of the decision of the court or referee—or, if the entry of the judgment on the verdict or decision be stayed, then before such entry is made,—a memorandum of the items of his costs and necessary disbursements in the action," etc. And section 1035, Code Civ. Proc., provides that the costs shall be included in the judgment. The effect of these provisions is that all costs and disbursements incurred in the action must, in order to be recovered by the prevailing party, be included in the memorandum of costs filed by the party. This includes all items of costs or necessary disbursements incurred up to the time of the rendition of judgment, and a failure to claim such costs, or any item thereof, in the manner required by the statute, is deemed to be a waiver of such costs, and precludes a recovery thereof. Riddell v. Harrell, 71 Cal. 260, 261, 12 Pac. 67; Sellick v. De Carlow, 95 Cal. 644, 30 Pac. 795; Chapin v. Broder, 16 Cal. 403. The sheriff's charge for keeper's fees and expenses was a part of the necessary disbursements incurred by plaintiff in the action, and which she would have been entitled to recover against defendant, but, being costs and disbursements incurred before judgment, it was incumbent upon plaintiff to include and claim them in her cost bill, or they were waived. The statute makes no distinction between such disbursements and any other items of cost or expense incurred before judgment. The sheriff, judging from his return on the execution, seems to have proceeded upon the assumption that the keeper's fees and expenses were a part of his "accruing costs," under section 691, Code Civ. Proc., and so chargeable against defendant, without being included in the judgment; and such would seem to be the theory adopted by plaintiff, so far as his brief tends to enlighten us. But that theory is entirely erroneous. Such items are in no sense "accruing costs," as that term is used in the statute, the latter being such fees and expenses only as are incurred in executing the judgment. The item for keeper's fees constituting no part of the judgment against defendant, the sheriff was not authorized to charge or deduct the amount thereof against defendant in applying the proceeds of sale to the satisfaction of the judgment. It appears that, exclusive of that item, the property sold under the execution brought more than enough, when properly applied, to satisfy plaintiff's judgment, including the amount of costs claimed in her cost bill to which she was entitled, and the accruing cost; and, this being so, the defendant was entitled to have the proceeds so applied, and to have the judgment satisfied. The order is reversed, and the court below directed to grant the motion.

We concur: HARRISON, J.; GAROUTTE, J.

108 Cal. 273

HAMILTON v. SAN DIEGO COUNTY et al. (CORONADO SCHOOL DIST., Intervener). (No. 19,543.)

(Supreme Court of California. July 29, 1895.)

SCHOOL DISTRICT—IRREGULAR ORGANIZATION—EXISTENCE DE FACTO—FUNDS TO ITS CREDIT—DISPOSAL OF.

1. Where a board of supervisors, believing that certain territory within the limits of a city is outside of such limits, form a school district out of the same, and the trustees appointed exexcise the powers of school trustees, and taxes are levied for the district, and, on an election by the voters of the district, bonds are issued to buy land and build a schoolhouse, one who paid taxes so levied cannot recover the same out of funds in the hands of the county treasurer to the credit of the district, on the ground that the board of supervisors had no authority to organize the district, as the district had, at least, a de facto existence.

2. Where a de facto school district issues bonds, money deposited by it with the county treasurer to pay the bonds should be applied to the payment thereof, and not paid to a school district legally organized in place of the old one.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Charles S. Hamilton against county of San Diego and another to recover taxes paid. The Coronado school district filed a complaint as intervener, and a demurrer thereto was sustained, and it appeals. Judgment was rendered for plaintiff, and defendants appeal. Judgment as to intervener affirmed, and as to defendants reversed.

M. L. Ward and Parrish & Mossholder, for appellants. E. W. Hendrick and A. C. Younkin, for respondents.

BRITT, C. Coronado Beach, formerly known as the peninsula of San Diego, was for several years the subject of dispute as to whether it was within or without the territorial limits of the city of San Diego. A decision of the former district court, rendered in the year 1877, held it to be no part of such city. From the judgment in that case—not entered until 11 years later—an appeal was taken to this court, where the judgment was reversed, and it was determined that said peninsula is "within the limits of the city of San Diego, and land situated on said peninsula is subject to assessment and taxation for city purposes." City of San Diego v. Granniss, 77 Cal. 511, 19 Pac. 875. This was in December, 1888. The question arose in other forms (People v. San Diego, 85 Cal. 369, 24 Pac. 727; Fisher v. Police Court, 86 Cal. 158, 24 Pac. 1000); but the case of City of San Diego v. Granniss remained authoritative as to the legal questions decided,—not to say the points of local geography involved,—and established that the peninsula was, and had been since the passage of the act to reincorporate the city of San Diego, April 1, 1876, an integral part of the city.

The present case grew out of that controversy. In January, 1887, the peninsula being then regarded as without the limits of the city, the board of supervisors of San Diego county took the proper formal steps for the organization of a school district comprising that portion of the peninsula called Coronado Beach, South Island, under the name of "Coronado School District of San Diego County." And the case shows that from and after January 10, 1887, during all the times mentioned in the complaint,—some four years,—the said "so-styled Coronado school district (although said Coronado Beach, South Island, was wholly within the boundaries of the city of San Diego, in said county, and was part of the territory of the San Diego school district, constituted by said city) assumed to exercise and did exercise all the powers and franchises and discharge the duties of a school district organized under the laws of the state of California, * * * exclusive of any other school district, and had an acting board of three persons, who assumed to be its board of trustees; that, among other things, up to December 12, 1888, it received and expended apportionments of state and county school moneys on the same basis with other school districts established within said county, employed teachers, maintained public schools out of said moneys within and for such district; and on November 14, 1887, at an election, in which were followed the forms of law, the qualified electors therein assumed to authorize the issue of bonds of said district to the amount of $40,000, for the purpose of purchasing a site for a school building, and building a schoolhouse thereon; that, pursuant to the result of said election, the board of supervisors of said county issued the bonds of said district to the amount of $38,000, and caused the same to be sold at par;" that the proceeds were applied to the purchase of land and the erection of a schoolhouse thereon within said assumed district, and such land was conveyed by deed to the district. And thereafter, in each of the years 1888, 1889, and 1890, the said board of supervisors, at the time of making the levy of taxes for county purposes, levied a tax upon the property within said so-styled Coronado school district, sufficient to pay the interest on the said bonds and such portion of the principal of said bonds as was to become due during the year in which such levy was made. Of the taxes so levied the sum of $5,412.66 was collected and paid into the county treasury; of which the sum of $700 was paid out for interest on said bonds, and $4,712.66 is yet in the hands of the county treasurer,—defendant Long. Plaintiff owned property within said Coronado school district, and paid the taxes for the years 1888 and 1889. levied as above shown. He prosecutes this action to recover the sums paid by him, and also the sums paid for the same purposes, and under the same circumstances, prior to December 31, 1890, by numerous other owners of property within such district; they having assigned to him their respective claims therefor. The court finds that plaintiff and his assignors did not discover that said Coronado Beach was parcel of the San Diego school district until the month of August, 1893. Plaintiff's claim, itemized and verified, was presented to the board of supervisors of the county for allowance on September 30, 1893, and was rejected. The action was commenced October 7, 1893.

There was a complaint in intervention filed by a new "Coronado School District," alleging, among other matters, that on October 16, 1890, the territory included within said former so-called Coronado school district was regularly segregated and excluded from the city of San Diego and from said San Diego school district. That thereafter the territory so excluded was incorporated into and named the "City of Coronado," and a new school district was thereby formed, now known and described as "Coronado School District,"—the intervener. We may suppose that the exclusion of such territory was accomplished in virtue of the proceedings required by the judgment in People v. San Diego, 85 Cal. 369, 24 Pac. 727. Said intervener further alleged "that said intervening school district is the successor of said first-described Coronado school district, and as such is the owner of and is entitled to the use of said money deposited in the county treasury"; and prayed that the court "decree that, since said money cannot be applied to the purpose for which it was paid in, it be applied as nearly as possible to such purpose, to wit, paying for school buildings for said intervening school district." The court sustained a demurrer to the complaint of the intervener, on the grounds that it had no interest in the matter in litigation, and for want of facts to constitute a cause of action against any of the other parties, and dismissed its complaint. Plaintiff recovered judgment directing that the amount claimed by him—$1,269.63—and costs "be paid out of the special so-called fund known as the Coronado school bond and interest fund." Defendants appeal from the judgment and an order denying a new trial; and the intervener appeals from the judgment dismissing its complaint.

A school district is a corporation organized for educational purposes (In re Bulmer's Estate, 59 Cal. 131); and, as the law stood in 1887, "each county, city or incorporated town, unless subdivided by the legislative authority thereof, forms a school district" (Pol. Code, 1576). By sections 1577–1579 of the same Code the county board of supervisors was clothed with the power to establish new school districts within the county. It is contended by defendants that these various sections, construed together, gave to the board of supervisors power which it regularly exercised in the erection of Coronado Beach into a separate school district, by the proceedings taken in January, 1887; that, failing this proposition, such district was at least a corporation de facto, whose existence cannot be assailed in this collateral manner; while, in the view of plaintiff, the only power to create the Coronado school district in the year 1887 resided, under said section 1576, in the municipal governing body of the city of San Diego, —its city council,—and the attempt of the county board of supervisors in that behalf "could not be even such a semblance of authority as would give it a de facto existence." We shall assume, for the purposes of the decision, that the power under the statute to form the new district rested in the city council, and not in the board of supervisors. We are to inquire if there was such an attempt to impress the character of a corporation upon the Coronado school district, followed by the assumption and discharge on its part of the duties pertaining to such district, as to bring it within the operation of those principles of public policy by reason of which the law will impute to it, for some purposes, the status of a lawful corporation; that is, will treat it as a corporation de facto. (1) In the first place, although a part of the district composed of the city of San Diego, yet it was legally capable of segregation as an independent district. Pol. Code, 1576. (2) The board of supervisors of the county was a body having power under the law to organize new school districts in San Diego county. The respondent says the order of the board was of no more moment than if made by the czar of Russia; but the illustration is not apt. A foreign government having no authority whatever within our borders could make no order in such a matter which would not be void on its face; while here, the order of the board of supervisors—acting as the board did within the lines of the statute (Pol. Code, 1577–1579)—was valid on its face, and only invalid because of the fact, then unknown, that the territory in question was within the limits of an incorporated city. The case shows affirmatively that it was believed to be and was dealt with as if outside those limits. (3) The order purported to form and establish into a school district the said territory, with a designated name, in formal compliance with the statute prescribing the mode for accomplishing that object. (4) Thereafter the district so organized exercised the powers and discharged the duties of a school district in the same manner as if its organization had been legally perfect; contracted debts and acquired and held property in its corporate name for the public purposes it undertook to promote. (5) This was done to the exclusion of any other district; that is, no other district maintained a school or performed other office of such a corporation within its confines, the district of San Diego having abdicated its functions, at least not attempting to discharge them, within those limits. Had both districts been endeavoring to exercise the same powers in the same territory a different question would be made. 1 Dill. Mun. Corp. § 184. (6) There was acquiescence, not merely by the San Diego school district, but by the county and state, in the assumption of such corporate prerogatives by the new district. The county officers levied and collected taxes in its behalf, and there was apportioned to it, and it expended, school moneys of both the county and state in like manner as other school districts in the county. (7) The plaintiff here and his numerous assignors, owners of property included within the district, recognized its corporate existence by paying taxes for its use in discharging the debts it had incurred. True they did this, as the court finds, under a mistake as to the legal creation of the district, but that is immaterial; well-nigh every merely de facto corporation is the result of the omission or mistake of somebody, or some body of people. We are of opinion that the district had a de facto existence. In the elements above enumerated we see nothing wanting to give the color of legality to its organization, or to render it impolitic to allow the collateral impeachment of such existence. The same rule which recognizes officers de facto applies to corporations de facto. Clement v. Everest, 29 Mich. 20. It is one of policy,—to prevent public confusion and private injustice. And it seems to be settled that one assuming to act as a public officer may in some cases be such de facto, although he has not color of election or appointment by the only body which has power to elect or appoint him, and although the appointing or electing body under which he assumes to act had not the legal power. State v. Carroll, 38 Conn. 449; 5 Am. & Eng. Enc. Law, 103. The order of the board of supervisors purporting to create the district was the formal exercise of legislative power (Hughes v. Ewing, 93 Cal. 417, 28 Pac. 1067); and thereunder, everything having been done to constitute the district a corporation colorably, if not legally, the law, as we see it, refuses, in this incidental way, to declare all its proceedings void (Attorney General v. Stevens, 1 N. J. Eq. 378).

The constitution of Tennessee provided that no line of any new county created by the legislature should approach nearer than 11 miles of the courthouse of any existing county. An act was passed forming a new county, under which one of the lines was established within the prohibited distance, but this circumstance did not appear on the face of the act. It was, therefore, on its face, not unconstitutional. The new county collected taxes and exercised other jurisdictional rights up to the line so fixed. Held, that so long as the older county acquiesced in the boundary which cut off part of its territory the right of the new county over such territory could not be questioned in any collateral proceeding; that only the older county could assert the invalidity of the boundary. Speck v. State, 7 Baxt. 46. A somewhat similar case received like treatment in Kansas. The court, citing many authorities, said: "When a public organization of a corporate or quasi corporate character has an existence in fact and is acting under color of law, and its existence is not questioned by the state, its existence cannot be collaterally drawn in question by private parties." In re Short, 47 Kan. 253, 27 Pac. 1005. In Michigan it was sought to review by certiorari the proceedings taken to form a new school district out of old districts; this was about 15 months after the proceedings were had. The court held that after lapse of such time it was presumed that the district had been organized in fact, officers elected, and expenses incurred; that any one desiring to contest the organization must proceed by quo warranto against the district or its officers. Fractional Dist. No. 1 v. Joint Board, etc., 27 Mich. 3; see Stuart v. School Dist., 30 Mich. 74. In Arkansas, by mistake as to the tribunal having authority for such purposes, a town was formally organized by order of the circuit court of a certain county, when in fact it had no jurisdiction in the matter. Otherwise the organization was in accordance with the general law, and for several years the town continuously exercised the franchises of a corporation. It was conceded that the order was void; yet the supreme court held that the town "had been an existing de facto corporation all the time from 1873 till now; and many things had in good faith been done under it which it would be shocking now to undo." State v. Leatherman, 38 Ark. 81. See, further, Ashley v. Board, 8 C. C. A. 455, 60 Fed. 55; Aller v. Town of Cameron, 3 Dill. 198, Fed. Cas. No. 243; School Dist. No. 2 v. School Dist. No. 1, 45 Kan. 543, 26 Pac. 43; City of St. Louis v. Shields, 62 Mo. 247; People v. Maynard, 15 Mich. 463; Cooley, Const. Lim. 310. Respondent lays much stress on School Dist. v. Linscott, 99 Cal. 25, 33 Pac. 781; but that case does not touch the present question. We have assumed the correctness of the remark there (page 28, 99 Cal., page 781, 33 Pac.) that "after the incorporation of the city the board of supervisors ceased to have any power over the school districts within the city."

Since the Coronado school district had a de facto existence, the plaintiff could not have enjoined the collection of the taxes, nor have resisted an action for the same, on the ground of illegality of its organization (Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514; Dean v. Davis, 51 Cal. 406; Reclamation Dist. v. Turner, 104 Cal. 334, 37 Pac. 1038; Land Dist. v. Silver, 98 Cal. 51, 32 Pac. 866); and, for reasons at least as strong, should not recover the money when paid. It follows also that the intervener has no standing to claim the money in dispute. Under section 1887, Pol. Code, the taxes when collected were required to be "paid into the county treasury to the credit of such district, and be used for the payment of the principal and interest of said bonds, and for no other purpose"; and, whether the holders of the bonds have any further remedy on the same or not, a subject on which we intimate no opinion, it seems to us clear that on the facts disclosed by the present record they are entitled to the fund in question, to the exclusion of both the plaintiff and the intervener. The judgment dismissing the intervener's complaint should be affirmed, and the judgment against the defendants and the order denying their motion for new trial should be reversed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment dismissing the intervener's complaint is affirmed, and the judgment against the defendants, and the order denying their motion for new trial, are reversed.

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108 Cal. 369

FOX v. HALE & NORCROSS SILVER MIN. CO. et al. (No. 15,301.)

(Supreme Court of California. Aug. 3, 1895.)

TRIAL—CONFLICT OF EVIDENCE—CONVERSION OF BULLION—MEASURE OF DAMAGES—SPOLIATOR OF EVIDENCE—WHAT CONSTITUTES—AGREEMENT TO DEFRAUD CORPORATION — COMPENSATION FOR WORK THEREUNDER—SERVICE ON FOREIGN CORPORATION—ACTION FOR FRAUD—PROOF OF NEGLIGENCE — LIABILITY OF DIRECTOR FOR FRAUD OF OFFICER.

1. On an issue as to whether the amount of bullion that should be extracted from a quantity of ore should be estimated by the car or mill sample, witnesses for defendants testified that the mill sample was the customary standard, and that the car sample was used merely as a check. A witness for plaintiff testified that an assay from a car sample would average $10 per ton more than from a mill sample, but stated that if, from the 50,000 to 100,000 tons of ore, a car sample was taken with the best known methods, it would approximately show the value of the ore, but that for returns from the mill, the mill samples were relied on, and that the car samples were merely a check. Another witness for plaintiff testified that if a fair sample were gotten from the car it would indicate the value of the ore, but the manner of the assay with which he was familiar was more complete than that with which the ore in question was treated, and that he had had no experience in mining such ore. A witness for defendant testified that car samples were taken as a check, and that if the mill assay did not show a proper percentage of the value shown by the car samples, complaint was made of the mill, but that the car samples assayed from $6 to $10 more than mill samples. *Held* to show that the car samples exaggerated the value of the ore, and that the mill samples are the better test.

2. A judgment for the conversion of silver bullion should be based on the coin value of the bullion, and not on the arbitrary standard value.

3. The doctrine that everything will be presumed against a spoliator does not apply to an action by a stockholder of a mining company against a milling company for improperly extracting the bullion, so as to leave a large quantity in the ore to be afterwards worked over by defendant, because, in the process of milling, the identity of the ore was destroyed.

4. The fact that a witness for a party refused to produce books does not render such party a spoliator of testimony, no demand having been made for the production of the books.

5. Where the records of a company engaged in reducing ore show the quantity of ore received, and in a column headed "On account of," the names of a number of mining companies appear, the records do not show that the quantity of ore opposite the name of a mining company was produced at its mine.

6. Where a corporation for reducing ore agrees to pay the president and manager of a mining company a percentage on the profit of reducing ore received from such company, the intention being that the president should ship ore whether or not it is sufficiently rich in metal to be profitable, the company will be allowed only for the actual costs of treating the ore, without allowing for the use of its mill, though part of the ore shipped was sufficiently rich in metal to make the process profitable to the mining company.

7. Jurisdiction of a foreign corporation cannot be acquired by service on the superintendent of one of its mills who is in this state merely as a witness in the action.

8. One who sues another engaged in the reduction of ore to recover damages for fraud in treating the ore cannot recover for loss resulting from negligence.

9. Const. art. 12, § 3, providing that the directors of corporations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled by the officers, does not apply to all the directors, where the president of a mining company, without the knowledge of the other directors, agrees on behalf of the company to pay a milling company an excessive price for treating its ore in consideration of payment to him of part of the profits.

10. Objection cannot be made to the form of a judgment which follows the complaint, to which no objection was made.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by M. W. Fox against the Hale & Norcross Silver Mining Company and others for conspiracy. Judgment was rendered for plaintiff, and defendants appeal. Judgment affirmed in part, and reversed in part.

W. F. Herrin, Lloyd & Wood, Mesick & Waters, Garber, Boalt & Bishop, Edward R. Taylor, and M. M. Estee, for appellants. Wm. T. Baggett, L. D. McKisick, and E. S. Pillsbury, for respondent.

BEATTY, C. J. The Hale & Norcross Silver Mining Company is a corporation, organized under the laws of California, with its principal place of business at the city of San Francisco. It is the owner of one of the mining claims on the Comstock Lode, in the state of Nevada, where for many years it has been engaged in the business of mining gold and silver bearing ores. The plaintiff, M. W. Fox, since the year 1887, has been at all times a stockholder of said corporation. In August and September, 1890, he addressed communications to its board of directors, and to the individual members of the board, charging, in substance, that for three years the corporation and its stockholders had been systematically plundered, and its property stolen, to the amount of more than $2,000,000, by means of a fraudulent conspiracy and combination between said directors and the owners or lessees of the mills employed in the reduction of the ores extracted from the company's mine; that the devices resorted to in furtherance of the object of this conspiracy were the mixture of worthless rock with high-grade ores so as to obscure their value, and at the same time increase the quantity of material to be put through the mills; the concealment from the stockholders of the average value of the ores, as thus reduced; a fraudulent system of milling, by which only a small portion of the precious metals contained in the ores was returned to the company; and a disposition of the stolen bullion in a manner intended to conceal the theft. He further stated in his communication to the board that he was prepared to furnish sufficient evidence of the truth of his charges, and demanded that the directors should institute an action in the proper court, in the name of the company, to recover from the conspirators the full amount of its losses. Nothing having been done by the directors in response to this demand, the plaintiff commenced this action, in which he joined as defendants the corporation, all the individuals who had served as its directors from 1887 to 1890 inclusive, and the owners of the several mills in which its ores had been reduced during the same period,—these last being sued by fictitious names. The summons does not appear to have been served on any of the mill owners, but the other defendants filed their answer to an amended complaint, and on the issues so made the cause was brought to trial November 18, 1891. During the progress of the trial the complaint was further amended by the insertion of the true names of the mill owners sued by fictitious names, and by the addition of some new allegations; and on March 6, 1892, at the close of the trial, a final amended complaint was filed, for the purpose, as stated, of conforming the pleadings to the proofs. All the material allegations of these amended complaints were either denied by the answers of the several defendants, or were by the court treated as denied. On June 11, 1892, the superior court filed its findings and conclusions, and entered its decree in favor of the plaintiff, for the benefit of the corporation defendant, and against the other defendants (except Hobart, a mill owner, who had died on June 2d, and as to whose estate all proceedings were continued) severally for various sums. As against Hayward and the Nevada Mill & Mining Company (a corporation), mill owners, and Levy, who had been president of the Hale & Norcross Company during the whole period from 1887 to 1890, inclusive, there were several judgments for the entire amount of the company's losses, estimated at $1,011,835. As against the other defendants, directors of the corporation, there were several judgments in smaller and varying amounts, corresponding, as it is claimed, to the losses sustained by the corporation during their respective terms of office from overpayments to the mill owners for the crushing and reduction of ores. Execution was directed to issue upon these judgments, but it was provided that no more should be collected thereon than said sum of $1,011,835, with accruing interest and costs, and a receiver was appointed, to whom the amount so collected was to be paid, and who was authorized and directed by the judgment to pay over to the attorneys for the plaintiff, as compensation for their services, 25 per cent. of all sums collected. In due time all of the defendants against whom judgment had been rendered moved for a new trial upon a settled statement of the case, and, their motion having been denied, they have taken this appeal from said order and from the judgment.

The large amount involved in the controversy, the difficulties presented by the subjects of investigation, the great length of the trial, the immense mass of evidence, consisting largely of closely-printed columns of figures, and the ability, industry, and ingenuity of counsel, have combined to raise an unusual number of difficult questions for our decision, in the discussion of which it will be necessary to state in considerable detail many of the matters contained in the record. It will be more convenient to make a particular statement of these matters in connection with the several assignments of error to which they relate, but it will facilitate the discussion to state at the outset the general nature of the issues presented by the pleadings, and the facts as found by the superior court. In his last amended complaint, filed, as above stated, after the evidence was all in, and for the declared purpose of conforming the pleadings to the proofs, the plaintiff alleges, among other things: That between the 1st of January, 1887, and the 1st of July, 1890, the Hale & Norcross Silver Mining Company delivered to the Chollar or Nevada mill, and to the Vivian and Mexican mills, at or near Virginia City, in the state of Nevada, not less than 80,000 tons of gold and silver bearing ore, the property of said company, to be by said mills crushed and milled. That said ores were crushed and milled at said mills, and were of the value of not less than $3,250,000. That said Chollar or Nevada mill was the property of the Nevada Mill & Mining Company, a Nevada corporation, organized under the laws of that state for the purpose of owning, leasing, and operating mills for crushing gold and silver bearing ores, and of which the defendants Hayward and Hobart were large stockholders. That the said Hayward and Hobart, acting with other persons in a conspiracy to defraud the Hale & Norcross Silver Mining Company, controlled and directed all the affairs of said Nevada Mill & Mining Company and of the Mexican mill during all the times mentioned in the complaint, and that all the fruits of said conspiracy came to the hands of said Hayward and Hobart. That said persons and corporations, owners, stockholders, and managers of mills, were at all times mentioned in the complaint also the owners of a large number of shares of the capital stock of the said mining company, and fraudulently and unlawfully, in aid of said conspiracy, procured a sufficient number of proxies of other persons in whose names stock was standing, but who were not the real owners thereof, to elect all the directors of said mining company at the annual elections, held March 9, 1887, March 14, 1888, March 13, 1889, and March 12, 1890. That said directors, so chosen, were at all times controlled by, and acted in subserviency to, and conspired with, said mill owners and managers in all their official acts and proceedings, and in all matters connected with the management and business of the mining corporation and its mine. That immediately after the election of said directors they formed and organized a fraudulent combination and conspiracy with said mill owners for the purpose of cheating and defrauding the Hale & Norcross Company and its stockholders by divers cunning and unjust practices, among which were the following: That the mill owners appointed and selected all the agents and employés about the mills, and having, by means of said combination and conspiracy, the control of the mining company, they caused all of the ore extracted from its mine to be crushed and milled at the mills belonging to or controlled by them, and caused the superintendent of the mining company to suppress or withhold from its stockholders any report of the assays of such ores. That said superintendent did cause assays to be made of every car load of ore extracted from the mine, and reported the same to the directors, not, however, for the purpose of protecting the stockholders, or as a check upon the mills, but merely as a basis for a division of the fraudulent gains of the combination. That said directors, with the consent and approval of the mill men, caused the superintendent of the mine to extract large quantities of low-grade ores of a value below the cost of mining and reduction, and to mix these with the high-grade ores for the double purpose of concealing from the stockholders the real value of such ores, and of giving constant employment to the mills at an extravagant rate of compensation. That the loss to the mining company caused by the mining, transportation, and milling of said low-grade ores amounted to about $500,000. That the mill owners caused false and fraudulent assays to be made of the pulp of said ores, and, knowing them to be false, represented them to be true. That said mill owners, in furtherance of the objects of the conspiracy, caused all of said ores to be handled by a fraudulent system of imperfect milling and reduction, intended to leave in the tailings, slimes, and residues a large portion of the gold and silver contained therein, which tailings, slimes, and residues were afterwards worked over for the joint benefit of the conspirators, to the damage of said mining company and its stockholders in the sum of about $1,000,000. That said directors, in furtherance of the conspiracy, ordered and permitted all of said ores to be milled at said Mexican, Vivian, and Chollar or Nevada mills, at the exorbitant and excessive rate of $7 per ton, $3.50 per ton being a fair and reasonable price; to the damage of said mining company and its stockholders in the sum of $280,000. That about 6,000 tons of ore were delivered to the Virginia & Truckee Railway Company, to be transported to the Chollar mill, which were never accounted for, causing a further loss to the company and its stockholders of $480,000. That the aggregate losses occasioned by these various acts of the conspirators amounted to $2,100,000, a large portion of which has been divided up and distributed to the directors of the mining company.

The defendants were not permitted to file any answer to this last amended complaint, but their answers to the second amended complaint were allowed to stand as answers to the last amended complaint, and, so far as its allegations were new or different from previous allegations, they seem to have been treated as if they were in issue, and I shall assume that they were so treated. The answer of the corporation and its directors admits the delivery of its ores to the mills named in the complaint, for the purpose of milling and reduction, and the answers of the mill owners admit the receipt of said ores, but it is denied that they were of the value alleged, or of any greater value than $1,879,094.68, less the cost of transportation and reduction. Aside from these admissions, it may be said with substantial accuracy that every material allegation of the complaint is put in issue. Hayward and Hobart deny that they were owners or lessees of, or engaged in operating, any of the mills named in the complaint. The Nevada Mill & Mining Company, of which they were stockholders, admits that it owned and operated the Chollar or Nevada mill, and received and worked a portion of the Hale & Norcross ores.

Upon these issues the findings of the superior court were generally in favor of the plaintiff, and I shall merely note in this connection some of the more important particulars in which they were otherwise. It was found that Hayward, Hobart, the Nevada Mill & Mining Company, and Levy did, with the consent and approval of the directors of the Hale & Norcross Company, command the superintendent of the mine to extract large quantities of low-grade ores, and mix them with high-grade ores, for the fraudulent purposes charged in the complaint, and that the cost of mining, hoisting, transporting, and milling said low-grade ores caused loss and damage to the mining company; but there is no finding as to the quantity of such ores mined and sent to the mills, or of the amount of the damage thereby caused. It is not found that all or any part of the fruits of the conspiracy came to the hands of Hayward or Hobart, otherwise than by the general findings to the effect that they were received by the whole body of the conspirators. There is no finding as to what was the reasonable price of milling Comstock ores during the years 1887–90. It is found that the actual cost of milling the ores in controversy was $4.50 per ton, and no more, and that the charge made and allowed of $7 per ton was fraudulent, exorbitant, and excessive to the extent of $2.50 per ton. But it is conceded that this is not a finding of what an honest miller, entitled to a reasonable compensation for the use of his mill, might properly have charged. It is a finding, only, of the actual cost of reduction, without allowing anything for the use of the mills,—the court being of the opinion that these mill owners, participants as they were found to be in a conspiracy to defraud the mine owners, were entitled to no compensation for the use of their mills. It is not found that any ores delivered to the railway company for transportation to the Nevada mill were unaccounted for, but, on the contrary, it is expressly found that all such ores were accounted for. It is not found that the mine or car sample assays were used by the defendants as a basis for the division of profits, or that any profits were divided, but in general terms it is found that all the defendants—including the directors of the Hale & Norcross Company—received and appropriated the entire amount of which the corporation and its stockholders were defrauded, viz. $1,011,835. In some particulars the findings go beyond the allegations of the complaint. It is not alleged, but is found, that Hayward, Hobart, and the other conspirators controlled and directed the business and affairs of the Vivian mill, as well as of the Nevada and Mexican mills. It is not alleged, but is found, that the defendant Levy was president of the board of directors of the Hale & Norcross Company during the whole period from 1887 to 1890, inclusive. The quantity of ore alleged to have been delivered at the mills for reduction was not less than 80,000 tons, and its value is alleged to have been not less than $3,250,000. It was found that 88,887 tons were delivered, of the value of $3,505,361.

The defendants, in support of their appeal from the judgments, contend that they are erroneous in form and substance; and, in support of their appeal from the order denying a new trial, contend that the findings of the superior court are against the evidence, and are vitiated by numerous errors committed in the course of the trial in ruling upon objections to the evidence, and upon other matters. The most important questions which we are thus called upon to determine relate to certain legal propositions, as to which our decision must become a precedent in future controversies; but the questions which have been most elaborately discussed by counsel, and which go most directly to the merits of this case, relate to the sufficiency of the evidence to sustain the findings of the superior court, and these I shall consider first.

It is contended that there is no evidence to support the findings as to the alleged conspiracy to defraud the Hale & Norcross Company. So far as the defendants Hayward and the other mill owners are concerned, it does not seem to be of much consequence whether these findings can be sustained in their full extent or not, since their liability is sufficiently established by other and independent findings. But with respect to the liability of the directors of the Hale & Norcross Company, the findings as to their active participation in the conspiracy are very material. The evidence upon this point which most nearly affects the directors of the corporation is that which relates to their election. It seems that in 1887, and for some time prior thereto, the bulk of the Hale & Norcross stock was in the hands and under the control of certain stockbrokers in San Francisco. On the books of the company it stood in the names of trustees of these brokers, but according to their theory it was the property of their customers. The evidence in this record as to the exact relations between broker and customer is not very explicit, but what they really were is a matter of common knowledge, with which this court has been made especially familiar by a series of cases recently decided here, involving a construction of the constitutional provisions against sales on margin. Cashman v. Root, 89 Cal. 373, 26 Pac. 883; Wetmore v. Barrett, 103 Cal. 246, 37 Pac. 140; Sheehy v. Shinn, 103 Cal. 325, 37 Pac. 393; Baldwin v. Zadig, 104 Cal. 594, 38 Pac. 363, 722; Kullman v. Simmens, 104 Cal. 595, 38 Pac. 362. I conclude, therefore, that this Hale & Norcross stock was held as mining stocks were at that time generally held by the San Francisco brokers. It had been purchased on orders from dealers and speculators upon deposit of the customary margin, and had been transferred to the trustees of the brokers as security for their advances. It was, in other words, according to the theory of the broker's contract, a pledge, but according to the constitution it was the property of the broker, and the subject of an unlawful and void contract of sale. It is not necessary, in my opinion, to decide who, under these circumstances, had the strict, legal right to vote the stock so held. Conceding that the brokers could lawfully vote it at the annual elections of the directors of the corporation, they were, nevertheless, bound to vote it in the interest of those for whom they had purchased it. It seems, however, from the evidence, that they gave proxies often as a mere matter of favor or professional comity, and occasionally for a consideration, to any one who chose to make a contest for the control of the board. By this means the defendant Levy carried the elections for some time prior to 1887, and had been made the president of the board. As president he was invested by the by-laws with the sole management of the business of the corporation, subject to the advice of the board of directors. When the election of 1887 was approaching, Hayward, Hobart, and other stockholders of the Nevada Mill & Mining Company,—who were considerable owners of stock in the Hale & Norcross Company,—determined to contest with Levy for the control of the board. A compromise was, however, effected, resulting in the election of a board acceptable to both parties, and the retention of Levy in the office of president. As a part of this arrangement an agreement was entered into between Levy and the mill owners, by which he was to receive one-eighth of the profit on the crushing of all Hale & Norcross ores milled by them. This agreement was, of course, secret, and there is no evidence that its existence was known to any member of the board of directors, except Levy and his partner, Hoeflich. Sell and Bridge, who ceased to be directors in March, 1888, knew of it after that time, but there is no direct evidence that they had such knowledge while in office. None of the directors, however, had any substantial interest in the corporation. A majority of them owned but 5 or 10 shares, respectively, out of a total of 112,000 shares, and these trifling amounts of stock had, in several instances, been transferred to them by Levy or the mill owners for the express purpose of qualifying them to serve. Being chosen in this way and receiving no compensation for their services, except $5 for each meeting of the board at which they attended, they gave to the affairs of the company the amount of attention that might have been expected. Several of them seem to have known next to nothing about the operations at the mine. While others took a little more trouble to keep themselves informed in a general way about the mining of ores and the price paid for reduction, they seem, one and all, to have intrusted the management of the entire business to the president, Levy, and to the superintendent of the mine; and if these officers, by abuse of their trust, caused the loss and damage to the mining company which the court has found, the evidence warrants the conclusion that the directors were at least guilty of gross negligence. But, except as to Levy, Hoeflich, Sell, and Bridge, I do not think there is any evidence that the directors knew of the unlawful agreement between Levy and the mill owners, or that they were active participants in the conspiracy and frauds alleged in the complaint. That this was the view of the judge of the superior court seems to follow, not only from his decision upon the separate motion of the defendant Wheeler for a new trial, but from the amount of the several judgments rendered against him and the other directors. In denying Wheeler's motion, the judge declared in effect that he did not believe him to have had any share in the frauds upon the company, but he was held responsible for the consequences of his gross negligence, —that is to say, he was held liable for the excessive price of $2.50 per ton paid for milling the ore reduced during the time he was director. The same judgment was rendered against all the other directors except Levy, against whom there was a several judgment for the entire loss found to have been sustained by the Hale & Norcross Company. Hoeflich having died pending the trial, the action was dismissed as to him. This discrimination shows that, notwithstanding the sweeping language of some of the findings, the superior judge did not really intend to convict the other directors of the fraudulent conspiracy charged; for, if he had found them equally guilty, they would have been liable to the same extent as Levy. Besides, as above shown, he expressly declared that he did not hold Wheeler guilty, and the evidence against Wheeler was substantially the same as the evidence against the other directors. For these reasons I think it must be held that the finding as to the directors other than Levy, that they were participants in the frauds alleged, is not sustained, except so far as they were made participants by a culpable negligence which enabled others to consummate such frauds. This, indeed, seems to be conceded by counsel for respondent in their argument upon Mr. Wheeler's appeal, in which they contend that the judgment against him is fully sustained by the proof of negligence,—a point to be considered hereafter.

It is next contended that the evidence does not sustain the finding that Levy, with others, controlled the Nevada mill. I do not think this point merits discussion, for the reason that the finding is immaterial. It harms no one else, and does not affect the liability of Levy one way or the other.

The next finding attacked is that in which it is found that Hayward, Hobart, and the Nevada Mill & Mining Company controlled and managed the Mexican mill. The evidence on this point is conflicting, and I think the fact, clearly proved, that Hayward and Hobart paid to Levy his one-eighth share of the profits on the crushing at the Mexican mill, in the same manner and at the same time that they paid him on account of the crushing at the Nevada mill, is sufficient to sustain the finding as to them. Their payments, however, are not evidence against the mill company, and I cannot see that there is any evidence to sustain the finding as against it.

It is next claimed that there is no evidence to sustain the finding that Hayward, Hobart, and the Nevada Mill & Mining Company controlled and operated the Vivian mill, and this contention, I think, must be sustained. The position of respondent's counsel with respect to this point may be best shown by quoting their entire argument. They say: "The arrangement with Levy which was made before any of the ores of the Hale & Norcross were milled, contemplated that he should have one-eighth of the profits of milling all the ores of the Hale & Norcross mine, without regard to where it was milled. The entire business of milling the ores was turned over to Hayward, Hobart, and the Nevada Mill & Mining Company. They had complete control of the affairs of the mining company so far as the milling of its ores was concerned. It is not claimed that any one else ever milled a pound of its ores. The milling of the ores began at the Vivian mill. Is there any doubt but that the same parties who had the ores sent to the Nevada and Mexican mills had them sent to the Vivian? The ownership of the mill is a matter of no consequence. Who controlled and managed the milling of the ores?" It will be observed that there is no reference here to any page or folio of the record, and I can only say that, after a very careful reading of the whole of it, I have failed to find anything to sustain the assertions of counsel. The only arrangement with Levy of which there was any evidence was, not that he should have a share of the profits of milling all ores of the Hale & Norcross mine, without regard to where they were milled, but only that he should have one-eighth of the profits on any ore milled by Hayward, Hobart, and the parties represented by them, including the Nevada Mill & Mining Company. There is no evidence that the entire business of milling the ores was turned over to Hayward, Hobart, and the mill company, or that they had complete control of the affairs of the mining company, so far as the milling of its ores was concerned; and it is not only claimed, but conceded, that the Vivian mill, with which the defendants are not shown to have had any connection, milled nearly 5,000 tons of the ore. It does appear that, owing to the merely passive attitude of a majority of the board of directors of the Hale & Norcross Company, the actual control of all its affairs was in the hands of Levy, the president of the board, and it is obviously true that it was to his interest to give the milling to those in whose profits he was to share. But it does not follow that he could have given no milling to outside parties. What the evidence shows is that towards the end of 1887, when the Hale & Norcross Company commenced extracting considerable quantities of ore from the large ore body then recently developed, the Nevada and Mexican mills were crushing for other companies, and neither of them received any Hale & Norcross ore for several months after that company commenced crushing. During that time they were all sent to the Vivian mill. But, as soon as the Nevada and Mexican mills were ready to handle them, the employment of the Vivian mill ceased. From which it would appear that such employment was only a temporary expedient for working such ores as could not be kept for the mills in which Levy was interested, and the circumstances are entirely insufficient to warrant an inference of the material fact which it was incumbent upon plaintiff to prove, in order to recover from Hayward, Hobart, and the Nevada Mill & Mining Company for losses on the working of ore at the Vivian mill. Moreover, since the only proof that Hayward and Hobart controlled the Mexican mill was the evidence furnished by their own books of account that they had paid Levy one-eighth of the profits of the crushing at that mill, the absence of any evidence that they had paid anything on account of the work at the Vivian mill is doubly significant. But, besides all this, the plaintiff in his last amended complaint, which was expressly designed to conform the pleadings to the proofs, omitted, ex industria, apparently, to charge that Hayward and his associates had anything to do with the Vivian mill, and the special finding of the superior court as to the separate losses on the ores milled at the Vivian mill, which was doubtless drawn or suggested by counsel for plaintiff as the basis for a modification of the judgment, indicates his lack of confidence in the sufficiency of the evidence to sustain the general finding as to the losses at the Vivian mill. It must be held, in my opinion, that this finding as to the control of the Vivian mill is contrary to the evidence, as it is unwarranted by the complaint.

It is next contended that the finding to the effect that Hayward, Hobart, and the Nevada Mill & Mining Company, in conjunction with the other defendants, controlled all the business affairs of the Hale & Norcross Company is against the evidence. This finding is material only so far as it relates to the mining and milling of the Hale & Norcross ores, and as to those matters the evidence fully warrants the conclusion that a majority of the directors were, as above stated, simply acquiescent or passive, and that Levy did as he pleased. Whatever inference, therefore, as to participation by the mill owners in the control of the mining company, may be legitimately drawn from the existence of the unlawful contract for a division of the profits of the milling, or from the manner in which the ore was milled, or from any inadequacy of returns of bullion, or neglect of proper precautions in behalf of the mining company, is to be considered as a fact proved. Undoubtedly, the existence of the contract supplied a motive to both parties to increase the amount of milling by the extraction of low-grade ores, and it may fairly be argued that it also afforded an inducement to Levy to connive at a careless and inefficient system of milling, by which a larger number of tons would be milled at the same cost, and consequently at a larger profit. But proof of a motive to commit a wrong is scarcely sufficient by itself to prove that the wrong has actually been committed, and it remains to be considered whether there was any other substantial evidence of the mining of low-grade ores or of imperfect milling.

This brings us to the questions which have received the principal attention of counsel, both in the oral and printed arguments, a proper discussion of which involves a preliminary statement in regard to the custom prevailing along the Comstock Lode in regard to the mining and reduction of its gold and silver bearing ores. It sufficiently appears from the evidence in this record, and is a notorious fact, that the ores extracted from the Comstock Lode since 1887 are of a lower grade, and are produced in smaller quantities, than in former years. Much of the ore at present mined barely pays the cost of mining and reduction, and much is found in the vein, mingled with ore of a better grade, that falls below that standard. Since the question whether such low-grade ores are worth extracting cannot, as in the case of richer ores, be determined by inspection, it is absolutely necessary to have daily assays of samples of the ore from the different drifts and levels in which the work is being done, in order to tell what to take and what to leave. It is also necessary, as a check upon the millers, to have assays of the ore hoisted to the surface, and deposited in the ore bins for transportation to the mills. Accordingly, numerous assays are daily made of specimens taken from the various drifts and levels in which work is being prosecuted, and in addition to these there is an assay of what is known as the car sample, which is obtained in the following manner: Each car load of ore, containing about a ton weight, when hoisted to the surface is pushed by a carman along the track to the ore bins, and, as it passes what is known as the "sample box," he takes from the car and deposits in the box a handful of the ore. At the end of 24 hours the box is emptied, its contents thoroughly mixed, and about eight pounds taken out as a sample of the whole. This sample is taken to the assayer, who breaks up the larger pieces in a mortar, mixes the whole as thoroughly as he can, and takes out about a pound for assay. Before weighing the specimen or sample to be assayed, it is thoroughly pulverized and dried, so as to get at the quantity of gold and silver in a ton of dry ore. The mode of making the assay is not described in the evidence, whether by fluxing and melting in a crucible, or by other means; but it is not questioned that the methods employed were sufficient for the purpose of ascertaining the exact quantity of pure gold and silver contained in the final sample selected by the assayer. Besides these mine samples and car samples, as they are called, taken and assayed as a guide to the miners and a check upon the mills, there are also taken pulp or battery samples at the mills in the following manner: The ores selected for milling are dumped from the cars in which they are hoisted to the surface into large bins overhanging the railroad, from which they are drawn through apertures opened and closed by sliding gates directly into the cars, upon which they are transported to the mills. Here they are again dumped from the railway cars upon an iron grating called a "grizzly," which allows the finer portions to pass through into an ore chamber adjacent to the batteries, and the coarser portions, after passing through the rock breakers, fall into the same receptacle, from which the ore is fed by the action of machinery into the batteries. In the batteries, by the fall of heavy stamps and the constant flow of a stream of water, the ore is reduced to a thin pulp, which, by the action of the stamps, is continually splashed against the perforated screens which inclose them, and through which the water passes, carrying in suspension the finely-crushed particles of the ore. After leaving the batteries the pulp flows to and through a series of tanks, in which the sand and slimes are settled, preparatory to placing them in the amalgamating pans. On the way from the batteries to the tanks samples of the pulp are taken every hour, by passing a dipper under a spout, through which all the pulp flows. From the dipper the sample so obtained is transferred to a large can, conveniently placed, and this, at the end of 24 hours, is set on the boilers, for the purpose of evaporating the moisture. When dried, the whole mass is thoroughly mixed, spread out in a thin layer, divided into squares, and three samples taken and put in paper bags,—one for the assayer of the mine, one for the assayer of the mill, and one sealed up for future reference in case of discrepancy between the mine and mill assays. The settlement between the miller and miner is usually based upon the mine assay of the mill sample, the miner expecting to receive in bullion a proper percentage of the gold and silver contained in the ore, as determined by this test.

It has never been the custom on the Comstock for the miner to supervise the taking of the mill samples. Occasionally a man has been employed by some of the mining companies to watch the milling at custom mills, but usually no such precaution is taken, the car sample assays, which are daily compared with the pulp assays, being deemed a sufficient check on any misconduct or negligence of the miller, besides which there is the additional security afforded by the manner in which the ore is handled from the time it leaves the mouth of the shaft until it leaves the mill as tailings. Ores of all grades are dumped promiscuously into the bins. By their own gravity they are carried from the bins to the railway cars, and from the railway cars through the grizzlies and rock breakers to the ore house, from which they are fed by machinery to the batteries. From the batteries they pass, in the form of a stream of muddy water, to the settling tanks. In this process it seems impossible that there should be any sorting of ores with a view to sampling. On the contrary, the result must be a more and more thorough mixing. It seems equally impossible that any material quantity of the ore could be lost, or otherwise diverted, without detection. The samples taken in the mill from hour to hour are taken by the men employed about the batteries and pans, working on different shifts, and in the presence and view of various other employés, to whose observation any systematic attempt to debase the samples would necessarily be exposed.

Before leaving the subject, it may be well in this connection to state briefly the manner of treating the pulp after it leaves the batteries, according to the process of reduction commonly employed with what are known as the free milling ores of the Comstock Lode,—the process actually used in reducing the ores in question here. The pulp flows from the batteries to and through a series of sand tanks, and from these through a similar series of slime tanks. In the sand tanks the coarser and heavier of the solid material is settled, but the evidence shows that there is mingled with the Comstock ores, and especially the Hale & Norcross ores, a large percentage of sticky clay, which composes that part of the pulp known as slimes, in contradistinction to the sand which results from the crushing of the quartz rock. These slimes, it appears, do not readily settle, and, with the largest number of slime tanks that can be placed in a mill, the overflow of the last tank will carry some solid material, and this material contains some gold and silver, the ownership of which is one of the questions in this case; for the evidence shows that, although the Nevada and Mexican mills were provided with a full complement of slime tanks, yet for every ten tons of ore crushed in the batteries, one ton of solid material passed out of the mill into the slime ponds or reservoirs, where it was finally collected and claimed as the property of the mill owners. That part of the pulp, both sand and slimes, which settles in the tanks, is shoveled out upon the sand floor, from which, after mixing, it is transferred to the amalgamating pans. In the amalgamating pans it is rapidly stirred and ground, and at the same time treated with certain chemical agents designed to free the gold and silver from combinations that prevent them from amalgamating with the quicksilver with which the pans are charged. In the process of amalgamation, time, as well as proper chemical treatment and a proper allowance of quicksilver, is an essential element,—that is to say, the longer the process is continued the larger is the proportion of gold and silver amalgamated. But there is a practical limitation to the time that can be economically given to the amalgamation of even high-grade ores, and this is more especially true of low-grade ores; for the additional percentage of the precious metals saved by continuing the process beyond a certain point amounts to less than the cost of running the pans, and this point is sooner reached in working low-grade ores than in the case of more valuable ores. By failing to continue the process a proper length of time,—that is, to the point which is economically justified by the grade of the ore,—a part of its legitimate value is lost in the residues or tailings of the mill. After the pulp has been worked in the amalgamating pans for the time which the amalgamator deems sufficient, it is drawn off into another set of pans, called "settlers," where it is more slowly stirred for a time, completing the process of amalgamation, and allowing the quicksilver, with the amalgamated metals, to settle, preparatory to drawing off. This is done through iron pipes, connected with the bottom of the settlers, through which the amalgam runs into canvas bags. These bags are provided with iron collars, and are locked to an iron framework below the settlers, in such manner that their contents cannot be removed without cutting the bag, or unlocking and detaching it from the frame. The key is carried by the superintendent or foreman of the mill. The bulk of the quicksilver strains through these canvas bags, and is caught and used over again in the pans. What remains in the bags in combination with the gold and silver is removed from time to time, and placed in an iron box, where it remains until a sufficient quantity is collected to justify retorting. It is then placed in a retort, and the remaining quicksilver expelled by heat. The resulting crude bullion is weighed and sent to the mint or assay office, as directed by the mine owner, to whom the returns are made with certificates of weight and fineness by the mint or assayer. Samples of the material remaining in the settlers, similar to the battery samples, are taken every day,—one for the mill, and one for the mine. A comparison of the assay of the battery sample with that of the settler sample shows how closely the ore is being worked, and is especially useful to the amlagamator as an indication of any imperfection of his process, and of the necessity of changing the treatment in case of undue loss. The mill process, however, does not completely end with the settlers, for the contents of those pans pass to the agitators, where they are slowly stirred, and where in a final clean-up some additional amalgam is collected for the mine owner. There is a continual discharge of the agitator through an aperture near the top, and the material there discharged is called tailings. Formerly the milling ended with the discharge of these tailings from the mill, for they were allowed to run off down the cañon, and were never reclaimed by miner or miller. It was discovered, however, in course of time, that a portion of these tailings could be saved by means of blanket sluices, and worked over at a profit. The blanket sluice consists of a double line of flat, wooden troughs, set at a proper grade or inclination, and lined with blankets, over which the mill tailings are allowed to flow, with the result that there is deposited upon the blankets a portion of the quicksilver that is always escaping from the mill, and a portion of the ore, known as "sulphurets," which is heavier and richer than the rest of the tailings, but resists amalgamation. The material so caught in the blanket sluices is called "concentrates," and is from time to time swept into tanks where it is claimed as the property of the mill owner. According to the most definite testimony in this case, about 1 ton of concentrates ought to result from the working of 30 tons of ore, but the quantity varies greatly, according to different estimates. At the Nevada and Mexican mills concentrates were collected in this manner while they were working the Hale & Norcross ores, and were worked over in the annex pans of those mills for the benefit of the mill owners, defendants herein.

Returning from this digression to the findings called in question by appellants, I shall first consider that in relation to the conspiracy to mine and send to the mills ores not worth the cost of mining and reduction. This finding, like several of the others, is of no consequence so far as it concerns the question of affirming, reversing, or modifying the judgment. For, as above stated, although the superior court finds that worthless ores were mined and milled, to the loss and damage of the mining company, the amount of such damage is not found, and it does not enter into the judgment rendered against any of the defendants; the damages awarded by the several judgments consisting of but two items, viz. the excessive price paid for milling all the ores, rich and poor, and the bullion lost by imperfect milling. But, as it affects the motion for a new trial, and as indicative of the views of the superior court as to some items of evidence which equally affect other questions, it is deserving of some attention. According to the testimony of Mr. Mackay,—and there is nothing to the contrary,—ore of a car sample value below $14 per ton will not pay the cost of mining and reduction, by which I understand him to mean that such ore will pay the bare cost of mining in a going mine, added to the bare cost of milling, without allowing any profit to the miller, or compensation for the use of his mill. His meaning, in other words, is that a mining company with its mine already opened and in running order, and owning its own mill, could hoist and mill $14 ore without going behind. In any other sense his testimony on this point is inconsistent with his testimony as to the usual disparity between the car sample assay and the battery sample assay, and the percentage of the latter that ought to be obtained by good milling. In order, however, that $14 ore may pay expenses, it must, according to Mr. Mackay, contain about an equal value of gold and silver. Otherwise, owing to the heavy discount on silver, it will not pay. Now, the evidence in this case shows that the foreman of the Hale & Norcross mine was, in effect, instructed to mine and send to the mill ore assaying by car sample as low as $12, and it appears that the Hale & Norcross ores contained a much larger percentage of silver than of gold. In view of these facts, which show that the practice and the intention was to send to the mills all ores assaying by car sample as high as $12 per ton, and in view of the understanding that the mills were to receive not merely the bare cost of working the ores, but $2.50 in addition to the cost for the use of the mills, it cannot be said that the finding of a conspiracy to mine worthless ores is without any support in the evidence. I account for this finding, and for the fact that no damages were awarded by reason of it, in this way: The superior court held that, in view of the contract or understanding that $7 per ton was to be paid for the milling, and the actual return in bullion of only about 75 per cent. of the battery sample assay, the parties must have known that not only $14 ore, but ore of even a higher grade, was being mined and reduced at a loss. In determining the question of damages, however, all losses were comprised under two heads, viz. excessive price paid for milling, and loss by imperfect milling. In order to determine these amounts the milling was reduced to actual cost, and the defendants were charged with 75 per cent. of the car-sample assay. This being done, there remained no appreciable loss on the mining of low-grade ores, except upon the comparatively small quantity assaying less than $12, which the court was justified in finding was unintentionally and unavoidably deposited in the ore bins before the mine assays could be returned. The calculation upon which I suppose the court to have proceeded would be as follows: 75 per cent. of $14 is $10.50, or gold $5.25, and silver $5.25, which at 80 per cent. equals $4.20, making a net yield of $9.45, of which $4.50 was allowed for milling and $4.95 for cost of mining. I do not think that this basis of calculation was entirely correct in view of other evidence in the case, but it was the basis upon which the court seems to have proceeded, and, assuming its correctness, the finding in question and the conclusions of the court are rendered perfectly consistent. Upon the whole, I think the evidence sufficient to sustain this finding.

The next, and by far the most important, exception to the decision of the superior court, relates to the various findings to the effect that Hayward, Hobart, Levy, and the other defendants worked the ores of the Hale & Norcross Company by a fraudulent system of imperfect milling, by which a large portion of their value was left in the slimes, tailings, and residues of the mills. The substance and effect of these findings, is that 88,887 tons of ore were worked; that its value (meaning the total amount of gold and silver contained in it) was $3,505,361, as correctly shown by the car-sample assays, and that if said ores had been honestly crushed and milled, and the gold and silver honestly and with reasonable care extracted and accounted for, the bullion yield would have been $2,616,491, whereas the actual return made by the mills was only $1,826,873, and the difference between these two sums, $789,618, is the main item of the damages going to make up the judgment. The principal and most direct evidence in support of this finding consists of the car-sample assays, which, it is contended, is corroborated and confirmed by proof of certain irregular and suspicious transactions between the managers of the mills and the Carson mint, as well as some other circumstances of like complexion and import. The appellants contend that, even taking the car-sample assays as a criterion of the amount of gold and silver in the ores mined and sent to the mills, the estimate of the superior court is erroneous and excessive to the extent of $34,427, and they sustain their contention by a citation of the pages and folios of the record, to which counsel for respondent have made no reply. If there is any mistake in the computations which apparently demonstrate the error alleged, it was the duty of counsel to have pointed it out. In the absence of any attempt to do so, I should perhaps have been justified in assuming that the error was conceded. I have, however, gone over the figures as carefully as I could, and, while my computation does not exactly agree with that of counsel for appellants, it does agree substantially. The error of the court amounts to over $34,000, the larger portion of which is found in the first item of the account, where 1,259 tons and 1,590 pounds of ore delivered at the Vivian mill in December, 1887, of the car-sample value of $72.12 per ton, is found to have amounted to $113,518.41, when its real value was only $90,856.41, an error of $23,000 in one item. But the appellants contend that the car-sample assays do not, as found by the court, correctly show the true value of the ores, and in this connection they call attention to what they say is an inconsistency between the finding that the value of the ore was $3,505,361, and that it should have yielded $2,616,491 in bullion. I do not deem this an inconsistency. One sum stands for the total amount of gold and silver in the ores, and the other for the percentage (about 75 per cent.) which, in the opinion of the court, it should have yielded under proper treatment.

This objection disposed of, I come to the pivotal question in the case,—the value of the car-sample assays as a criterion of the value of the ore. The testimony is, without conflict, that, according to the general custom and course of dealing between the miners on the Comstock Lode and the managers and owners of custom mills, the battery samples are, and the car samples are not, regarded as the true index of the value of the ores; that all settlements between the miner and the miller are based upon the average assay of the battery samples, and that the car-sample assays are for the guidance of the miners, and useful as a check upon the mills. There is, also, no conflict in the evidence that the car samples always run above the true value of the ore. This fact was clearly proved when the plaintiff closed his case in chief by the testimony of his own witness, Mr. John W. Mackay, and it was much more fully and amply proved by a number of witnesses sworn on behalf of the defendants. The respondent's counsel, of course, contend that there is evidence on this point to sustain the finding of the superior court, and they cite certain passages from the testimony of Mr. Mackay and Mr. Holden in support of their argument, which I shall proceed to examine. Mr. Mackay, as I have stated, was the plaintiff's own witness, and being examined by him with reference to this matter, said: "We take car-sample assays at the mine; that is, the samples of the assays taken on top. There is always a difference between the battery and the assays at the mine,—that is, the samples of the assays taken on top. For various reasons there is a good deal of the assay that comes out on top that is covered up. We cannot get a sample from the top as close as we can in a 500-ton battery, but you get a very fair sample. To answer your question, I can tell you, if I examine the books, what has been the difference between the mine samples and the battery samples. Without stating specifically, I should think about $10 per ton. The top or car samples are the higher. Generally they run pretty close. Sometimes they run variable. It is a very difficult matter." Being asked what the battery sample ought to be, if car samples properly taken showed an assay of $72.12 per ton, his answer was: "About $62, probably $10 difference." In reply to another question, he said: "If the car sample was $42.62, that ought to pulp $32 or $33, or somewhere in that neighborhood." In answer to a question whether the difference would be less in ore of a lower grade, he said: "Sometimes, but they will average pretty much that,—about from $8 to $10; sometimes not so much, sometimes a little more." These clear, direct, and specific statements, made on his direct examination, were confirmed by his cross examination. On his redirect examination, when testifying to the specific point that even battery samples are not always correct, owing to mistakes of the assayers—as illustrated by the fact that he had frequently obtained from ore more than 100 per cent. of the battery assay—he added this statement: "If you take 50,000 or 100,000 tons of ore, taken out in a year or two years, and a car sample taken of all those, honestly and fairly taken, with the best methods known, the average of those car samples, some being too high, and some being too low, would pretty closely approximate the value of the ore. There is a difference, of course."

It is upon this passage of Mr. Mackay's testimony, standing alone, and construed without reference to what he had previously stated, and upon one even less to the purpose from the evidence of Mr. Holden, that counsel build their whole argument in support of the proposition that there is a substantial conflict in the evidence in regard to the disparity between the average assay of the car samples and the real value of the ore. The most they can possibly claim, however, is that while their only witness as to this matter has, in explicit terms and in answer to direct questions calling his attention to the precise point, stated and illustrated by two examples the fact that the car samples always go about $10 above the battery samples, he has, when testifying with reference to another point, made a statement in more general terms which is entirely inconsistent. For, upon the construction which counsel for respondent insist upon giving to the language last quoted, Mr. Mackay's answers are necessarily inconsistent. They cannot be reconciled, and counsel do not attempt to reconcile them, upon the theory that in Mr. Mackay's opinion the car samples are correct and the battery samples are incorrect,—both being fairly and honestly taken,—for he, like all the other witnesses, testifies directly to the contrary. So far as returns of bullion are concerned, he relies upon the battery sample exclusively. The car sample is merely a check. When the discrepancy between the two becomes too great, it is an indication that something is wrong in the working of the ore, which calls for investigation and correction. It indicates that there is some fault in the treatment; that there is not enough salt, or bluestone, or quicksilver in the pans, or not enough time allowed for amalgamation, or that there is some refractory combination in the ores which prevents amalgamation. The whole of his testimony from beginning to end, so far as it touches this point, teems with illustrations of his opinion that the battery assay, although fallacious in some instances, owing to mistakes of the assayer or other causes, is on an average, and in the long run, the only true test of the value of the ores. But really the testimony of Mr. Mackay does not require a construction which makes it inconsistent with itself. In the passage relied on by counsel for respondent, he was referring to the mistakes of assayers, and the insufficiency of a few samples, even from the battery, and he intended to explain that, although assays were sometimes too high and sometimes too low, these mistakes would in the case of 50,000 or 100,000 tons of ore taken out in a year or two neutralize each other, and the average would afford a fair index of the value of the ore; or, in other words, would afford a basis from which, with the proper deduction, the real value could be estimated. His closing words, "There is a difference, of course," must refer to his previous testimony, in which he states precisely what the difference is. But, even if I were mistaken in this view of Mr. Mackay's testimony, which makes it entirely consistent in itself, and if there were no escape from the conclusion that within a few minutes he made two diametrically opposite statements as to a point upon which all the other witnesses are agreed, I should say unhesitatingly that this did not make a substantial conflict in the testimony in regard to a matter which, whatever the truth about it may be, presents no opportunities for concealment or deception. If it is not true that car samples give an exaggerated value to the ore, there must have been many competent and trustworthy witnesses to the real truth, who could have been produced during the months that this cause was on trial. No such witness, however, was produced, unless it be true, as claimed by counsel, that Mr. Holden fills the gap. Mr. Holden was a witness called by the plaintiff in rebuttal for the purpose of proving the percentage of the precious metals that ought to be obtained by a proper system of working ores. As a general expert upon that point, he undoubtedly possessed superior qualifications. He is more than usually intelligent and exact in his statements, and apparently perfectly fair. But his testimony was confined to the point stated. He had no experience of his own in mining or milling on the Comstock, and made no pretense of knowing the relative accuracy of car and battery samples. His opinion was that, under proper treatment, the ores of the Comstock Lode of the grade of those in question here should yield a bullion return of from 80 to 85 per cent. of their real value. On redirect examination he made the following answer to a question: "In speaking about 80 or 85 per cent. return, I said from a fair sample of the ore,—a sample of ore taken in a correct, fair, accurate manner, at any stage. I do not care whether it is taken from the drift or any place; so long as you can get a fair, accurate sample of the ore, it should not change in character from where it is taken from the mine into the pulp." It seems a waste of time to notice the claim that Mr. Holden has here testified that car samples are reliable. All that he says is that, when you get a fair sample,

—a sample which truly indicates the value of the ore,—it makes no difference if it is taken from the drift in which the ore is mined. The expression he uses may be said to imply that possibly a fair sample might be obtained in that way, but certainly he does not say so, and the whole tenor of his testimony, as well as of all the other witnesses, is opposed to such a notion. There are reams of testimony in this record to the effect that the only way to sample ores is to take them out and mix them thoroughly, and that the more thorough the mixture the more reliable the sample,—the more numerous and the larger the samples, the closer the average; and there is nothing to the contrary. Mr. Holden himself, who is a large buyer of valuable ores, tells us what his own practice is. He has the ore spread out and thoroughly mixed. He then takes a large sample,—5, 10, or 20 per cent. of the whole, according to the grade of the ore,—and has it put through a sampling mill and tested. His process is, in fact, much more thorough and complete than the battery sample tests. He merely states an obvious truth when he says that, when you have got a fair and accurate sample, it makes no difference where or how it was obtained. The ore does not change its character in being reduced to pulp.

I should, perhaps, notice in this connection a claim advanced in the course of the oral argument, but not made in the briefs, to the effect that Mr. Lyman, a witness for defendants, testified in favor of the accuracy of the car samples. Mr. Lyman was the superintendent of the Consolidated Virginia and other leading mines on the Comstock, and testified from an experience of 30 years in mining and milling Comstock ores. Testifying as to his own practice at the Consolidated Virginia, he stated that mine and car samples were daily taken and assayed in the manner above described, and that samples were also taken from the ore after it had been loaded on the cars for transportation to the mills. On cross-examination he said: "Our object in taking these samples, the mining-car sample and the railroad-car sample, and having them assayed, is to ascertain as near as we can, correctly and positively, the value of the ore extracted from the mine. Then we claim that, from those samples, we can check the mill; that is, if the mill does not make a return of a proper per cent.,—that is, such a percentage as my experience would dictate was proper,—I would make a complaint of the mills." Upon this passage of Mr. Lyman's testimony, disconnected from all he had testified to before, and what he said almost immediately afterwards in the further course of his cross-examination, the claim is made that, according to his evidence, the value of the ore may be correctly and positively known from the car-sample assay. But Mr. Lyman does not say so, even in this passage, and what he said directly afterwards shows that he did not mean to be so understood. To make this plain I quote that part of his examination immediately ensuing: "Q. About what percentage,—if you can now recall, in your experience in handling the Consolidated Virginia ores,—about what percentage do the mills make of these car samples, the mining-car or the railroad-car samples; about what percentage? A. Well, I never figured them in that manner, and I don't know. Q. Well, I understood you to say that you took them as a check? A. Yes, sir; they are there on file. All these figures are on file in the office. We figured on a basis of the assay or value returned from the mine on the battery assay. The percentages are all figured up on the battery assay; that is the contract, I believe. The assays are not made by the mill. They are made by the mine. It is sent to the mine for assay. Q. I will ask you again how can you ascertain whether or not your ores have been properly worked, if the samples, if the battery samples from which samples are taken, are made wholly by the employés of the mill, or by the owners of the mill? A. I have answered that before. The only thing that we have is this check from the mine of the assay. Q. The mine assay? A. Yes, the mine assay; and that mine assay we take as a check. I will say right now, if you will permit me, that we never figured up the per cent. on the mine assay, but we figure it from the pulp from the mill, as the contract calls for. Q. Well, if you never figured the percentage, do you mean by that that you never paid any attention whatever to the railroad-car or mining-car sample assays when you come to investigate the question as to whether or not the mill company has returned you or made you a proper return for milling its ores? A. No, sir; I don't mean that at all. Q. Well, what do you mean? A. Well, I mean this: That there is a difference between the car assay in the mine and in the mill. It varies from $10 to $6 apiece. If you figure the 10 per cent. on the mill assay, and if you figure it on the mine assay, it will be so much. The per cent. from the mine assay will be less than that from the mill, because there is from $6 to $10 difference; but I have not figured that out, or worked it out, down to a point where it can be answered. Our books will answer whenever they are called for."

I have now quoted all the testimony cited by counsel to sustain the finding of the superior court that the value of the Hale & Norcross ores is correctly shown by the car-sample assays, and have only to repeat, what I said in the beginning, that in my opinion it does not raise a substantial conflict with the evidence of the various witnesses who testified that the car-sample assay always exaggerates the value of the ore. It remains only to notice the legitimate argument of counsel for respondent that, if the fact is as these witnesses claim, there ought to be some rational explanation of it. I quite agree with counsel on this point, that there must be some cause of uniform operation to bring about the invariable result that the average of the car-sample assay always goes above the real value of the ore; and that, if such cause exists, some one ought to be able to point it out. I think, however, that, aside from other suggestions of witnesses and counsel, a perfectly rational and probable explanation is to be found in the evidence. There was a strong preponderance of evidence to the effect that, not only on the Comstock, but in other localities, the richer portions of the ore are more easily broken, and in blasting and picking commonly break into smaller fragments than the poorer portions of the rock, and that the miner who takes the car samples habitually takes the smaller particles in preference to the larger ones, not only because he is instructed to do so, but because, under the operation of a natural law of mechanics, the finer portion of the ore is on the top and in the center of the car; that is to say, when the ore is shoveled from the floor of the drift into the car, the finer portions naturally rise in a cone in the center of the car, while the larger fragments roll down the sides, so that, when the car is filled and the load leveled off, the top is composed of the fine ore. I see no reason to doubt the correctness of this explanation, and, allowing it to be true, it is easy to see how at the end of every 24 hours the sample box would contain a lot of ore of higher grade than the mass of that which had been dumped into the ore bins. If my views as to the effect of the evidence on this point are correct, it follows that there is no basis left for the estimate of the court as to the amount of damage sustained by the Hale & Norcross Company by reason of fraudulent or imperfect milling. It has already been shown that, even on the theory that those ores actually contained the amount of gold and silver indicated by the car-sample assays, their total value was overestimated in the findings by more than $34,000. If this is deducted, and a further deduction of $10 a ton (according to the estimate of Mr. Mackay, the plaintiff's own witness) is made on account of the difference between the car-sample assays and the actual value of the ores, it reduces the estimate of the superior court over $900,000 on the original value of the ores, and makes a corresponding reduction in the amount of bullion supposed to have been lost or diverted; or, in other words, since the defendants were held for about 75 per cent. of the gold and silver supposed to have been contained in the ore, the judgment would require to be reduced by nearly $700,000. If, instead of deducting $10 per ton, only half that amount were taken off, the judgment would be reduced by over $350,000, to which must be added the greater portion of the loss apportionable to the ores worked at the Vivian mill, amounting, on the basis of the estimate of the superior court, to about $70,000. I do not add the whole of the supposed loss at the Vivian mill, because, as above shown, the principal error in overvaluation of the ores, according to the car samples, relates to ores sent to the Vivian mill, and the full deduction on that account has already been made.

It will be seen that, in all my calculations and estimates, I assume that 75 per cent. of the assay value of the ores is a proper return in bullion to be made by the mill. I would not have it supposed that I have overlooked the contention of counsel that there is evidence to sustain a finding that a higher return should be made from ores properly worked. But the obvious answer to this is that the superior court has made no such finding. On the contrary, it is as clear as any mathematical demonstration can be, that the superior court's estimate of damages rests upon the assumption that a proper return is $74^{6}/_{10}$ per cent., a fraction less than the percentage I have assumed. The evidence would easily have supported a finding in favor of a still smaller percentage, while a finding in favor of a higher percentage would have had no substantial support. The evidence of Mr. Holden that a return of from 80 to 85 per cent. ought to be made, when properly understood, perfectly agrees with that of the other witnesses. In his estimate he allows for moisture in the ore. He expects a return of from 80 to 85 per cent., but only from the number of dry tons, and the uncontradicted evidence in this case is that the Hale & Norcross ores contain from 8 to 10 per cent. of moisture, or, in other words, that in every 100 tons of ore sent to the mill there were at least 8 tons of water, and, consequently, not more than 92 tons of dry ore. Now 82½ per cent. (the medium of Mr. Holden's estimate) of 92 is only $75^{85}/_{100}$ per cent. of 100. This brings his estimate into substantial agreement with those of the other witnesses. Besides all this, it is proper to add that the court had another good reason for discounting Mr. Holden's opinion as to the ores in question. He had had no experience in working the Comstock ores, and knew nothing about them, except from his dealing in those of a high grade—ores running into hundreds of dollars to the ton, such as would bear transportation to San Francisco and Swansea, and justify reduction by smelting, leaching, and other thorough and expensive methods of treatment. The evidence all goes to show that ores of this grade can be economically worked, and commonly are worked, to a higher percentage than ores of a comparatively low grade. The testimony of Mr. Mackay to the effect that, in the early history of mining on the Comstock, mill owners would buy ore from miners at 65 per cent. of the car or wagon sample, and work them for what they could get out of them, does not raise a conflict upon this point. In those times there was no discount on silver, and the ores mined were of high grade. There is no evidence that the mode of sampling with a view to such sales from the miner to the miller was the same as that now employed in taking car samples, and it is not reasonable to suppose that the miller would rely upon samples taken exclusively by the miner without any participation by him. No doubt both parties took part in the selection of the samples from the wagons upon which, in those days, the ores were transported from the mine to the mill, and probably the result of the assays was a nearer approximation to the true value of the ores. But, even supposing it was not, and that a wagon sample giving an assay of $200 to the ton indicated a real value of only $190 or $180, the cost of a ton would be $130, and, if it was, by a more thorough treatment in the pans, such as its value would justify, worked up to 80 per cent., the yield would be $144, or, in other words, $14 per ton for milling. In ore of greater value the profit would have been correspondingly greater. All that this evidence of Mr. Mackay proves, then, is that the millers in early times felt that they could afford to purchase the class of ores then mined, upon the chance of getting out 80 per cent. of the precious metals by careful handling. It is in no wise inconsistent with his opinion that 75 per cent. of the battery sample of the class of ores now being mined is a fair return. Mr. Lyman's testimony is that 73 per cent. of the battery sample of the Consolidated Virginia ores is the return they have actually received, but, in answer to questions put to him on cross-examination, he said, in reference to a lot of ore averaging $48.33 per ton by car sample, that if he had owned them and sent them to mill, he should have hoped for a return of 65 per cent. of the car-sample assay, and should have expected nothing better. The proper deduction from this answer may be stated as follows: Sixty-five per cent. of $48.33, the car-sample assay, is $31.41, and this is 81$^7/_{10}$ per cent. of $38.33, the corresponding battery assay. So it appears that Mr. Lyman would hope to get 81$^7/_{10}$ per cent. of the battery sample. He does not say that he would regard it as evidence of fraudulent or dishonest milling if he got only 75 per cent., and according to his actual experience of what he deems correct milling, 73 per cent. of the battery sample has been returned. Finally, it may be said that, if the defendants were held for the return which Mr. Lyman would hope to get, i. e. 65 per cent. of the car-sample assay, the judgment on that basis would be more than $350,000 less than that which was actually rendered.

It is claimed that there is another serious error in the estimate of losses by milling, arising out of the disregard by the superior court of the discount on silver bullion. It is doubtful, however, if the evidence in relation to this matter is sufficiently clear to demonstrate the error alleged. The claim is that in all the car-sample assays (the basis upon which the court estimated the bullion contents of the ores in question) the silver was reckoned at $1.2929 per ounce,—that is to say, at its standard value according to the number of grains of pure silver (371.25) in a coin dollar,—and that in computing the loss the court has taken the same standard of value for the missing silver bullion, and awarded a money judgment for the resulting amount, when the actual market value of the bullion was at least 20 per cent. below the standard value. If this is so, it was certainly a very serious error, amounting, according to my estimate, to at least $100,000, and probably to a good deal more; for there can be no doubt that a judgment for the conversion of silver bullion, payable in coin, should be based upon the coin or market value of the bullion, and not upon an arbitrary standard of value above its market value. I do not find, however, any direct evidence that the car-sample assays were made upon the basis of $1.2929 per ounce of silver. The evidence, it is true, does show that the battery or pulp sample assays were based upon that assumed value, and since the car-sample assays were made by the same assayer, and at the same time, it is perhaps a fair inference that they were computed on the same basis. But, however this may be, a decision of the point is not necessary here. There must be a new trial of this issue for other reasons, and it is sufficient to indicate our views as to the proper allowance to be made, in case it shall appear that the ore assays were based upon an assumed value of silver bullion different from its market value. The true method of determining the loss sustained by imperfect or fraudulent milling is to ascertain the quantity of gold and silver actually contained in the ore, as nearly as practicable; next, to ascertain what percentage of the bullion contents should be returned by fair and honest milling, and the difference between this amount and the actual return in the actual damage. To make these computations, it is obvious that the standard of value must be the same in the assays of ore and in the assays of bullion returned, and it makes no difference whether this is $1.2929 or any other figure, provided that it is the standard used by the assayer of the ores, and is uniform. By this means alone can the true difference between the proper return and the actual return be correctly determined. When this has been done, in order to determine the amount of the damages for the purpose of the judgment, the money value of the difference must be obtained by allowing for the discount on the silver, whatever it was. I find that, roughly speaking, the Hale & Norcross ores, according to the car-sample assays, contained about $2 of silver to $1 in gold. This is my own estimate, based upon a comparison of a large number of assays taken at random, and possibly erroneous. The mint returns of the bullion extracted from these ores show an average disparity considerably less. This is accounted for in great part by the fact, very clearly shown from the evidence, that the mint return was based, not upon a valuation of $1.2929 per ounce of pure silver, but upon the price which the mint was paying for silver, which was considerably below that rate. This indicates that the amount of silver bullion returned by the mills was underestimated, as compared with the bullion in the ores, for the silver was valued at less per ounce in the bullion than in the ores. It ought to have been estimated on the same basis, and the difference, when ascertained, should have been reduced to its money value. Since the necessary consequence of these errors in the findings is that there must be a new trial as to the question of damages from imperfect milling, it does not seem worth while to discuss the evidence offered to corroborate the general charge of fraud in the milling, by which I mean the evidence intended to show how it was possible to debase the battery samples, or to run the value of the ore into the tailings by improper amalgamation, or to abstract the amalgam, or purloin the bullion. All these things have their place, as tending more or less to corroborate other evidence of improper milling, and are entitled to such weight as the trial judge may think belongs to them, when considered in connection with the mere direct evidence of the assay value of the ores, the bullion returns made, and the percentage that ought to be returned with correct milling. There are one or two matters, however, connected with the milling that require to be noticed.

Exception is taken to the finding to the effect that the slimes and concentrates resulting from the working of these ores were the property of the Hale & Norcross Company, on the ground that all the evidence shows that, according to the universal practice and understanding, the slimes and concentrates become the property of a custom mill. This finding, like that in regard to the mining of worthless ores, is not made the basis of any award of damages and rests upon similar grounds. The court, being of the opinion that 75 per cent. of the car-sample assay was a proper return of bullion, necessarily concluded that a large part of the value of these ores was improperly run into the tailings, and, consequently, that the tailings did not become the property of the mill. And this was a correct conclusion from the premises; for it is only when the milling has been reasonably efficient that the tailings can rightfully be claimed by the mill, according to the custom. But the court gave no separate or additional damages on account of the value of the slimes and concentrates, because their value was included in the 75 per cent. of the car-sample assays with which the defendants were charged.

A claim is made on behalf of the respondent that the superior court was justified by the doctrine, "Omnia presumuntur contra spoliatorem," in assuming that the Hale & Norcross ores were of the value shown by the car-sample assays, and, in support of this contention, they cite the celebrated ring case of Armory v. Delamirie, 1 Strange, 505. That was a case in which the defendant, a jeweler, had taken a ring, removed the jewel, and kept it wrongfully from the plaintiff, and the jury were directed to make the value of the best jewel that would fit the setting the measure of their verdict, unless the defendant would produce the jewel and show it to be of less value. The meaning and the limitations of the doctrine of this case are stated in the notes appended to the report, in 1 Smith, Lead. Cas. (Hare & W. Ed.) 589: "It signifies that, if a man by his own tortious act withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted. * * * When the nature of a wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of the loss, the law will aid a recovery against the wrongdoer, and supply the deficiency of proof caused by his misconduct, by making every reasonable intendment against him, and in favor of the party injured. A man who willfully places the property of others in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own or in any other manner, will consequently be compelled to bear all the inconvenience of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole, if the parts cannot be discriminated, or responding in damages for the highest value at which the property in question can reasonably be estimated. * * * The presumption, 'Contra spoliatorem,' also arises when a party to a suit or controversy willfully destroys or suppresses by wrongful or dishonest means a deed, will, or other instrument, which belongs to, or would be admissible if called for by, the opposite party, and will justify a court or jury in drawing the most unfavorable inference, consistent with reason and probability, as to the nature and effect of the evidence which they have thus been precluded from using and examining as a means for the discovery of truth. * * * The extent and force of the presumption must evidently vary with the nature of the wrong and the circumstances under which it was committed, and it will not, perhaps, even when most hostile, be an absolute and insuperable bar. * * * The presumption arising from the wrongful destruction or suppression of evidence will not, however, justify a judgment or decree without evidence, nor the substitution of conjecture or allegation for proof; and its legitimate effect is confined to rendering evidence admissible which could not be received under ordinary circumstances, and the deduction of every inference from the evidence actually given, in favor of the injured party, and against the spoliator. * * * The better opinion would seem to be that the mere fact of withdrawing or refusing to produce an instrument which belongs exclusively to the party by whom it is withheld will not render him a spoliator, nor give birth to the extremely hostile presumption which attaches to the wrongful suppression or destruction of the property of others, and will simply authorize the introduction of secondary evidence, which will be construed as favorably as the circumstances will permit for the party who is deprived of the means of full and accurate proof. * * * A line should obviously be drawn between those instruments or means of evidence in which the parties have a common interest, and consequent right to expect that they will be forthcoming when needed, and those which are intended only to meet the eye, or kept solely for the benefit, of the person by whom they are withheld; and the conduct of a tenant who refuses to supply the loss of a lease by the production of the counterpart is viewed in a more unfavorable aspect than that of a merchant or tradesman who withholds private books or papers from a public examination which he may desire to avoid for reasons having little or nothing to do with the particular case in which their production is demanded."

Applying the doctrine as expounded in the foregoing quotations, it falls very far short of sustaining the contention of respondent. In the first place, the facts of the case do not make it applicable. The milling of the Hale & Norcross ores was not in itself a wrongful act. The means by which the employment to mill them was obtained was wrongful, and entails the penalties which are to be considered hereafter; but the milling, if properly conducted, was a lawful, legitimate, and necessary operation. The form of the ores was, of course, changed, and their identity destroyed, but the usual means and the only means of establishing their value were taken, and the evidence preserved. There were the car-sample and the pulp-sample and the settler-sample assays, all taken according to the usual course of the business, and all preserved. They constitute the most direct and trustworthy evidence of the real value of the ores, while all other means of proof are indirect and secondary. So far as they are indefinite or uncertain, the willful suppression of any secondary evidence or corroborating circumstances, which would tend to clear up such uncertainty, would justify a court in giving to the direct evidence the strongest construction in favor of the other side that it would reasonably bear. But, as has been shown, the evidence in this case is all to the effect that the car-sample assay is invariably and largely in excess of the actual value of the ore, and it is not reasonable in the face of such evidence to assume the car-sample assay as a basis of computation. This is not holding that the respondent is bound by the battery samples, or that a deduction from the car samples of $10 per ton, or of any other definite sum, must be made, but only that the trial court should give proper consideration to the uncontradicted testimony of all the witnesses, and make such deduction as in its judgment is reasonable in view of all the evidence.

As to the claim that evidence was suppressed by failing to keep any record of the bullion resulting from the working over of concentrates, and by the refusal to produce the books of the Nevada Mill & Mining Company, the record does not bear out the assertions of counsel. There was no record kept in the mill of the working of the concentrates, or, so far as appears, of any other part of the business. The books containing a record of the business of the mill were kept at the office of the corporation, and the testimony of Williams, the superintendent of the mill, is that the account of the proceeds of the concentrates of all the ore worked in the Nevada mill, amounting to 93,000 tons, inclusive of 53,000 tons of Hale & Norcross ore, was kept in the books of the corporation, and showed a product of only about $14,000. Mr. Williams, when the crude bullion was delivered to him by the foreman of the mill who had charge of the retorting, and who kept a memorandum of the weight, took the bullion to the assayer, who in a few days returned the resulting bars with his certificate of weight, fineness, value, etc., to the office; and he says that, in the meantime, he made no written entry of the weight, but carried it in his head. This may be a loose way of conducting business, but it is not a suppression of evidence. As to the refusal to produce the books of the company, counsel does not cite the evidence in the record, and I have been unable to discover that any demand for the production or inspection of the books was ever made.

Another alleged suppression of evidence was in the refusal of the cashier and clerks of the Bullion & Exchange Bank of Carson to exhibit the books of that concern at the time of the taking of their depositions. Evan Williams was vice president and principal stockholder of the Bullion & Exchange Bank, and Hofer, the cashier, and Brown and Peters, the clerks, may be said to have been in his employ and under his control. He was also a stockholder of the Nevada Mill & Mining Company, and superintendent of its mill and of the Mexican mill. But he has never been a party to this action, and at the time the depositions were taken neither Hayward, Hobart, nor the Nevada Mill & Mining Company had been brought in. No demand was then made, nor has any demand been since made, upon any party to this action for a production or inspection of the books of the bank, and how, under the circumstances, they can be treated as spoliators of testimony is not apparent.

In connection with this subject of suppression and spoliation of evidence, a good deal has been said in reference to the mint transactions, which were more particularly urged in the argument as evidence of the purloining of bullion, or of large returns secured by the mill owners from the working over of tailings, etc. As to the weight of this evidence as affecting the question of improper milling, any discussion in this opinion in anticipation of a new trial would be out of place, and with reference to the doctrine of spoliation little need be said. It is claimed that the mint records were improperly kept by Hofer, cashier of the Bullion & Exchange Bank, and also acting superintendent of the mint; and the principal irregularity specified is that, in entering the deposits of bullion, instead of giving the name of the mine or locality where produced, he would enter it as "unknown," contrary to law and his duty; and the claim is that these fraudulent entries were made at the instance of Williams for the purpose of covering up abstractions of Hale & Norcross bullion. The only law to which we have been cited in reference to this matter is section 3506 of the Revised Statutes of the United States, which does not make it the duty of the superintendent of the mint to note the place of production of the bullion. But there is probably some regulation of the department, or perhaps some later statute, which does require something of the kind, for the evidence in this record shows that such was the practice at the Carson mint. But it also shows that, long before the reduction of these ores was commenced, there were frequent deposits of bullion, the source of which was entered as unknown. Indeed, such entries were more frequent before than since that time. I do not discover any evidence in the record as to when Hofer first went into the mint, and consequently it does not appear that any of the entries referred to were made by him. Indeed, it does not appear that he was ever the superintendent of the mint,—only that he was acting superintendent in August, 1891, a year after these transactions were closed. But, if it is true, as stated by counsel on the argument, that he first went into the mint subsequent to March 4, 1889, then much the larger proportion of the entries of unknown bullion were made before his advent, and in making the compartively small number of similar entries, assuming that he did make them, he was following the established practice. I can only infer from the evidence that parties sometimes deposited purchased bullion, the origin of which they did not know. I should add that, notwithstanding the effort I have made to comprehend the evidence relating to these matters, I discuss it with some diffidence. It is extremely voluminous, and consists largely of tables of figures. It does not appear to have been introduced at the trial, or printed in the record with any regard to chronological order, or any other system of arrangement. Very few exact references are made by counsel to the particular folios, and I am far from sure that I have examined with due attention the portions upon which they particularly rely. I have, however, carefully examined the pages cited by counsel for respondent on the oral argument, as an illustration of the suspicious practice of the mint officials in entering bullion as unknown. The pages referred to are 1354 to 1360, inclusive. The list contained on these pages seems to have been completely misunderstood by counsel. It does not, from beginning to end, mention the place of production of a single lot of bullion. It gives the name of the depositor, the name of the person on whose account the deposit is made, the name of the person receipting for it, a description of the deposit, whether bars or amalgam, the weight, the value and mode of payment. That is absolutely all. Under the heading "On Account of" appear the names of many different mining companies, and it may be surmised that their mines produced the bullion, but their names are mentioned as owners, not as producers; and in the same column appear the names of other corporations and persons besides the Bullion & Exchange Bank, and in no case is it stated where the bullion was produced. Evidently, the list was not intended to show the place of production, and the word "Unknown" does not occur in it. This being the particular part of the evidence selected by counsel to illustrate their point, I am convinced they have overrated its force.

It does not seem necessary to further extend this discussion of the evidence relating to the value of the ores, and the losses caused by fraudulent and imperfect milling. As to the other element or item of damage,—exorbitant charges for milling,—the evidence and findings are so clear that nothing is left for decision, except a pure question of law. The finding of the superior court that the cost of milling did not exceed $4.50 per ton is fully sustained by the evidence; and it is equally clear that $4.50 was not a fair price for milling as between a miner and miller dealing on equal terms, and under circumstances entitling the miller to a fair compensation for the use of his mill. The question, therefore, is whether, in view of the manner in which the contract to mill these ores was obtained and executed, the mill owners are entitled to receive anything for the use of their mills? If they are, there must be a new trial of this part of the case; if they are not, then, so far at least as Levy and the mill owners are concerned, there is no need of a new trial. As to the other directors against whom there are several judgments, the case may be to some extent different. Were the mill owners in this case entitled to retain, out of the moneys paid them for milling, the ordinary and reasonable price of milling, including a fair return on the capital invested in the mills? The authorities to which we have been cited, including the case so much relied on by counsel for respondent (Distilling Co. v. Pratt, 45 Minn. 215, 47 N. W. 789), are all consistent with, and several of them directly sustain, the proposition that a trustee who has contracted with himself on behalf of his cestui que trust, and has received the stipulated price of his goods or services, although he cannot, when called upon to account, retain the whole sum so received, may be, and in equity ought to be, allowed to retain what is equivalent to the benefits and advantages actually received by his cestui que trust; or, in other words, that he is entitled to the reasonable value of his goods or services, measured by their current market price. According to this doctrine the appellants contend that the mill owners in this case must be allowed the ordinary market price of milling Comstock ores, which was $7 per ton. But I do not think this case can be determined by the rule applied to cases which involved no element of misconduct, except an express agreement of a trustee to pay himself more than reasonable value. Here, as has been shown, was a contract which made it to the interest of the actual manager of the mining company to sacrifice the interests of the stockholders by mining and milling ores which would not pay the cost of mining added to the current price of milling. The court has found, and the evidence is sufficient to sustain the finding, that such low-grade ores were intentionally mined and sent to the mills, involving certain loss to the stockholders if the current price were allowed, but involving no loss if the millers were limited to the actual cost of milling. Under these circumstances, it was not inequitable to allow only the actual cost of milling. It is true that a large proportion of the ores were of sufficient value to pay a profit on the mining and milling at current rates, with a return of 75 per cent. of the pulp assay, and it may be argued that, as to such ores, the market price of milling should be allowed. But in cases of this kind the courts cannot be expected to go into very nice calculations and estimates to save parties from the consequences of wrongdoing; and where it appears that the intention was to mine and mill ores that would barely pay the cost of handling, and where this intention was in fact carried out, a court of equity is justified in applying to the whole transaction one measure of compensation, and that measure must be actual cost. My conclusion is that the superior court did not err in requiring the mill owners to account for $2.50 per ton for all the ores milled by them; and this part of the judgment, which is erroneous only so far as it includes the ores worked at the Vivian mill, may be modified upon the findings contained in the record. The proper sum is $2.50 per ton on 84,079 tons, the quantity of ore sent to the Nevada and Mexican mills, amounting to $210,197.50. To this extent the judgment against Hayward and Levy is fully warranted by the findings and evidence.

As to the Nevada Mill & Mining Company, it would be necessary to reduce this part of the judgment still further on account of the fact that it had nothing to do with the ores reduced at the Mexican mill, but this and all other errors in the proceedings affecting that corporation become immaterial in view of my conclusion that it was never brought under the jurisdiction of the superior court. It is a Nevada corporation, and the only service of summons was made on Evan Williams, the superintendent of its mill, at Virginia City, who was at the time of service in attendance upon the trial of this cause, but not engaged in attending to any business of the corporation in this state. Such service was wholly insufficient to confer any jurisdiction over the company, and the judgment as to it is erroneous in toto.

As to the directors of the Hale & Norcross Company, other than Levy, it is not seriously contended that they are liable, except on the ground of negligence, and it is clear that such was the opinion of the superior court. But they were not charged with negligence in the complaint, but only with fraud. Fraud and negligence, however culpable, are not the same thing. It is true that, when negligence causes an injury of the same character as would be occasioned by an intentional fraud, it is visited with the same consequences, so far as compensation to the injured party is concerned, but the plaintiff has no right to demand a conviction of fraud when no fraud has been committed. When he relies on fraud he ought to plead fraud, and when he relies on negligence he ought to plead negligence, not only because the defendant has a right to know what the charge is which he is called upon to meet, but because the defenses are different. An action for relief on the ground of negligence is ordinarily barred by the statute in a shorter time than an action for relief on the ground of fraud. In this case, however, it is contended that the action against the directors is founded upon a liability created by statute, and, consequently, that the same limitation of the right to maintain the action applies as in cases of fraud. Code Civ. Proc. § 338. The statute referred to is section 3, art. 12, of the constitution, which contains the following provision: "The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association during the term of office of such director or trustee." This clause of the constitution has never been construed, so far as I can discover. According to its literal terms, every director of a corporation is severally liable for the full amount of any misappropriation of its funds during his term of office, without respect to any question as to his own culpability, and the argument of counsel is that it must be enforced according to its letter,—"ita lex scripta est,"—and hence a director, no matter how innocent he may be, and no matter how hard the case may be, must be adjudged to pay, at the suit of any stockholder, the whole of any misappropriation of corporate funds occurring during his term of office. And therefore, according to the contention of counsel, if some large stockholder of the Hale & Norcross Company, with the sole purpose of protecting his own interests and the interests of the other stockholders, had, by cumulating his stock, secured an election to the board of directors, and as a member of the board had opposed the milling of low-grade ores, or the payment of more than $4.50 per ton for milling, and had to the utmost of his ability guarded the interests of the company in every direction, he could, nevertheless, have been singled out by any stockholder and compelled to make good the entire loss caused by the willful and corrupt misconduct of a hostile board. If this construction must obtain, it seems very clear that no man with any property or character to lose will be willing to serve as director of a California corporation after it becomes known that the constitution contains such a provision. I do not think, however, that the construction contended for can be allowed. It does seem that it was the intention of the framers of the constitution to make each director of a corporation severally liable, whether individually culpable or not, for certain kinds of losses to the corporation occurring during his term of office; that is to say, he is made liable for embezzlement or misappropriation of corporate funds by officers of the corporation. But in my opinion the word "misappropriation" is to be construed by the maxim, "Noscitur a sociis." It means something like embezzlement, or, in other words, it means the misapplication of funds intrusted to an officer for a particular purpose, by devoting them to some unauthorized purpose, and does not apply to the payment of an extravagant price for services or materials properly appertaining to the business of the corporation,—which is this case. For losses occasioned by such means the law affords an ample remedy, without the need of resorting to the constitution, against those who are justly responsible, whether by reason of fraud or negligence; but the law does not in such cases visit upon the innocent the sins of the guilty, and if the liability arises from negligence, the action must be commenced in two years after it accrues, whereas, if it arises out of fraud, it may be commenced at any time within three years after the discovery of the facts. In this case, if the directors had been sued for negligence only in paying too much for milling the ores, the statute of limitations would have been a complete defense as to some of them, and a partial defense as to others. For these reasons I think the directors other than Levy are entitled to a new trial of the whole issue.

Objection is made to the right of the plaintiff, Fox, to maintain the action, upon the ground that the findings and evidence show that he made himself a stockholder after the occurrence of the injuries complained of, for the express purpose of bringing this action, that he acquired but a small amount of stock at that time, and that he never had any substantial interest in the corporation at any time. The finding of the court is, however, that he was at all times a stockholder, and as this finding is not attacked in the specifications of grounds in the statement on motion for a new trial, we cannot look at the evidence; and in construing the finding we must hold that it means that he was a stockholder in a substantial sense.

Objection is made to the form of the judgment or judgments upon various grounds, but these are objections which should have been made to the complaint. Having waived any objection to the complaint on the ground of misjoinder, etc., I think the objection to the several judgments on account of their mere form comes too late. In form they follow the complaint, and, if the several judgments had been for the respective amounts for which the defendants were liable, the form in which they were entered would have afforded no substantial ground of complaint. In view of these conclusions upon the main points in controversy, most of the other assignments of error become immaterial, and, so far as the points not herein particularly discussed seem likely to arise upon a new trial, I see no substantial error calling for particular discussion.

To summarize the above views, my conclusion is that the record sustains, or fails to sustain, the findings and conclusions of the superior court in the following particulars:

1. That the defendants Hayward, Hobart, and Levy formed a fraudulent combination and agreement for mining and milling the ores of the Hale & Norcross Silver Mining Company, but that the other directors of the mining company were not parties to this agreement, but were merely negligent in the performance of their duties, and are therefore chargeable only with such negligence, and are not chargeable with any actual fraud.

2. That the Mexican and Nevada mills were under the control of Hayward, Hobart, and the Nevada Mill & Mining Company, but that it is not shown that the Vivian mill was under their control.

3. That Hayward, Hobart, and Levy, with the acquiescence and consent of the officers of the Hale & Norcross Company, controlled the affairs of that company.

4. That Hayward, Hobart, and Levy, in pursuance of their agreement aforesaid, caused a quantity of inferior and worthless ores to be extracted from the mine and to be milled, after being mixed with ores of a higher grade.

5. That the Hale & Norcross Company paid $7 per ton for milling said ores; that the actual cost of milling the same was but $4.50 per ton; that by reason of their fraud, as aforesaid, the said defendants were entitled to receive only the actual cost of milling said ores; that by reason of having been required to pay $7 per ton for milling said ores, the Hale & Norcross Company had sustained damage in the amount of $210,197.50.

6. That the evidence is insufficient to sustain the finding of the court that the Hale & Norcross Company sustained damage by reason of the imperfect milling of the ores in the amount of $789,618, and that the actual amount of damage sustained thereby cannot be determined from the findings of the court.

7. That the Nevada Mill & Mining Company, not having been served with process, was not before the court as a defendant.

The cause is therefore remanded to the superior court with the following directions, viz.: The judgment appealed from is set aside, and the superior court is directed to enter a judgment, as of the date of its former judgment, against Alvinza Hayward and H. M. Levy for the sum of $210,197.50, with interest from that date, upon the issue presented by the claim for having paid an excessive price for milling the ore in the Mexican and Nevada mills, and upon that issue the order denying a new trial as to these appellants is affirmed. As to the other appellants, except the Nevada Mill & Mining Company, the order denying a new trial as to this issue is reversed, and a new trial thereon ordered. Upon the issue presented by the claim for damages sustained by reason of the imperfect and fraudulent milling, the order denying a new trial is set aside as to all the appellants, and the court is directed upon the evidence already taken in the case, and such other evidence as may be presented by either party, to make findings in accordance with the views hereinbefore expressed. Upon the amount, if any, of such damage sustained by the Hale & Norcross Company, in addition to finding the value of the ore delivered to the mills, the court is directed to find the amount and value of the bullion that should have been returned therefor. The court should also find what amount of this value of the ore delivered to the mills was necessarily lost in working, or would not under fair milling be separated from the baser matter, and also the amount of money, if any, received by the mills from the working or sale of the tailings or residue of the ores. Until the Nevada Mill & Mining Company has been brought before the court, the court will make no trial of the issues against that company.

We concur: HARRISON, J.; VAN FLEET, J.; HENSHAW, J.; TEMPLE, J.; McFARLAND, J.

GAROUTTE, J. (concurring). I concur in that portion of the judgment which is affirmed, but dissent from the opinion of the court wherein it is held that the evidence is insufficient to support the finding of fact to the effect that 74.6 per cent. of the car-sample assay is a fair return to the Hale & Norcross Company. The actual return to this mining company by the milling company was but 52 per cent. of the car-sample assay. This was not enough. No argument or citation of facts is necessary to prove it. Everybody knows it. But the all-important question is, how much bullion in excess of this 52 per cent. should have been returned to the mining company under the evidence found in this record? There is the rub. Mr. Lyman, superintendent of the Consolidated Virginia mine, and one of the principal witnesses for the defense, stated that he would hope to get a return of 65 per cent. of the car-sample assay. And, if I had been the trial judge, upon this and other evidence introduced, I should have recognized the justice of a return to the mining company to that amount at least. But the true rule to be invoked by a justice of this court, in determining the sufficiency of the evidence to support a finding of fact made by a trial court, is not what such justice would have done upon the evidence, if sitting as a trial judge, but, rather, is there a substantial conflict in the evidence? And the question of the presence of a substantial conflict is in no way dependent upon the great number of witnesses upon the one side, and the limited number upon the other; for it is often the case that one shall prevail against the many. For the foregoing reasons, and many others unnecessary to detail, in a case like this the finding of a fact by a trial court should not be set aside without the soundest and most convincing reasons. The opposite conclusion should be so plain that a mere statement of the evidence would indicate it. It should not be necessary to resort to an elaborate and complex analysis of the evidence in detail to prove it. The witness Holden testifies that the mining company should have had a return of 85 per cent. upon the basis of the pulp-sample assay. If we allow a variation of 10 per cent. between the car-sample assay and the pulp-sample assay, then under this testimony there should have been a return to the mining company of about 76.5 per cent. of the car-sample assay. It is attempted to reduce this percentage by a claim of allowance or discount for moisture and evaporation. There appears to have been but little importance attached to this question of moisture during the progress of the trial, and all indications point to it as somewhat of an afterthought. But, however that may be, I think a slight reduction would satisfy its claims; and, in view of this testimony, taken in connection with that of Mr. Mackay and others, I think there is sufficient evidence in the record to support the finding which the majority of the court hold to be without support.

108 Cal. 475

FOX v. HALE & NORCROSS SILVER MIN. CO. et al. (No. 15,414.)

(Supreme Court of California. Aug. 6, 1895.)

ACTION FOR BENEFIT OF CORPORATION—CONSPIRACY OF OFFICERS—RECEIVER TO COLLECT JUDGMENT.

Where, in an action by a stockholder against the president of the company and others for conspiracy to defraud the company, judgment is rendered for plaintiff, it is proper to appoint a receiver to collect the judgment and distribute the proceeds in conformity with its terms.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by M. W. Fox against Hale & Norcross Silver Mining Company and others for conspiracy. Judgment was rendered in favor of plaintiff, and from an order appointing a receiver to collect it, defendants appeal. Affirmed.

W. F. Herrin, Lloyd & Wood, Mesick & Waters, Garber, Boalt & Bishop, Edward R. Taylor, and M. M. Estee, for appellants. Wm. T. Baggett, L. D. McKisick, and E. S. Pillsbury, for respondent.

BEATTY, C. J. The facts of this case and the material parts of the judgment of the superior court are fully set forth in the opinion just filed in case No. 15,301. 41 Pac. 308. This is a separate appeal by the Hale & Norcross Silver Mining Company from that part of the judgment appointing a receiver of the moneys collected on the execution, and directing him to pay to the plaintiff's attorneys, as compensation for their services, 25 per cent. of all moneys so collected. Since the appeal was taken it has been voluntarily dismissed by the appellant, so far as the amount of the allowance to attorneys is concerned, so that it now stands as an appeal from that part of the decree appointing a receiver, and involves only the question of the power of the court to make such appointment. There is no doubt, we think, that the case was one in which the court had power to appoint a receiver to carry its judgment into effect. The action was not prosecuted by the plaintiff in his own right, or for his own exclusive benefit. He sued in behalf of the corporation to recover a fund in which others were equally interested, and the judgment in his favor was for the use and benefit of the corporation. He was, therefore, not entitled to receive the amount of the judgment himself, but clearly was entitled to an allowance, out of the moneys collected, of his reasonable expenses, including counsel fees. This right to his expenses was sufficiently shown by the allegations of the complaint, and the prayer for general relief authorized the court to make proper provision for their payment. The appointment of a receiver to apportion the fund and pay it over to the parties, according to their respective rights and subject to the direction of the court, was a proper provision. The want of findings to support the allowance of attorneys' fees becomes immaterial in view of the dismissal of the appeal from that part of the decree. The order appointing the receiver is affirmed.

We concur: McFARLAND, J.; VANFLEET, J.; GAROUTTE, J.; HENSHAW, J.; HARRISON, J.; TEMPLE, J.

108 Cal. 478

FOX v. HALE & NORCROSS SILVER MIN. CO. et al. (No. 15,612.)

(Supreme Court of California. Aug. 6, 1895.)

DEATH OF PARTY PENDING SUIT—FILING FINDINGS NUNC PRO TUNC—ENTRY OF JUDGMENT—MAINTENANCE AGAINST EXECUTOR.

1. Code Civ. Proc. § 669, providing that if a party die after decision and before judgment the court may render judgment on the decision, does not deprive courts of authority, when a party dies after the submission of a case but before its decision, to order the findings to be filed nunc pro tunc as of the date of submission.

2. Where, in an action by a stockholder for conspiracy to defraud the company, one of the defendants dies after the case is submitted but before its decision, the court should not order that judgment be entered against him nunc pro tunc as of the date of submission, but should direct that it be entered at the same time as that against his codefendants.

3. Under Code Civ. Proc. § 1584, providing that an action may be maintained against an executor of a testator who, in his lifetime, has wasted, destroyed, or converted to his own use goods or chattels, where deceased died pending an action by a stockholder against him and the president of the company for conspiracy to defraud the company, the action can be maintained against his executor.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by M. W. Fox against Hale & Norcross Silver Mining Company and others for damages for conspiracy. Defendant Hobart died after the case was submitted, but before its decision, and from an order that the findings be filed, and judgment against him be entered nunc pro tunc, his executors appeal. Order modified.

W. F. Herrin, Lloyd & Wood, Mesick & Waters, Garber, Boalt & Bishop, Edward R. Taylor, and M. M. Estee, for appellants. Wm. T. Baggett, L. D. McKisick, and E. S. Pillsbury, for respondent.

HARRISON, J. This appeal is taken by the executors of W. S. Hobart, deceased, and involves the same questions which were presented upon the appeal of Hayward et al. in the same action, No. 15,301, recently decided.

41 Pac. 308. The cause was tried and finally submitted to the court for its decision May 3, 1892, and on the 26th of May the court filed a written opinion announcing its conclusions, and directing counsel to prepare findings and a decree in accordance with said opinion. Hobart died June 2, 1892, and upon proper proceedings therefor the appellants, Cross and Bridge, who had been appointed the executors of his last will and testament, were made parties defendant in the place and stead of Hobart, and thereafter, upon proper notice to them, the court, on motion of the plaintiff, ordered its findings and a judgment thereon to be entered against Hobart nunc pro tunc, as of the 26th day of May, 1892. From the judgment thus entered, the executors have appealed, and urge in support of their appeal that, inasmuch as the court had not made its decision prior to his death, the action against him had abated, and the court was not authorized to enter a judgment nunc pro tunc, as of a date anterior to his death.

The authority of a court to order its judgment to be entered nunc pro tunc is inherent in the court, and is to be exercised for the purpose of doing justice between the parties. A court will always exercise this authority when it is apparent that the delay in rendering the judgment, or a failure to enter it after its rendition, is the result of some act or delay of the court, and is not owing to any fault of the party making the application. One class of the cases in which this authority may be exercised, says Mr. Freeman, comprises those "actions in which no judgments have ever been rendered, but which are, so far as the suitors can make them, in condition for the rendition of final judgments." Freem. Judgm. § 57. "The rule established by the general concurrence of the American and English courts is that, where the delay in rendering a judgment or a decree arises from the act of the court,—that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, through the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties,—the judgment or the decree may be entered retrospectively, as of a time when it should or might have been entered up. In such cases, upon the maxim, 'actus curiæ neminem gravabit,'—which has been well said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice,—it is the duty of the court to see that the party shall not suffer by the delay. A nunc pro tunc order should be granted or refused as justice may require, in view of the circumstances of the particular case." Mitchell v. Overman, 103 U. S. 62. See, also, Blaisdell v. Harris, 52 N. H. 191. Whether the decision of the court is to be expressed in the form of findings of fact, or in the form of a judgment, or both, is immaterial. The principle upon which its action is to be sustained is that justice may be done between the parties. If the cause has been tried and finally submitted to the court for its judgment, the rights of the parties are to be determined as they existed at the time of such submission, and neither party is to be prejudiced by the delay of the court in rendering its judgment. In Campbell v. Mesier, 4 Johns. Ch. 342, the cause had been submitted to the chancellor upon proofs taken before the master, and after argument but before decision one of the defendants died. The chancellor ordered the decree to have relation back, and to be entered as of the date when the cause was finally heard.

If, as is provided by sections 632 and 633, Code Civ. Proc., the making and filing of findings of fact is essential to its decision, the court has the same authority to order these findings to be filed nunc pro tunc as it has to order the judgment thereon to be so entered. These various acts—the making, as well as the filing of findings, and the entry of judgment—are only parts of the decision which the court has been invoked to make upon the submission of the cause, and together constitute the final determination of the rights of the parties. The decision which the parties have invoked the court to make is not necessarily the statutory and technical "decision" referred to in section 633, Code Civ. Proc., but is the final determination of the rights of the parties, and includes every step or act of the court which is requisite to a final judgment upon their rights. The rights of the parties are not to be prejudiced by the delay of the court in respect to any of these acts or proceedings, and the court is authorized to direct the making or filing of its findings of fact and conclusions of law, as well as the entry of a judgment thereon, nunc pro tunc as of such date as will preserve these rights.

As the rule has its origin in a purpose to prevent a failure of justice, it is necessary to invoke it only to the extent that is requisite in effecting this purpose. If the Code were silent regarding the procedure in case of the death of a party pending litigation, the court would be authorized to make its decision as complete as if it had become final prior to his death. Section 669, Code Civ. Proc., however, provides: "If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in course of administration on his estate." The effect of this section, in providing for the entry of a judgment which is payable out of the estate of the decedent, affords a statutory procedure which was unknown to the common law, and to that extent removes the necessity of directing the judgment to be entered upon the decision as of a date anterior to his death. It does not, however, do away with the rule that authorizes the court to direct that its decision, so far as the same shall be necessary to protect the rights of the parties, shall be entered nunc pro tunc, as of a day anterior to the death of the party. In Re Page's Estate, 50 Cal. 40, it was held that the effect of entering a judgment under the provisions of section 202 of the practice act, which corresponds to section 669, Code Civ. Proc., was the same as if it had been ordered as of a date anterior to his decease, except that it could not be made to charge the estate with a lien which should have priority, and that it was payble only in due course of administration, and that the proper practice was to enter the judgment against the deceased by name.

In the present case, therefore, it was proper for the court to direct that its findings of fact and conclusions of law thereon should be filed as of a date anterior to the death of Hobart. By so doing the decision became in all respects as effective as if actually made before his death, and by the provisions of section 669 the judgment thereon could be entered after his death. In view of this provision, and considering the nature of the action itself, we think that the preferable course would have been to direct the judgment to be entered as of the date of the judgment against the codefendants of Hobart.

The right of the plaintiff to "maintain" the action against the executors of Hobart is fully authorized by section 1584, Code Civ. Proc.[1] See, also, Coleman v. Woodworth, 28 Cal. 567. It falls within the rule given by Lord Mansfield in Hambly v. Trott, Cowp. 371: "Where property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor."

The judgment is therefore set aside, and the court is directed to enter judgment against the defendant Hobart for the sum of $210,197.50, as of the same date that it shall enter judgment against the defendants Hayward and Levy, with the directions that the said judgment against Hobart be payable in the course of administration on his estate, and to take such further proceedings in the action against the appellants herein as were directed in the appeal of Hayward et al., so far as the same may be appropriate under the proofs that may be made before it.

We concur: TEMPLE, J.; McFARLAND, J.; HENSHAW, J.; VAN FLEET, J.; GAROUTTE, J.; BEATTY, C. J.

108 Cal. 38

HOSTETTER v. LOS ANGELES TERMINAL RY. CO. (No. 19,521.)

(Supreme Court of California. July 9, 1895.)

BOUNDARIES—DISTANCES—FRACTIONAL LOT—NATURAL OBJECTS.

1. Where three sides and the number of acres are known, and it is disputed whether the fourth side is a straight or meandering line, the straight line will be adopted, when the tract thus inclosed contains the number of acres called for, and when the acreage would be largely increased if the meandering line were adopted.

2. Where a fractional lot is conveyed, the grantee is bound by the distances given, even if reference is made to an official map.

3. Where land conveyed forms a triangle, and two sides and the acreage are given, a straight line from point to point will be adopted as the third side, when the boundary thus formed will inclose the number of acres called for.

4. A river will not control metes and bounds, when it is not clear that such was the intention, when another natural monument could more properly be adopted as a boundary, and when the identity of the land can be sufficiently established from the distances given in connection with the acreage.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by D. Herbert Hostetter against the Los Angeles Terminal Railway Company to recover possession of land. From a judgment for defendant, plaintiff appeals. Affirmed.

Galbreth & Morrison, for appellant. T. E. Gibbon, for respondent.

GAROUTTE, J. This is an action in the nature of ejectment to recover the possession of a certain tract of land, 100 feet in width and 1,936 feet in length, situated within the boundary lines of the city of Los Angeles. It is conceded that, in the year 1868, the city of Los Angeles had the title to the realty; and plaintiff claims title as successor in interest of the grantees of the city. The city conveyed certain lands to plaintiff's predecessors in interest, and he now claims that those deeds carried the city's title to the property involved in this litigation; and it is upon the construction of those deeds that the merits of the present case depend.

The first deed "grants, conveys, and quitclaims unto Thomas Rowan that certain piece or parcel of land situated, lying, and being in the city and county of Los Angeles, and known on the official map of said city as fractional lot No. 6 (six), in block No. 57 (fifty-seven), of Hancock survey of said city, containing 7.25 (seven and twenty-five one-hundredths) acres of land." The second deed "grants, conveys, and quitclaims unto Prudent Beaudry that certain piece or parcel of land situate, lying, and being in the city and county of Los Angeles, and known on the official map of said city as lot No. 1 (one), in block No. 57 (fifty-seven), containing 24.77 (twenty-four and seventy-seven one hundredths) acres." That portion of the official map of the city of Los Angeles relating to the lots in dispute may be fairly illustrated by the following diagram:

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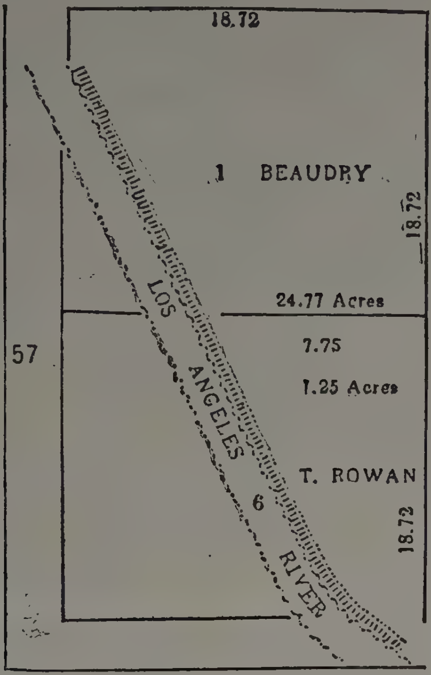
[1] Code Civ. Proc. § 1584, provides that an action may be maintained against an executor of a testator who in his lifetime has wasted, destroyed, or converted to his own use goods or chattels.



This land lies upon the east side of the Los Angeles river, and the river at high water is confined upon the east side by a precipitous bank of some two hundred feet in height. The river here in flood time is wide in extent, and lessens as summer advances; and the width of the river bed or bottom varies with the seasons and the amount of rainfall. At the date of the city's deeds, the official width of the river bed had been established, and by those lines the strip of land here involved lay between the high bank or bluff and the east line of the official bed. In other words, this land forms that part of the actual river bed or bottom lying east of its official bed. Plaintiff now claims that the city, by these deeds, sold the land to the east line of the official bed. The defendant claims that it only sold the land to the high bluff or bank. The description contained in the deeds from the city is made by reference, by block and number, to the official map; but, upon an inspection of that map, it is not at all plain and apparent as to the exact boundary lines of the respective tracts conveyed. What is to establish the shape and acreage of the tract of land described as "lot 1, block 57, as shown by the official map"? This interrogatory must be answered by a location of the western boundary line of that lot. From the face of the map we have the respective distances of three sides given; and possibly we would have the right to presume, in the absence of anything to the contrary, that the line making the fourth side was a straight line from one point to the other. But, be that as it may, we have the acreage of the tract given, and, by calculation, ascertain that a tract so located contains the exact number of acres credited to lot 1 upon the official map. This would seem to be conclusive as to the location of the west line of the tract. While a statement in a deed or upon a map as to the acreage of a certain tract of land is not at all conclusive or controlling as to the quantum of land in the tract, and while, as a matter of description, it must go down, when coming in conflict with metes, bounds, and monuments, yet cases are presented where a statement of acreage renders most valuable aid in fixing boundary lines. If the description of tracts of land by monuments, distances, or otherwise is vague and indefinite, by reason of conflicting lines, or by the omission of a line, or from any other cause, then a statement of the acreage sheds valuable light upon the issue, and often serves as the acting, moving cause for the conclusion reached. Such was the result in Hicks v. Coleman, 25 Cal. 142; and, in Hall v. Shotwell, 66 Cal. 381, 5 Pac. 683, it is said: "Now, it is well settled, where there is not a sufficient certainty and demonstration of the land granted expressed in the other terms of its description, the number of acres is an essential part of the description." In the present case, we see nothing upon the face of the map to indicate that a portion of the river bed is included in lot 1. Full lots, under the Hancock survey, as shown upon the official map, are square in form, each side being 18.32 chains in length, and containing 35 acres; and it is conceded that this lot is a fractional lot, and does not extend across the river. Hence, it becomes unnecessary to refer to the lines inadvertently shown upon the opposite side of the stream; but, the lot being fractional, plaintiff is absolutely bound by the distances given. His belongings go that far, and no further. The testimony of the witnesses and the findings of the court declare that the north and south lines, running west the distance called for upon the map, terminate upon the bluff. They therefore necessarily fail to touch the river bed, and the land here involved could only be brought within lot 1, as so described, by making the western line of the tract a meandering line; and for this we see no authority whatever upon the face of the map. And, in addition thereto, such a construction would increase the acreage of the tract more than four acres, and thus directly contradict the statement of its acreage, as disclosed by the face of the map. All that we have said applies with equal force to fractional lot 6, of the same block. It appears to form a triangle, the length of two sides being given, and the acreage. By calculation, we find that a straight line upon the third side from point to point will inclose a tract of land filling the acreage demanded. Such fact authorizes us to so declare the third boundary line.

Appellant contends that the river is a natural monument, marking the west line of the tract, and, as such monument, overthrows the calls for distance found upon the north lines of the respective lots. There is some reason in this contention. Natural monuments are all-controlling, and the river here, as a monument, if it was plainly apparent from the map that it was so intended, would force other descriptions to give way. But it is not at all clear that such was the intention; for the line does not stop at the river. It crosses over, and goes away beyond. From the map, it may as well be urged that the north line of these respective tracts crosses the river, and stops at the west bank. Again, the north line going west strikes a natural monument before it reaches the river; and it may, with much more plausibility, be urged that this monument marks the termination of the line; for, by reference to the scale upon which the map is made, it is apparent that it most nearly coincides with the distance calls of the north line of the respective lots. This monument is plainly observable upon the face of the map; and, while it is not designated as a bank or bluff, that fact is immaterial; for that a natural monument of some character is there located cannot be questioned. Even if the map does not speak for itself as to the character of the monument, we still have the evidence of the surveyor as to what the marks there delineated upon the map represent, and there is no question whatever as to the actual fact. It is thus apparent that we are led into inextricable confusion when it is attempted to locate this land from the natural monuments appearing upon the map; and no resort is left us but to hold the distances given controlling; and, taking all the distances given, in conjunction with the acreage of the respective tracts, we deem their identity sufficiently established. Especially are we confident of the soundness of this conclusion when we call to its support the principle of law that grants of land by public bodies, as such, to private parties, are to be interpreted in favor of the grantor. Civ. Code, § 1069.

Owing to the conclusions reached, we do not deem it necessary to review the oral evidence offered at the trial. Neither do we discern any error of the court, in the admission or rejection of evidence, of sufficient importance to demand a retrial of the case. For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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5 Cal. Unrep. 105

HOWLAND v. KRETER. (No. 19,478.)

(Supreme Court of California. Aug. 3, 1895.)

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by George D. Howland against Leonard Kreter. Judgment for defendant. Plaintiff appeals. Affirmed.

G. D. Howland, for appellant. James Burdette, for respondent.

BELCHER, C. This is an action for unlawful detainer, and the facts which need be noticed are as follows: On March 23, 1893, plaintiff leased to defendant 15 acres of land for a term commencing at the date of the lease and ending January 1, 1894. Covering about one-half of the leased land was an orchard of orange and other fruit trees. The lease contained a covenant on the part of defendant "to keep the orchard entirely free from weeds," and "to plant nothing in the orange orchard, and to allow nothing to grow within four feet of the other trees of the place," and that plaintiff might re-enter for default in any of the covenants. The rent to be paid by defendant for the whole term was $350, and the last installment thereof—$50 in amount—was paid by him to plaintiff on August 30, 1893. On the next day, August 31st, plaintiff served notice on defendant that he must perform the covenants of his lease, and that he was "required to free the orchard entirely from weeds, and to stop the growing of anything that is now growing within four feet of the trees of the place, or deliver up possession of the said premises and appurtenances" to him. On September 5, 1893, plaintiff commenced this action, alleging, among other things, "that defendant has failed and neglected to keep the orchard on said premises free from weeds, but has allowed said orchard to become overrun with weeds, and the said orchard now is and at all times hereinafter mentioned was grown up to and overrun with weeds"; and "that defendant has failed and neglected to allow nothing to grow within four feet of the trees of the place, but did so plant squash seeds that the vines growing from said seeds have climbed to and are now growing in the tops of some of said trees, and at all times hereinafter mentioned were climbing upon and growing in said trees." And the prayer was for judgment declaring the lease forfeited, and awarding the plaintiff restitution and possession of the premises, with damages, etc. The answer denied all of the material averments of the complaint. The case was tried before a jury, and a verdict was returned in favor of defendant, on which judgment was entered. The plaintiff appeals from the judgment and from an order denying a new trial.

The appellant contends that the verdict was not justified by the evidence, and that errors in law were committed by the court in its rulings upon the admission of evidence, and in its instructions to the jury. It would subserve no useful purpose to state the numerous points made, or to enter into any lengthy discussion of them. The questions presented are of easy solution, and, in our opinion, it is enough to say that the evidence introduced by defendant was amply sufficient to justify the verdict; that the rulings upon the admission of the evidence objected to were proper; and that the instructions given to the jury stated the law applicable to the case correctly. The record discloses no prejudicial error, and the judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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5 Cal. Unrep. 107

HUNTER v. MILAM. (No. 19,555.)

(Supreme Court of California. Aug. 3, 1895.)

MARRIAGE—AUTHORITY TO PERFORM—LICENSE—EVIDENCE.

1. The fact that the person performing a marriage ceremony in California in 1858 was not authorized to perform such ceremonies would

not invalidate the marriage, if assented to by the parties and consummated by cohabitation as husband and wife.

2. Prior to Act April 9, 1863, a license was not a prerequisite to marriage.

3. Under St. 1850, p. 424, making 14 years the age of consent, and declaring guilty of a misdemeanor one who joins in marriage a female under 18 years of age without consent of her parent, the marriage is not void, though consent of the parent is not obtained, the female being over 14 years old.

4. A sworn complaint by a female for divorce from M., filed after her marriage to H., alleging her marriage to M., prior to the time of her marriage to H., and that she and M. "ever since have been and now are husband and wife," is, in the absence of explanation, conclusive, in an action against her by H. to annul his marriage with her, that she and M. were married in due form at the time alleged, and that M. was living, and was her lawful husband, when she married H.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Jesse Hunter against Jane Elizabeth Milam, sometimes known as Jane Elizabeth Hunter. Judgment for defendant. Plaintiff appeals. Reversed.

Knight, Simpson & Knight and Simpson & Harphan, for appellant. S. A. W. Carver, for respondent.

SEARLS, C. Jesse Hunter, the appellant, brings this action to annul a marriage entered into with the defendant at Los Angeles, Cal., on the 3d day of July, 1862, upon the ground that at the time of the alleged marriage of plaintiff and defendant the latter had another husband living, viz. one Joseph Milam, from whom she was not divorced, and which said marriage between said defendant and the said Joseph Milam had not been annulled. The amended complaint avers that prior to the marriage of plaintiff and defendant, viz. in the month of February, 1858, at the county of San Bernardino, state of California, defendant intermarried with one Joseph Milam, who was still living, and from whom she was not divorced, but which marriage was still in force and effect at the time of her marriage with plaintiff; that plaintiff and defendant lived together as husband and wife until 1884, when he learned that Joseph Milam, the defendant's former husband, was still living, whereupon he severed his connection with defendant; and that thereupon defendant brought an action to obtain a divorce from said Milam, and that on the 29th day of March, 1884, a decree was duly made and entered in the superior court in and for the county of Los Angeles, dissolving the bonds of matrimony between said defendant and said Milan. The answer admits that in the month of February, 1858, a marriage ceremony was performed between her and the said Joseph Milam, but avers, on information and belief, that the person who performed said ceremony had no right or authority so to do. She further alleges that she was at the time but 15 years of age; that her father and mother, with whom she was living, did not consent to her marriage with said Milam, and that within 10 days after said purported marriage she left said Milam, and returned to her parents, and that Milam departed from the county of San Bernardino, since which time she has heard nothing of him, or whether he is living or dead. The answer further avers knowledge on the part of plaintiff of the marriage of defendant previously to his marriage to her, and avers cohabitation with her until May, 1884, etc. An amendment to the answer sets up the statute of limitations as a bar to the action. The cause was tried by the court, written findings made and filed, upon which judgment was entered June 14, 1893. The appeal is from the judgment and from an order denying plaintiff's motion for a new trial. The notice of appeal was served and filed August 14, 1894, more than one year after the entry of judgment, and cannot therefore be considered, so far as it applies to the judgment. Counsel for defendant moved in the court below to strike out the statement of plaintiff upon the ground that no notice of intention to move for a new trial was served or filed within the time required by law, or within 10 days after notice of the decision. The affidavits and testimony upon the motion pro and con are quite voluminous, and present a sharp conflict. Under these circumstances, it can serve no useful purpose to discuss it at length, and it matters not what our views might be were the question presented to us as an original proposition, as it involves an issue of fact which was passed upon by the court below and determined against the contention of the defendant, and, in consonance with an oft-repeated rule, this court will not reverse the conclusion reached by the court below upon questions of fact depending for their solution upon conflicting evidence. The motion for a new trial must therefore be determined upon its merits.

The court below, after finding that plaintiff and defendant were duly married in 1862, proceeded to find that in February, 1858, a marriage ceremony was performed between Joseph Milam and defendant (defendant being then 15 years of age), by a person unauthorized to perform marriage ceremonies; that no license was procured therefor, and that defendant was at that time living with her parents, who did not consent thereto or know thereof, and that thereafter the said defendant lived with said Milam as his wife for about 10 days, when her parents compelled her to leave Milam and return home; that Milam then left the county of San Bernardino, and defendant has not seen or heard from him since; that the said Milam was not living at the time of the said marriage of plaintiff and defendant, and the marriage between defendant and Milam was not in force or effect at the time of the marriage between plaintiff and defendant, and there-was no impediment to their marriage on July 3, 1862. These findings, except that in which it is found that plaintiff and defendant were married in 1862, are assailed by appellant as being unsupported by the evidence or as contrary thereto. The conclusion of law drawn from these facts is "that plaintiff and defendant were lawfully married on the 3d day of July, 1862, and ever since that time have been and now are husband and wife; that plaintiff should take nothing by his action"; and that defendant have judgment for $500 counsel fees. We are of opinion the findings assailed cannot be upheld.

1. There is not a particle of evidence in the record that the marriage ceremony between Joseph Milam and defendant was performed by "a person unauthorized to perform marriage ceremonies," as found by the court. There was no evidence as to the person by whom the ceremony was performed, or as to his official character.

2. The fact that a marriage ceremony was performed in this state in 1858, by a person not authorized, would not in itself invalidate the marriage, if assented to by the parties and consummated by cohabitation of the parties as husband and wife.

3. No license was required as a prerequisite to marriage in this state in 1858, or prior to April 9, 1863. 2 Hitt. Gen. Laws, art. 4466; St. 1863, p. 244.

4. Fourteen years was the age of legal consent in 1858 (St. 1851, p. 186), and defendant, according to her own testimony, was over 15 years of age when married to Milam.

5. By the marriage act of 1850, any person joining in marriage any male under the age of 21 years, or female under the age of 18 years, without the consent of the parent or guardian of such minor, was deemed guilty of a misdemeanor and subject to a fine. St. 1850, p. 424. But the marriage was not void, or even voidable, except in cases where the female was under the age of 14 years, and was not ratified on her part after reaching the age of 14 years. St. 1851, p. 168.

6. The evidence that defendant was married to Joseph Milam in February, 1858, and that he was living in July, 1862, when she intermarried with the plaintiff, is to be found: (a) In her testimony at the trial, where she says that she was living in San Bernardino when she married Milam against her father's wishes; that her parents were Mormons, and were about to go to Salt Lake, and take her and her sister with them, and that she feared she would be sealed to some old man, and they both ran away, and she married Milam, with whom she lived 10 days, when her mother took her home, and in a few days she went to Salt Lake. She further testified that she heard from her nephew that Milam was living in Walla Walla, and that then, by advice of her husband, she consulted counsel, and was advised to apply for a divorce from him. This was in 1883. (b) In December, 1883, defendant filed her sworn complaint against Joseph Milam, in the superior court in and for the county of Los Angeles, in which she alleged that she and Milam intermarried in the county of San Bernardino, state of California, in February, 1858, "and ever since have been and now are husband and wife"; that defendant resides out of the state of California, and his residence is unknown; that about March, 1858, defendant therein willfully deserted her, etc.,—whereupon she prayed that the marriage between herself and the defendant be dissolved, etc. On the 24th day of December, 1883, the plaintiff in said cause filed an affidavit for the publication of summons against said defendant, Milam, in which, after stating the nature and object of the action, she alleged that defendant could not, after due diligence, be found in California, and that, "to the best of her knowledge, information, and belief, he resides at Walla Walla, Washington territory." On the 29th day of March, 1884, the cause was tried by the court, and written findings filed, in which the court found that this defendant and said Milam intermarried in the county of San Bernardino in February, 1858, and ever since have been and now are husband and wife; that defendant resided out of the state; that said defendant willfully and without cause deserted the plaintiff therein in March, 1858; that defendant had been regularly served with process, had failed to appear and answer, and that his default had been regularly entered, etc.,—whereupon a decree was duly entered whereby it was decreed "that the marriage existing between the plaintiff and defendant [therein] be, and the same is hereby, dissolved, and that plaintiff be and she is hereby freed and absolutely released from the bonds of matrimony," etc. (c) On the 16th day of February, 1892, the defendant herein filed her sworn complaint in the superior court in and for the county of Los Angeles, against the plaintiff herein, to procure the annulment of the marriage existing between them, in which complaint she averred: (2) Their marriage in 1862. (3) Her prior marriage in 1858 to Joseph Milam, and his desertion of her, and her ignorance of his whereabouts until after her marriage to the present plaintiff. (4) Her cohabitation with the plaintiff herein until 1884, when she discovered that her former husband, Joseph Milam, was still living; the institution of an action, and the decree of divorce against said Milam. (5) That this plaintiff and defendant herein have not lived together as husband and wife, or at all, since the decree of divorce against Milam. (6) That there was no issue of either marriage, etc.

The foregoing testimony, which is without substantial conflict, would seem to call for but little comment. The record in the divorce case of Defendant v. Joseph Milam was in the nature of a proceeding in rem, and therefore binding upon, not only the defendant, but all the world. 2 Smith, Lead. Cas. (6th Am. Ed.) 670, and cases there cited. Conceding, however, that this record is not absolutely conclusive of the facts therein enunciated, and which were necessary to confer jurisdiction upon the court in the given case, viz. that the plaintiff and defendant in that case were husband and wife, that defendant therein was living, and that the court had acquired jurisdiction of the case by such service as the law requires, still the admissions in the sworn complaint in that case, and in the action brought by the defendant against her husband, the plaintiff here, were not only sufficient, but, in the absence of explanation, conclusive of the facts that defendant and Joseph Milam were married in due form in 1858, and that said Joseph Milam was living, and the lawful husband of the defendant, at the date of her marriage to this plaintiff in 1862. The testimony of the defendant, tending indirectly to show that the plaintiff knew as well as she did of her former marriage, and of the existence of her husband under such marriage, and that he cohabited with her after her divorce from such former husband, can only be upheld upon the theory that she had deliberately committed willful perjury in her former sworn statements. The order denying a new trial should be reversed, and a new trial ordered.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a new trial is reversed, and a new trial ordered.

108 Cal. 306

LOWER KING'S RIVER RECLAMATION DIST., NO. 531, v. PHILLIPS et al.

(No. 18,341.)

(Supreme Court of California. July 31, 1895.)

RECLAMATION OF SWAMP LANDS—CONCLUSIVENESS OF ASSESSMENT.

In an action by a reclamation district to recover an assessment, defendant may show that his land was not benefited by the reclamation works, and that it was excessively assessed.

In bank.

On rehearing. For former report, see 39 Pac. 630.

Daggett & Adams, for appellants. Denson & De Haven, for respondent.

TEMPLE, J. After a careful examination of the original arguments of counsel and of the petition for a rehearing, and also the briefs in Reclamation Dist. No. 307 v. Glide, 41 Pac. 278, one of which contains an elaborate review of the opinion rendered in department, I am convinced that the judgment ordered and the opinion rendered should stand. The point upon which the rehearing was asked was that the conclusion in department, that "the court erred in excluding the evidence tending to prove that defendants' land was not benefited by the reclamation works, and was arbitrarily and excessively assessed, without regard to proportionate benefits," was unwarranted. Naturally, to this point our attention has been mainly directed, and, while the matter is fully and satisfactorily discussed in the opinion, I will notice some of the objections urged.

It is contended that the opinion overrules several decisions of this court, and that neither the case of Reclamation Dist. No. 108 v. Evans, 61 Cal. 104, nor the other cases cited in support of the conclusion reached in department, sanction that conclusion. In People v. Hagar, 52 Cal. 171, it was said: "The statute confides to the commissioners the duty of ascertaining the benefits to each parcel of land severally. They must exercise their judgment and discretion, and, in the absence of fraud, their action in this respect cannot be attacked and shown to be erroneous in a collateral proceeding." This case, and those in which the decision has been followed or approved, constitute, in the main, the authorities which it is claimed are in conflict with the opinion rendered in department. They are cited in that opinion. The attention of the court in the case of People v. Hagar was not called to the proposition that the taxpayer had been afforded no opportunity to be heard, and that without such opportunity the assessment could not become a fixed and final charge; and, further, unless such opportunity was afforded by the statute, it was void, and the assessment invalid.

In the subsequent case of Reclamation Dist. No. 108 v. Evans, 61 Cal. 104, the counsel for the appellants, both of whom had appeared as counsel in the case of People v. Hagar, 52 Cal. 171, say in their brief: "The question as to whether a given assessment is in proportion to benefits is a question of fact which must be determined favorably or unfavorably to a party by the commissioners whose duty it is to make the assessment. No other board or officer has power to review their decision, and no means are provided by which a party can be heard before them, or by which their decision can be reviewed. This court has held that their determination upon this question is final and conclusive, and hence their determination is a judgment in the strict sense." Id. 187. The constitutional provision was cited, and it was insisted that no hearing was provided for in the statute. In view of a further point, to be noticed hereafter, it should be noted that the matter upon which counsel contended that a hearing ought to have been provided was in regard to the judgment of the commissioners as to whether a given assessment was in proportion to benefits. The court stated the claim of appellant as follows: "They [the provisions of the Code] are said to be unconstitutional because they do not provide for any mode by which a party assessed should have notice of the proceeding and an opportunity to object to the amount charged against his land." The first question which the court had to decide in that case was whether the statute did provide the taxpayer with the opportunity to be heard as to the amount of his assessment before the tax became a final and fixed charge against his land, and whether the opportunity afforded constituted due process. It was held that such opportunity was afforded, because the tax could only be collected by a suit in which the defenses were not limited, and that in such action "the appellant here could have shown that the sums assessed against his property were not 'proportionate to the benefits' resulting from the work of reclamation." It was further said that appellant could not complain because the court on such hearing had no power to change the assessment, since the court had the power to declare the assessment invalid so far as it purported to create a charge against his land. The point was necessarily involved in that case. The court could not have avoided deciding it unless it was prepared to hold that an assessment not made in accordance with an arbitrary standard laid down by the legislature, but by some rule which required the use of judgment and discretion, could be made a final charge against property when the taxpayer has had no opportunity to be heard. The court was not prepared to sanction this last proposition, and therefore the only alternative was to find that the law did afford an opportunity to be heard as to the amount of the assessment, or that the statute was void and the tax invalid. The same view was taken in Reclamation Dist. v. Goldman, 65 Cal. 637, 4 Pac. 676, and in Swamp-Land Dist. v. Gwynn, 70 Cal. 566, 12 Pac. 462.

Hutson v. Protection Dist., 79 Cal. 90, 16 Pac. 549, and 21 Pac. 435, arose under an act entitled "An act to provide for the protection of lands from overflow, other than lands recognized as swamp lands." Laws 1880, p. 55. Under this law, districts were formed and trustees elected, who provided plans for protecting the district and made the assessment. No hearing was provided for, and the tax was collected by a sale of the lands, and without suit. This court held the act unconstitutional, saying: "No provision is made anywhere in the statute for a hearing by the landowner whose land is to be charged. No notice is to be given him when the board of trustees is to levy the assessment, and, if he appears when such assessment is to be levied by the board of trustees, no hearing by the board is provided for in the act. The assessment is by the terms of the act made an absolute lien on his property, without any provision or opportunity allowed him to show its illegality or unconstitutionality." This is the conclusion which would inevitably have been reached in the Evans Case if the court had not found in the law an opportunity for the landowner to be heard as to the amount of his tax.

With these views the case of People v. Hagar is in evident conflict. If the Evans Case was correctly decided, the attack on the assessment is not collateral: (1) For the reason, given in the opinion, that a collateral attack implies a judicial determination in which the parties have been heard, and the determination has therefore become final; (2) also, because, if it can be said to be an attack upon a final determination, it is one provided by law, and therefore cannot be collateral. "Any proceeding provided by law for the purpose of avoiding or correcting a judgment is a direct attack, which will be successful upon showing error; while an attempt to do the same thing in any other proceeding is a collateral attack, which will be successful only upon showing want of power." Van Fleet, Coll. Attack, p. 5. But, in my judgment, a defense of this character cannot properly be called an attack on a final determination, either direct or collateral. The suit is itself a step in a proceeding to subject the property of a taxpayer to the burden of the tax, and the charge does not become final until the suit is determined against the property owner. Otherwise it would be a proceeding in which one might be deprived of his property without due process of law. Counsel say that it was not intended in the Evans Case to hold that, in defense of an action to collect the tax, the defendant could call in question the judgment of the commissioners in estimating the proportionate benefits. He could plead as a defense that the commissioners acted arbitrarily, and did not use any judgment at all upon the subject, or pursued an erroneous method; but he cannot turn the court into a board of equalization. Certainly the court did mean to say that such an opportunity was afforded as would constitute due process. Whether the limited hearing counsel is willing to concede would satisfy the constitutional requirement counsel have neglected to discuss. I think it is just upon the question of the correctness of the estimate of proportionate benefits that the landowner is entitled to be heard, and probably the legislature could deny him a hearing on any other question without rendering the law unconstitutional. Common sense would seem to teach that a hearing would be of little value except as to the points on which the commissioners had some discretion, and might be lawfully influenced by evidence or argument. True, he may say that the law has not been followed, or that the act is unconstitutional. But he does not lose these defenses altogether, for an assessment under an unconstitutional law is invalid, and so is an assessment not made substantially as directed by law; but, because he cannot call in question the judgment of the assessor after the charge has been fixed and final, he ought to be heard before it has become so. And, again, where an arbitrary standard for ascertaining the burden is fixed by the law,—that is, where the legislature has itself apportioned the tax,—no notice or hearing is required. Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663; Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921. In such case a hearing would be useless. In other cases, if it were conceded that the commissioners had in all cases pursued the law, still the taxpayer would be entitled to his hearing. To say that he can only object that the law had not been followed would be to hold that a hearing on the assessment may be denied altogether.

Counsel have cited a great many cases in which it has been held that the valuation made upon land by the assessor cannot be called in question in actions to collect the tax, unless the right to do so is provided by law. We are not called upon to dispute that proposition here. If an assessment has been made as the law provides, and that law does not violate the constitutional inhibition alluded to, the tax has become a final charge, —if the law so provides,—and cannot be called in question because the valuations were erroneous. But these cases have no application here. Here the question is, did the charge become final until the determination of the suit for its collection? The courts have held that it had not become a final charge, and if it was held that it had become final it would be necessary to hold the law invalid. The Evans Case is plain enough upon this proposition. The very question was whether the judgment of the commissioners could be called in question in the action for the collection of the tax. It was held that it could be. In the case of Patten v. Green, 13 Cal. 325, the board of equalization raised the assessment without notice. If the taxpayer had been afforded a hearing, it would only have been as to the valuation. As he was not allowed such hearing, the order made by the board was set aside. In Lent v. Tillson, 72 Cal. 404, 14 Pac. 71, it was held the constitutional requirement was complied with if the taxpayer could be heard as to the amount of the tax.

I do not agree with counsel on the proposition that the excluded evidence consisted solely of the opinions of witnesses to be set against the opinions of the commissioners. There was evidence other than the opinions of witnesses on the direct point of proportionate benefits, which, if true, showed gross inequality.

For these reasons, and those stated in the opinion rendered in department, the judgment and order are reversed.

We concur: GAROUTTE, J.; HARRISON, J.; VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.

LOWER KING'S RIVER RECLAMATION DIST., NO. 531, v. WOOD. (No. 18,343.)

(Supreme Court of California. July 31, 1895.)

In bank.

On rehearing. For former report, see 39 Pac. 634.

Daggett & Adams, for appellant. Denson & De Haven, for respondent.

PER CURIAM. On the authority of Lower King's River Reclamation Dist. v. Phillips (No. 18,341, this day decided) 41 Pac. 335, the judgment and order appealed from are reversed.

LOWER KING'S RIVER RECLAMATION DIST., NO. 531, v. PHILLIPS et al. (No. 18,344.)

(Supreme Court of California. July 31, 1895.)

In bank.

On rehearing. For former opinion, see 39 Pac. 634.

Daggett & Adams, for appellant. Denson & De Haven, for respondent.

PER CURIAM. On the authority of Lower King's River Reclamation Dist. v. Phillips (No. 18,341, this day decided) 41 Pac. 335, the judgment and order appealed from are reversed.

(108 Cal. 354)

SAMONSET v. MESNAGER et al. (No. 19,440.)

(Supreme Court of California. Aug. 3, 1895.)

GRATUITOUS AGENT—LIABILITY FOR NEGLIGENCE —FINDINGS—PROOF OF LOST LETTER.

1. Where facts are found as alleged in a verified answer, defendant cannot question the correctness of the finding.

2. One who receives money, and agrees to loan it without any charge, and to collect the interest and principal, is liable for its loss by reason of his negligence, where he loans it without security to one to whom he personally furnishes goods to enable him to start in business, and does not collect principal or interest when due for fear the borrower would become crippled, and unable to pay what he owed him personally.

3. Testimony of the recipient of a letter that he had lost it, that he had looked for it a great deal, that he thought at one time he had left it at the office of his buyer, but had looked for it there, and been unable to find it, is sufficient to allow proof of the contents.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by J. Samonset against George L. Mesnager and Pierre Darancette. Judgment for plaintiff. Defendant Darancette appeals. Affirmed.

Horace Bell, for appellant. H. H. Appel, E. A. Rizon, and J. McKinley, for respondent.

BELCHER, C. This is an action to recover the sum of $500, with interest thereon. The court below found the facts and rendered judgment in favor of the plaintiff, from which, and from an order denying a new trial, the defendant Darancette appeals.

The facts, as disclosed by the record, are, in substance, as follows: In 1886 respondent, being about to leave the city of Los Angeles and go to France, left with appellant the sum of $500, to be loaned out by him at interest for the use and benefit of respondent. Appellant received the money, and agreed to loan the same, without any charge or compensation for so doing, and to collect the principal and interest, and, when collected, to remit the same to respondent, in France. About October 1, 1886, respondent departed from Los Angeles, and went to France, where he has ever since resided. Within a few days after his departure, appellant loaned the said $500 to one Couture, and took his promissory note therefor, payable in one year, with interest at the rate of 12 per cent. per annum, but took no security for its payment. The loan to Couture was made to enable him to commence and carry on business in selling groceries and liquors, and appellant furnished him goods from a store in Los Angeles, then owned and conducted by a firm of which he was a member. After the note became due, appellant took no steps to collect it, except he asked Couture several times for the money, and was told by him not to be afraid, that the note was good for a considerable time, and that he had not the money then, but would get it, and pay all that he owed. Couture closed out his business, and in January, 1888, went to France, where he remained till the latter end of that year, and then returned. On his return he again went into business in East Los Angeles, and was furnished with goods and merchandise by appellant's firm. He thereafter continued in his said business until April, 1891, when he became absolutely bankrupt, and unable to pay the said $500 so loaned him, or the interest thereon, and has so continued ever since. Some time in 1890, appellant took a new note from Couture for the amount due respondent, and again, on April 21, 1891, he took another new note from him. The first two notes were made payable to appellant, and the last was payable to appellant and respondent two years after date, and was for $2,000, bearing interest at the rate of 10 per cent. per annum, which sum included the amount due respondent, $789.36, and the balance of an indebtedness due appellant. When Couture returned from France he had $3,500 in money, $2,000 being on deposit in a bank in Los Angeles; and he says appellant never asked him to pay the $500 due respondent, and that, if he had, he could and would have paid it. During all the times mentioned, appellant "failed and neglected to collect the said sum of five hundred dollars from said Couture, or the interest thereon, and used no diligence or reasonable means, or any means at all, to collect said sum of money," and, as an excuse therefor, he says: "I didn't wish to bring suit against Mr. Couture, who owed this five hundred dollars, because Mr. Couture owed me and Mr. Mesnager also; and, if I should attach his business, he would have been crippled so that he could not pay me and my partner what he owed our firm." Appellant failed to inform respondent in regard to the said loan, and of the fact that he had not required or obtained security therefor; and at no time did respondent know that the loan had been made to Couture without security, and the money lost, until a short time before this action was commenced, when, by his agent, he demanded of appellant the repayment of the money, and "he refused to pay it, and said: 'I don't want to be molested. Neither you or he can collect that money, because the time has gone by.'" Upon these facts, the question is, was appellant guilty of such negligence as rendered him personally liable to respondent?

It is claimed for appellant that some of the findings were not justified by the evidence, and the first point made under this head is that there was no evidence to support the finding that respondent left the money in question with appellant about the time of his departure from Los Angeles, and that, within a few days after his departure, appellant loaned the money to Couture; and it is said that the evidence of appellant shows, beyond question, that the money was loaned on August 21, 1886. A sufficient answer to this point is that the finding is in almost the exact language of appellant's verified answer, and its correctness cannot, therefore, be questioned by him. The other findings objected to are not without support in the pleadings and evidence; and the judgment cannot, therefore, be reversed on the first ground urged.

It is further claimed for appellant that his agency was merely gratuitous, and that a gratuitous agent can only be held liable for gross negligence. But such an agent is bound to exercise good faith and ordinary diligence. As was said in Herrick v. Hodges, 13 Cal. 434: "If defendant had undertaken this agency, he would be bound, though it were gratuitously undertaken, to good faith and ordinary diligence in executing what he pretended to do." And the general rule is that trustees, having trust money to invest, must act in good faith, and with a sound discretion, in investing it, and that it is not a sound discretion to invest in mere personal securities. Perry, Trusts, §§ 459, 453. Here it appears, from appellant's own testimony, given on cross-examination, that he did not know what Mr. Couture's circumstances were when he loaned him the money; that Couture worked as a barkeeper for his firm in 1886 or 1887, but how long he could not say; that he never knew what wages he was getting; that he took no security for the loan; that he did not ascertain whether Couture purchased any property or not; that he loaned the money for one year, and, when the debt became due, did not collect it, and did not know what Couture was doing at that time; that with the money, and with goods and merchandise, he helped Couture to start in business; that when he received the money from respondent he agreed to collect it and remit it; that he allowed the time to go by without payment of principal or interest until 1891, when Couture became bankrupt, because he was afraid, if he brought suit, that Couture would be crippled, and unable to pay what he owed him and his partner. This testimony was, of itself, quite sufficient to show that appellant did not exercise ordinary diligence, or a sound discretion, in the management of the money intrusted to him, but was guilty of gross negligence.

The point that respondent was guilty of contributory negligence, and therefore not entitled to recover, cannot be sustained. He was in France during all the times named, and had no knowledge of the mismanagement of his money by appellant until a short time before this action was commenced.

So the point that the court erred in admitting in evidence proof of the contents of a lost letter from respondent to his brother here is also untenable. The letter directed the brother to go to appellant and demand the payment of the said $500, and, unless paid, to commence an action to recover the same; and the recipient of the letter testified that he had lost it; that he had looked for it a great deal, and that he thought at one time he might have left it at the office of his attorney, but he had looked for it there, and had been unable to find it. This testimony was sufficient to justify the ruling complained of. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

108 Cal. 538

PEOPLE v. COBLER. (No. 21,199.)

(Supreme Court of California. Aug. 21, 1895.)

EMBEZZLEMENT — SUFFICIENCY OF INDICTMENT — SUFFICIENCY OF EVIDENCE — PROOF OF OTHER EMBEZZLEMENTS — CHARGE — WEIGHT OF EVIDENCE—INTENT—REASONABLE DOUBT.

1. Under Pen. Code, § 967, providing that, in an indictment for embezzlement of money, the coin, number, denomination, or kind thereof need not be alleged, an indictment which alleges that defendant embezzled "the sum of $12, lawful money of the United States," sufficiently describes the money.

2. An indictment for embezzlement which alleges that defendant, while deputy assessor of a certain county, and as such deputy, had in his possession and under his control, by virtue of his trust as such deputy, a certain sum, public funds of said county, which said money he had received as such deputy for the use and benefit of said county, sufficiently shows the manner in which defendant received the money, and the purpose for which he held it.

3. A deputy county assessor charged with embezzlement cannot set up as a defense that the assessor who appointed him never filed his official oath or bond as required by statute, it appearing that when the crime was committed the assessor was in the discharge of the duties of his office.

4. On trial of a deputy county assessor for embezzlement, proof that defendant was engaged outside taking statements and collecting personal taxes, and that he received from a firm their statement and collected from them taxes thereon (the moneys charged to have been embezzled), is sufficient to show that the moneys received were public funds, though he did not return the statements to the assessor's office, and no entry was made on the assessment books, it being his duty to return the statements and money to the assessor.

5. Such evidence sufficiently showed that he converted the money to his own use.

6. On trial of a deputy county assessor for embezzlement, evidence that he collected other taxes and failed to pay them over is admissible to show guilty intent in appropriating the money alleged to have been embezzled.

7. On trial of an indictment under Pen. Code, § 504, providing that any officer who fraudulently appropriates to any purpose not in the lawful execution of his trust any property which he has in possession by virtue of his trust is guilty of embezzlement, a charge that if the jury believe "beyond a reasonable doubt that defendant was a deputy county assessor, and that, as such, he collected from B. $12 for personal property tax, and that he did not pay over said money to the assessor of said county, nor account for the same, but that he fraudulently appropriated the same or any part thereof to his own use, then you should find the defendant guilty," is not objectionable as passing on the weight of evidence.

8. Nor because it fails to state that the conversion must be made with intent to steal the money.

9. The instruction sufficiently charges that the jury must find all the facts stated therein beyond a reasonable doubt.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Al Cobler was convicted of embezzlement, and appeals. Affirmed.

McKeebe & Appel, for appellant. Atty. Gen. Fitzgerald, for the People.

BELCHER, C. The defendant was convicted of the crime of embezzlement, under section 504 of the Penal Code, and sentenced to imprisonment in the state prison for the term of five years. He appeals from the judgment and an order denying his motion for a new trial. The indictment charges that in the month of March, 1893, the defendant was a duly qualified and acting deputy county assessor in and for the county of Los Angeles, under F. E. Gray, who was then and there the duly elected, qualified, and acting assessor of said county, and as such deputy county assessor defendant then and there had in his possession and under his control, by virtue of his trust and as such deputy, "the sum of twelve dollars, lawful money of the United States, public funds of the said county of Los Angeles," which said money he had received as such deputy for the use and benefit of said county, and did fraudulently appropriate to his own use, etc. The defendant demurred to the indictment upon the grounds, among others, that it failed to state the kind of money, or specifically describe the money, alleged to have been embezzled, and also failed to state in what manner or for what purpose defendant received the said money, or how or in what manner the same was for the use and benefit of the said county. The court overruled the demurrer, and this ruling is assigned as error.

There was no error in the ruling complained of. Under our statute it is not necessary to specify in an indictment or information for the embezzlement of money, or prove at the trial, the coin, number, denomination, or kind of money embezzled. Pen. Code, §§ 967, 1131; People v. Treadwell, 69 Cal. 237, 10 Pac. 502. Here the indictment sufficiently described the money (see People v. Mahlman, 82 Cal. 585, 23 Pac. 145, where the sum of money appropriated was described only as "lawful money of the United States"), and also sufficiently stated the manner in which defendant received the same, and the use and purpose for which he held it.

It is contended that the verdict was not justified by the evidence: First, because there was no sufficient showing that Gray was the county assessor, or that defendant was his deputy; second, because there was no sufficient showing that the moneys received by defendant were public funds; third, because there was no sufficient showing that the moneys received were converted by defendant to his own use.

Under the first of these objections it is urged that the statute required an assessor to file an oath of office and a bond for the faithful discharge of his duties, and that the record entirely fails to show that Mr. Gray ever filed such oath or bond, or was an assessor of the county of Los Angeles, or had authority to appoint a deputy. And it is said: "In order to show the relation existing between the defendant and the county, it became necessary to prove that he was acting by and through the authority of a legal appointment made as required by law, by an officer authorized to make appointment. And in cases of embezzlement this relation of trust must be clearly shown to exist, or no conviction can be had." It is further urged that, while it appears from the record that some papers were introduced in evidence showing the appointment of defendant to the office of deputy assessor, still it was not shown that he filed any oath of office or bond as required of a deputy. The judgment cannot, in our opinion, be reversed on this ground. It was clearly shown that Mr. Gray was acting as assessor of the county of Los Angeles during the year 1893, and the defendant was acting as his deputy. The law presumes "that a person acting in a public office was regularly appointed to it," and "that official duty has been regularly performed." Code Civ. Proc. § 1963, subsecs. 14, 15. If, therefore, the defendant, while acting as deputy assessor, received, as such officer, moneys belonging to the county, and fraudulently appropriated them to his own use, he was guilty of embezzlement, under the provision of section 504 of the Penal Code.

In answer to the second objection above noted, it is enough to say that it was clearly proved that defendant was a "field deputy outside, taking statements and collecting personal property taxes," and that he received from the firm of Blum & Lubin a statement of their taxable personal property, the assessed value of which was fixed at $1,000, and collected from them the tax due thereon, which amounted to $12, and is the money alleged to have been embezzled. He did not return the statement so received to the assessor's office, and, so far as appears, no entry of the assessment was made on the assessor's books. But that does not show or tend to show that the money collected did not constitute a part of the public funds of the county. On the contrary, the facts proved clearly show that it was the duty of the defendant to return both the statement and the money to the assessor, and that if he failed to do so and fraudulently appropriated the money to his own use he was guilty of a crime.

As to the third objection, that there was no sufficient evidence of the conversion of the money by defendant, it need only be said that it was proved, without contradiction, that neither the statement nor the money was returned to the assessor's office; and, if so, the jury was justified in finding that the money was converted by him to his own use as charged.

Evidence was admitted showing that defendant collected personal property taxes from other parties, and failed to pay over or account for the money so collected. This evidence was admissible for the purpose of showing guilty knowledge and intent in the appropriation of the moneys alleged to have been embezzled here. People v. Gray, 66 Cal. 271, 5 Pac. 240; People v. Neyce, 86 Cal. 393, 24 Pac. 1091.

Numerous objections were taken to the admission of evidence, but we see no material error in any of the rulings complained of. And, as it would subserve no useful purpose to state the objections and rulings at length, we pass them by without further notice.

The court gave to the jury, among others, an instruction reading as follows: "If you believe from the evidence, beyond a reasonable doubt, that, at the time and place alleged in the indictment, the defendant was a deputy county assessor, as alleged in the indictment, and that as such deputy county assessor he collected from Julius Blum and Willa Lubin, copartners, doing business under the firm name of Blum & Lubin, the sum of twelve dollars for personal property tax, as therein alleged, and that he did not pay over said money to the assessor of said county, nor account for the same, but that he fraudulently appropriated the same or any part to his own use, then you should find the defendant guilty as charged." It is claimed that this instruction was erroneous for three reasons: First, because it tells the jury that if they find certain probative facts, then they may find the greater fact of guilt from these probative facts, and therefore passes upon the weight which should be given to the evidence, and invades the province of the jury (citing People v. Carrillo, 54 Cal. 63); second, because the instruction omits to state the intent with which the conversion of the money should be made, that is, that the conversion must be made with the intent to steal the money; and, third, because the instruction omits to state that these facts must be found by the jury beyond a reasonable doubt. In People v. Carrillo, supra, the court, after setting out the instruction there complained of, said: "This instruction is clearly erroneous, in that the jury are told that the failure of the prisoner to pay over the money, if unexplained, raises a presumption of a felonious appropriation which will authorize a verdict of guilty." The instruction here complained of is not obnoxious to any such criticism. It does not invade the province of the jury, but simply tells them that if they find from the evidence all the facts stated, and among others that defendant fraudulently appropriated the money to his own use, then they should find him guilty. Section 503 of the Penal Code declares that "embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." And section 504 declares that "every officer * * * and every deputy, clerk or servant of any such officer * * * who fraudulently appropriates to any use or purpose, not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement." It was not error, therefore, for the court to tell the jury that, if they found from the evidence all the facts constituting the offense charged, they should return a verdict of guilty. Embezzlement is a statutory offense, and it was not necessary for the court to go beyond the statute, and tell the jury that the appropriation or conversion must be made with intent to steal the money. The instruction does not omit to state that the facts must be found by the jury beyond a reasonable doubt. On the contrary, it starts out with the statement that, "if you believe from the evidence, beyond a reasonable doubt," etc. And in other instructions given at the request of the prosecution and defendant the jury were several times told, in effect, that before they could find the defendant guilty they must find from a full and fair consideration of all the evidence, beyond a reasonable doubt, that he committed the offense charged.

The record discloses no prejudicial error, and the judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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108 Cal. 503

GLASSELL et al. v. VERDUGO et al. (SCHERER et al., Interveners. No. 19,508).

(Supreme Court of California. Aug. 9, 1895.)

PARTITION OF WATER RIGHTS—EFFECT OF DECREE—INJUNCTION—ENJOINING INNOCENT PARTIES.

1. Where a decree in partition adjudged that certain parties should have the use of the waters of a stream, the source of which is on the land of another party, the fact that, after the decree was made, the volume of water at the source of the stream increased, does not entitle the owner of the land to appropriate the increase, there being no evidence of its cause.

2. In an action to enjoin the pollution of a stream, defendants, who deny that they polluted or intended to pollute it, are not prejudiced by a decree enjoining them from doing so.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Andrew Glassell and others against Theodoro Verdugo and others to enjoin the obstruction and pollution of a stream. J. C. Scherer and others intervened. Judgment was rendered for plaintiffs and interveners, and defendants appeal. Affirmed.

Houghton, Silent & Campbell, for appellants. N. C. Burch and Albert M. Stephens, for respondents.

TEMPLE, J. The plaintiffs and the interveners claim the ownership of certain waters in Verdugo cañon, in the county of Los Angeles, and complain that defendants are obstructing their use of the same and polluting the stream. The defendant, Theodoro Verdugo, owns the land upon which the water rises. The other defendants claim under him. All deny obstructing the flow of any water to which plaintiffs or interveners are entitled, or that they are polluting the stream. Judgment was against the defendants upon all points, and they appeal from the judgment and from a refusal of a new trial.

All the parties own, or claim under those who own, in severalty, various tracts of land, parts of the Rancho San Rafael. The lands included in the rancho were partitioned by a decree of the district court on the 29th day of November, A. D. 1871. By this decree the waters on the ranch were divided and assigned to the several parcels of land. The following extract from the statement found in the record shows all that is necessary to know in regard to said partition:

"That said referees in said partition suit made a report to the court of their proceedings as such referees, which was filed on the 21st day of November, 1871. That said referees in their said report set forth and described the various allotments made by them, and set off in severalty to the various parties in whom interests in said land had been found, as set forth in the report of said referee James H. Lander, heretofore referred to. That the tract referred to in the complaint as containing 2,629.01 acres of the Rancho San Rafael was allotted to Teodoro Verdugo, and is the same land shown upon the map attached to and referred to in the final decree of partition, and is the same land upon the map attached and referred to in the final decree of partition, and as shown upon the plaintiffs' Exhibit A, hereinafter referred to. Paragraph numbered fifteenth of said last-named report contains the entire report made by said referees in partition relating to the apportionment of water on Rancho San Rafael, and is as follows, to wit: 'Fifteenth. Your referees have carefully considered the questions in regard to water, deeming them of the most vital importance to the parties interested in the rancho; and, in granting lands, the practicability of irrigation has entered largely into the value of these tracts most accessible to the sources of water supply. And in order that as much of the lands as possible may be supplied, your referees have endeavored to so adjust the rights and proportions of the several parties owning the various tracts, as that, when one party is equally able to draw his supply from either one or another of the various sources, and the same can be used by him to greater advantage than by the other parties, they have considered it best and most equitable to confine such party to that stream which cannot be used by the other parties so advantageously as by him, and to restrict his enjoyment of the water in the other courses. Excluding those springs which can be naturally made available for irrigating the tract upon which they rise, the localities from which water may be obtained, without the employment of artificial means to raise it to the surface of the earth, may be set down as five in number. (1) The first is the stream that rises in the Verdugo cañon upon the tract of land assigned to Teodoro and Catalina Verdugo, as tenants in common, near the foot of a spur running down from the Cuchilla of Francisco Maria, east of and near to both the road that runs through the cañon and the house or "jacal," in which at present reside a family of Mexicans bearing the name of "Paco." (2) The second are the streams that rise west of the said road within the inclosure of the said Teodoro, and east of his house. These constitute and form by far the largest body of flowing water upon the ranchos, excepting the Los Angeles river, which forms one of the boundaries. (3) The third is a stream that rises near the south boundary of the 1,702 $^{64}/_{100}$-acre tract assigned to P. Beaudry, near the Arroyo Seco, and within a short distance from the ruins of the old adobe house wherein one Joaquin Chabulla formerly resided. This stream flows naturally in a southerly direction. (4) The fourth is the Arroyo Seco. The supply from this, though at present only an undefined interest, may in the future be so developed and established as to be worthy of their notice. The probability of obtaining water from the Arroyo Seco did not affect the grades as established by us of those lands lying along it. (5) The fifth is the Los Angeles river, from which, by means of canals and ditches, it is the opinion of your referees that water can be conducted upon a large body of the lands lying along its east bank. Your referees therefore recommend, as the most economical, as well as just and equitable, disposition of the waters of these five sources, that the following be adopted by the court: That the said Teodoro Verdugo and Catalina Verdugo, so far as her interest is in common with the said Teodoro, be decreed to have, so far as their necessities require, the exclusive use and benefit of the first above mentioned stream of water; the surplus thereof to be turned into and to be permitted to flow into the second above mentioned stream or streams. That the waters forming the second, together with the surplus from the first, as above provided, belong to the several parties, Rafaela Verdugo de Sepulveda, Julio Verdugo, O. W. Childs, C. E. Thom, Maria Antonio Verdugo de Chabulla, Crisostomo Verdugo, Fernando Verdugo, Pedro Verdugo, Jose Maria Verdugo, Quirino Verdugo, Rafael Verdugo, Guillermo Verdugo, Vittorio Verdugo, Benjamin Dreyfus, Catalina Verdugo, Maria Sepulveda de Sanchez, Andrew Glassell, A. B. Chapman and P. Beaudry, and that these several parties be decreed to be entitled to use and enjoy said streams referred to as the second, and the surplus water from the first in the following proportions, which proportions have been calculated by your referees upon the basis of the number of irrigable land assigned to them, in this partition, to wit.' (The report here proceeds with the allotment made by the referees, of the waters from the Verdugo cañon, to the various parties other than Teodoro Verdugo and Catalina Verdugo, to whom lands were allotted in severalty in said Rancho San Rafael, as stated in the complaint of plaintiffs in this suit.) That there was attached to said report of said referees a map showing the lands and waters parceled between the parties in said action, and made a part of the referees' report; which map was introduced in evidence by plaintiffs, and which said map is hereto attached, as plaintiffs' Exhibit A. That the final decree in said partition suit was made and filed by said district court on the 29th day of November, 1871, and set forth the allotment of the lands of the said Rancho San Rafael in severalty to the parties to whom the same were allotted in and by the report of said referees in said partition, and allots to the said Teodoro and Catalina Verdugo the said tract of 2,629.01 acres, and which tract is designated by the said figures inscribed thereon on the map referred to in the decree of final partition. That said decree of partition contains the following clause with reference to the water rising upon the tract set off and allotted as aforesaid to said Teodoro and Catalina Verdugo, shown upon said partition map: 'It is further ordered, adjudged, and decreed that the defendants, Teodoro Verdugo and Maria Catalina Verdugo, so far as the interest of the said Catalina is in common with the said Teodoro, their heirs and assigns, do henceforth forever have, hold, and enjoy as an appurtenance connected with, and attached to, the said tract of two thousand six hundred and twenty-nine and 1-100 acres, and so far as the same is necessary to supply their necessities for water, for domestic and irrigating purposes and the demands of their stock and cattle, the sole and exclusive right to the springs of water that rise near the foot of a spur running from the Cuchilla Francisco Maria, east of the road that passes up the cañon, and near to the house wherein now a family of Mexicans of the name of Paco reside; provided, that all the surplus water of said springs, over and above that reasonably required by the said Teodoro and Catalina, their heirs and assigns, shall be permitted by them to flow, or be turned into the channel of those springs which rise within the inclosed field of the said Teodoro and Catalina, west of the said road, and to be used by the other parties as hereinafter next provided. And it is further ordered, adjudged, and decreed, that the waters rising within the said inclosed field of the said Teodoro and Catalina Verdugo, west of the said road and the west side of the Verdugo cañon, together with the surplus from the spring or springs of Catalina and Teodoro as aforesaid, belong to, and shall be held and enjoyed as an appurtenance attached to and running with, their respective tracts, irrigable therefrom by the several parties hereinafter named, their heirs and assigns, forever, in the following proportions, to wit.' (Then follows in said decree the allotment of said waters to the persons and in the proportions as described in the complaint in this suit.) That said final decree has never been modified or reversed, and is the final decree in the said partition suit. Said map so filed and referred to by said referees in partition was referred to by the court in its final decree, and confirmed and made a part of said decree, and reference made thereto for descriptions of land and water."

The court in such an action is not required to adopt the report of the referees as a whole, or reject it, but may modify and change the division recommended. So far as concerns the division of the water in question here, however, it is evident, notwithstanding the use of different descriptive terms, that the court did adopt the division recommended, and endeavored to effectuate it in the findings and decree. Since the partition, defendant Theodoro Verdugo has acquired the interest in the tract of land, awarded to the two in common, of Catalina Verdugo. The water assigned to the use of that tract in the decree is the water first described in the report of the referees. Concerning it there is no dispute. It ran southerly along east of the road in Verdugo cañon. Verdugo lived on some high mesa land to the west of the cañon. He had an inclosed field to the south of a road called the "Cross Road," leading from the cañon to his house, and a field partly inclosed to the north of this road. Plaintiffs contend that both fields make one field, and constituted the inclosed field mentioned in the decree of partition, while the defendants claim that the lower field, which they call the parallelogram field, was the only inclosed field then on the land. The water west of the cañon road, which by the decree is given to the plaintiffs and interveners, flows in a gulch which opens into the cañon a mile or more below Verdugo's house. This gulch extends into Verdugo's mesa land from the south, passing along the lower field where it branches. In the easterly branch is the largest body of water. Both branches extend north of the cross road into the upper or northerly field. They are so delineated on the partition map. The partition map also shows the fields to the north of the cross road and that to the south as one field or inclosure, and this was the finding of the court. I think this must be held conclusive on this appeal.

The question is not whether there was a substantial inclosure, such as would constitute adverse possession, but simply what is the inclosed field referred to in the decree. The springs or water referred to were on the west of said road and west of the cañon, and the decree—construing it, in this respect, as a confirmation of the report—assumes to dispose of all the waters on the ranch, "excluding those springs which can be naturally made available for irrigating the tract upon which they rise." It was certainly intended to give to plaintiffs the water running in these gulches. But the defendants contend that, even if the court finds that the inclosure mentioned in the decree includes the field northeast of Verdugo's house, still the plaintiffs cannot recover. They claim that the water in controversy was not there at the time of the partition, but had appeared since. It seems that there are now two swamps or marshes in this northerly field. They are divided from each other by a narrow ridge. The westerly one counsel call cienaga A, and the easterly cienaga L. A contains almost 15 acres; the other is larger. These cienagas, it is said, are fed by percolating water, and made their first appearance there not earlier than 1884. They are now found just north of the termination of the two branches of the streams as they are marked on the partition map. Dams have been erected just above the heads of the two streams and below the swamps or cienagas, and the water diverted for use on defendants' land. But for this obstruction and diversion, the water from the cienagas would flow into the channels of the streams as designated on the partition map. From the testimony of the witnesses it seems pretty certain that there is more water in the upper field than there was at the time of the partition. A mere increase, however, would not justify the defendants in appropriating the excess. The evidence does not show in what mode the water rises in these cienagas,—whether by percolation over the whole surface, or in one place,—and it is claimed that but for the dams there would be no marsh there. To sustain the contention of the defendants would be to establish a very dangerous doctrine. The memory of witnesses is little to be trusted on such subjects, and the owner of the land from which the water rises has a great advantage in that matter. Such increase is a very unusual occurrence, and the fact should be established very satisfactorily before the court would be justified in determining that there had been such increase. The cienagas are probably fed from the same source as the streams which were allotted to the plaintiffs. In fact, as defendants' counsel says, the decree designates the source of the water given plaintiffs as springs. There was evidence, aside from the map, that the water flowed from the upper field. Eaton, one of the referees who made the partition, is very positive about it, and thinks there was a swamp at the head of the easterly branch. Thom says there was some swampy ground in the north field. Andrew Glassell testifies to the existence of swamps there two or three years after the partition, and Snee that they were there in 1877. It must be remembered that this is not a controversy between an appropriator and a riparian owner. By the decree it was competent for the court to dispose even of percolating water. Several witnesses testify that the lands of the upper field, or portions of it, were springy, moist, spongy, or boggy prior to 1884. Considering the difficulty of proof in such a case, and that such occurrences as that claimed for defendants are quite unusual, I cannot think the conclusion reached by the trial court unreasonable. The court found the facts against the defendants, and there was certainly evidence to sustain the decision. Notwithstanding the implication, in the report of the referees, that the description of the various sources of water excluded such springs as could be made available to irrigate the lands upon which they rise, such springs, if clearly included in the allotment in the decree, passed to the parties to whom they were given.

The answer admits obstructing some of the waters claimed by the plaintiffs and interveners, and the fact was also proven. If some defendants have not polluted and do not propose to pollute the water, the fact that in this respect the injunction does not discriminate between them and the Chinamen who are doing so will do no harm. The order and judgment are affirmed.

We concur: HARRISON, J.; McFARLAND, J.

5 Cal. Unrep. 103

COCKINS v. COOK. (No. 19,515.)

(Supreme Court of California. July 31, 1895.)

PLEADING—VARIANCE.

Under Code Civ. Proc. § 469, providing that no variance between the allegation in a pleading and the proof is to be deemed material unless it has misled the adverse party, where a complaint by a judgment creditor of a corporation against a stockholder alleges that the debt was contracted on June 1st, proof that it was contracted on Aug. 20th is not a fatal variance.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by William W. Cockins against Joseph A. Cook to recover from defendant the proportion of a judgment against a corporation due from defendant as a stockholder thereof. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Cole & Cole, for appellant. White & Monroe, for respondent.

BELCHER, C. The Artesian Land & Water Company, a corporation, issued 20 bonds for $1,000 each, dated June 1, 1888, and secured by a mortgage on its corporate property. The defendant, Cook, became the owner of 270 shares of the capital stock of said company on the 20th day of June, 1888, and he continued to be the owner thereof until the 20th day of November, 1888. The said mortgage was subsequently foreclosed by plaintiff, and under the decree rendered the mortgaged premises were sold. The sum realized from the sale was not enough to satisfy the amount found due the plaintiff on the bonds, and thereupon a judgment against the said company for the deficiency was docketed in his favor. The plaintiff commenced this action to recover from the defendant his proportionate share of the said deficiency judgment, under section 322 of the Civil Code. The complaint alleges, among other things, that the bonds were "made, executed, and issued" on the 1st day of June, 1888, and that "at all of said dates and during all of said times, and during and at the time and respective times when said debt was incurred * * * and the said bonds and mortgage were made, executed, and delivered by said corporation aforesaid to this plaintiff, the said defendant, Joseph A. Cook, was a stockholder," etc. The answer alleges that although said bonds bear date on the 1st day of June, 1888, "yet the same were not made, executed, and issued, or made, executed, or issued, at the date herein last mentioned, nor were said bonds sold and negotiated, or sold or negotiated," prior to the month of October, 1889; and denies that defendant "was at the time of the commencement of this action, or at any time subsequent to the month of October, 1889, an owner and holder, or owner or holder, as original subscriber or otherwise," of any shares of the capital stock of said corporation. At the trial it was proved that the bonds "were not issued by the company or delivered to anybody, and no indebtedness was incurred upon them by the company until the 20th day of August, 1888, or a day or two thereafter, when they were delivered by the company," etc. And the court found that the bonds were delivered by the company on or about the 20th day of August, 1888, "and at that date the said company incurred an indebtedness on said bonds." Judgment was accordingly entered against the defendant for his proportion of the deficiency judgment, from which, and from an order denying a new trial, he appeals.

The appellant contends that there was a fatal variance between the allegations of the complaint and the proofs as to the time when the indebtedness was incurred; and this is the only point made for a reversal. We do not think this point can be sustained. The general rule invoked that the allegata and probata should correspond is undoubtedly correct, but it does not apply here. The Code provides: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." Code Civ. Proc. § 469. The main issue at the trial was as to whether defendant was or was not a stockholder at the time the indebtedness was incurred, and it seems impossible that he could have been misled to his prejudice by the averment in the complaint that the bonds were "made, executed, and issued" on the 1st day of June, 1888. The judgment and order should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

108 Cal. 300

PHILP v. DURKEE. (No. 19,458.)

(Supreme Court of California. July 31, 1895.)

COMPLAINT—SUFFICIENCY.

The complaint of one suing as assignee of F., averring that F. contracted with defendant to manufacture and erect certain iron gates for which defendant agreed to pay F. $430; that F. manufactured the gates, and ever since has been able, ready, and willing to erect them in accordance with the contract; that the gates were specially adapted to the places for which they were made, and cannot be sold elsewhere without enormous loss, amounting to almost the entire contract price; and that at divers times F. requested defendant to accept the gates, and permit him to erect them, and to pay him therefor $430, but defendant without cause refused; and that plaintiff, by reason of the premises, has suffered damages in the sum of $430,—is insufficient; as, treated as a complaint in an action for the price of goods, there is no averment of delivery, or offer to deliver, sufficient to pass title to defendant, and, considered as a complaint in an action for damages, it is uncertain as to what the damages consisted of, or as to the extent thereof.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Harry Philp against J. E. Durkee. Judgment for plaintiff. Defendant appeals. Reversed.

Chapman & Hendrick, for appellant. Houghton, Silent & Campbell, for respondent.

TEMPLE, J. Defendant appeals from the judgment and from an order refusing a new trial. The complaint was demurred to, and the demurrer is insisted upon here. Plaintiff sues as assignee of Fruhling Bros., and avers in his complaint that: Fruhling Bros. contracted with Durkee to manufacture, out of materials to be furnished by them, and to erect upon foundations to be prepared and designated by Durkee, certain iron gates and lamps, for which Durkee agreed to pay Fruhling Bros. $430. Also that Fruhling Bros. did construct and manufacture said gates and lamps, and the work of manufacture was completed about October 1, 1891, "and they have ever since been able, ready, and willing to erect the same in accordance with said contract." Further, the gates are specially adapted to the places for which they were made, and cannot be sold elsewhere without "enormous loss, amounting to almost the entire contract price." And that at divers times before the 29th day of April, 1892, Fruhling Bros. requested said Durkee to accept said gates and lamps, and to permit said Fruhling Bros. to erect them upon said premises, and to pay them therefor the sum of $430, but said defendant, without any cause therefor, refused to accept said gates and lamps, or any of them, or to permit the same to be erected, or to pay for the same, or any part thereof. The assignment was made to plaintiff April 29, 1892. It is averred that plaintiff, by reason of the premises, has suffered damages in the sum of $430, with interest from the 1st day of October, 1891. The demurrer was not only upon the general ground of insufficiency of facts, but also for uncertainty; charging that it is uncertain upon what grounds plaintiff seeks to recover in this action, and in what the alleged damages consist of, or in what manner plaintiff has been damaged, or as to what is the value of said gates, lamps, and material.

The complaint, treated as in an action for the price of the goods, is insufficient, because there is no averment of delivery, or offer to deliver, sufficient to pass the title to Durkee. Considered as an action for damages for a breach of the contract, it does state a cause of action, but as such it is obnoxious to the objections raised by the special demurrer. It is uncertain as to what the damage consisted of, or as to the extent of the damage. It may be construed as asserting that the loss of Fruhling Bros. is enormous, and amounting to almost the entire contract price, because the goods would not be valuable for any other purpose. How much they are injured by the refusal of Durkee to permit them to complete the contract is nowhere stated, even in general terms. The final allegation that plaintiff has been damaged in the sum of $430 is not material. Defendant did not contract with him.

It has been often held that there is nothing in the proposition that the court overruled the demurrer because the defendant failed to appear and present it. A demurrer raises an issue of law. To overrule the demurrer is to decide that issue. On appeal, if there was prejudicial error in the ruling, the case may be reversed for that reason. Even a rule of the superior court that a demurrer would be overruled for want of presentation would make no difference. The Code allows such issue to be made, and, unless the demurrer is waived, or gotten rid of in some lawful mode, the court must decide the questions raised. The demurrer itself presents the points. The judgment and order are reversed, and the cause remanded, with directions to the trial court to sustain the demurrer.

We concur: HENSHAW, J.; McFARLAND, J.

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108 Cal. 365

GOULD v. ADAMS et al. (No. 19,572.)

(Supreme Court of California. Aug. 3, 1895.)

MORTGAGES—PRIORITIES—DELIVERY.

1. Defendant agreed with A. to sell him certain land, part cash, and balance secured by mortgage. Defendant went with A. to a notary's office, where a deed was executed. While the mortgage was being prepared, A. said, "Let me see that deed," and took it from the table, and went, without defendant's knowledge, to plaintiff, from whom he negotiated a loan. A. then returned to defendant, paid him the money, and executed the mortgage, which defendant at once recorded. Prior to this time, plaintiff had the deed and A.'s mortgage to her recorded. *Held*, that defendant's mortgage was entitled to priority, as there had been no delivery of the deed to A. at the time he negotiated the loan from plaintiff. 32 Pac. 576, affirmed.

2. Defendant's negligence in allowing the deed to be removed from the room was not such as would justify an estoppel against a plea of nondelivery of the deed. 32 Pac. 576, affirmed.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Frederick Gould, executor of the will of Julia F. Gould, against Asa Adams, John Wise, and another, to foreclose a mortgage. From a judgment in favor of defendant Wise, plaintiff appeals. Affirmed.

For former reports, see 32 Pac. 576, and 33 Pac. 323.

Richards & Carrier and Geo. H. Gould, for appellant. H. H. Appel, F. R. Willis, and Houghton, Silent & Campbell, for respondents.

VANCLIEF, C. Action to foreclose a mortgage executed by defendant Adams to plaintiff's testatrix, in which John Wise was made a party defendant on the ground that he had a mortgage on the same land, alleged to be subsequent and subject to that of plaintiff. Wise answered, and also filed a cross complaint claiming that his mortgage was prior and superior to that of plaintiff, and praying that it be foreclosed as such. On the first trial of the cause the plaintiff prevailed, and the defendant appealed. This court reversed the judgment, and remanded the cause for a new trial. Gould v. Wise, 97 Cal. 532, 32 Pac. 576, and 33 Pac. 323. Upon the new trial the mortgage of defendant Wise was adjudged to be prior and superior to that of the plaintiff, and ordered to be first satisfied from the proceeds of the foreclosure sale. From this judgment the plaintiff brings this appeal on the judgment roll, containing a bill of exceptions as to matters of both law and fact.

On the former appeal the judgment was reversed on a state of facts fully set forth in the opinion of the court by Mr. Justice Garoutte. On the new trial the lower court again found the same facts, and nothing inconsistent with nor in avoidance of them. If these findings of fact on the new trial are justified by the evidence, as I think they are, it follows that the former decision is the law of the case.

Appellant complains that the court failed to find upon certain specified issues of fact, but, in view of the facts found, those issues were immaterial. A finding on each of them in favor of the plaintiff would not have necessitated any change in the judgment rendered.

It is further contended that the court erred in denying plaintiff's motion to strike out defendant's answer on the alleged ground that the amended answer is inconsistent with the original answer, in that the latter avers, and the former denies, that the deed from Wise to Adams was delivered. But there is no such inconsistency. The amended answer does not deny the delivery of the deed from Wise to Adams, but merely denies that it was delivered at the time of the execution of the mortgage from Adams to plaintiff's testatrix; and this was the effect of the original answer and cross complaint, as construed on the former appeal. The principal ground upon which the first judgment was reversed was that the deed from Wise to Adams had not been delivered at the time the mortgage from Adams to Julia F. Gould was executed. On the law of the case, as determined on the former appeal, the judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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108 Cal. 345

SEABRIDGE v. McADAM et al. (No. 19,582.)

(Supreme Court of California. Aug. 3, 1895.)

MALICIOUS PROSECUTION—ADVICE OF COUNSEL—PROBABLE CAUSE.

1. In an action for malicious prosecution of plaintiff for willfully tearing down a fence to make a passage through an inclosure, it appeared that plaintiff was in possession of land under a lease providing that, if the lessor sold any part of the land on which there was a crop, such portion would be released by paying plaintiff a reasonable compensation for his labor on the crop. Defendant bought the land while there was a crop on it, and plaintiff refused to surrender possession till paid for his labor. Defendant nailed up the fence to a field at a place where plaintiff used to enter it, and told plaintiff, if he wanted law, he would give it to him. Plaintiff pried off the boards nailed up by defendant. The attorney who advised the prosecution of plaintiff testified that defendant told him that plaintiff had broken through the fence, and that he knew there was a dispute between plaintiff and defendant as to plaintiff's right to enter the field, but did not testify as to any other facts on which his advice was given. He stated that on the trial of plaintiff no facts were brought out of which he was ignorant. *Held*, that the evidence is insufficient to show probable cause.

2. In an action for malicious prosecution, where the facts are admitted, the question of probable cause is one of law.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Lee Seabridge against Robert McAdam and another for malicious prosecution. A verdict was directed for defendants, and from an order granting a new trial they appeal. Affirmed.

A. R. Metcalfe and J. H. Merriam, for appellants. Edwin Baxter, for respondent.

TEMPLE, J. This is an action to recover damages for malicious prosecution of a criminal action against plaintiff upon a charge that plaintiff did maliciously and willfully tear down fences to make a passage through an inclosure, under Act March 16, 1871-72, p. 384. At the close of the trial in the present action the court instructed the jury to find for defendants, on the ground that the evidence showed, without contradiction, that there was probable cause for the criminal prosecution, because defendants acted in good faith, under the advice of counsel, given upon a consideration of all the facts in the case. Verdict was accordingly rendered for defendants, and, upon a motion for a new trial, was set aside by the judge, presumably because he was convinced that he had erred in giving the instruction. This appeal is taken from the order granting a new trial.

It seems that plaintiff was in possession of a certain tract of land under a lease from an administrator. In the lease it was stipulated: "In case of sale by the party of the first part of any portion of said land before the same shall be in crop or use, such portion thereof shall be excepted from this lease, provided that all pasture land shall pay rent until so sold. In case of such sale of any portion of said land before the first day of July, 1890, with the crop thereon, to any person other than to said party of the second part, said portion shall be released by payment to said lessee of a reasonable compensation for his labor and expenditure in putting in of such crop and caring for the same until such sale." Plaintiff was a subtenant of a portion of the demised premises, and had corn growing upon the land on the 31st of May, 1893, when McAdam became the owner of the land through a sale by the administrator. There was evidence that tended to show that McAdam knew of plaintiff's rights before he purchased the land, and on the day of the confirmation of the sale he was shown a writing which contained the terms of the lease, and that he also knew of plaintiff's possession and rights. When he had received his deed he claimed that plaintiff must deliver to him the land, and look to the administrator for payment for his labor and expenditures. Seabridge merely persisted in holding on until he was paid. He was not paid the cost of putting in and caring for the crop, nor was anything ever tendered to him in payment. After several interviews between the parties and between McAdam and the administrator upon the subject, McAdam finally nailed up the fence where plaintiff had been in the habit of going into his field, and forbade plaintiff going into the field; and when plaintiff said he would do so as he owned the crop and had a right so to do, McAdam said: "If it's law you want, I will give you all you want, and stay with it as long as you can." Plaintiff, having occasion to go to his field, pried off the boards which had been nailed on by McAdam, and went in. For this he was arrested, as stated.

The evidence produced by plaintiff made an undoubted case against defendant. There was no defense, except that defendants had acted upon the advice of counsel. In his testimony, McAdam made no attempt to state what he had told his counsel, or what his counsel knew about the facts. The attorney was a witness, and did not state upon what facts his advice was based. He merely stated that he had been the attorney for defendant McAdam; that he was informed that plaintiff had broken through the fence; that he knew there was a dispute between the parties, and that plaintiff claimed the right to go through the fence to the field; and, further, that he attended the trial of the case against plaintiff, and no facts were brought out at the trial of which he was ignorant when he gave the advice. He testified further that he had heard that plaintiff had made certain threats against McAdam, but had not heard, and did not know, that McAdam was aware of the fact, at the time of the confirmation of the sale, that plaintiff was the owner of the crop. This testimony was entirely insufficient to show probable cause, or to justify the instruction. It was not denied that plaintiff broke through the fence. The only question, then, was whether he did so in good faith, under a reasonable belief that he had a legal right so to do. If the facts had all been stated, no reputable attorney could have doubted that plaintiff acted under such belief. The facts detailed to the attorney, or the information which he had, should have been proven. It was then a question of fact, to be determined by the jury, and not by the court, whether the defendants had made a fair and full statement of the facts which were known to them. And even if, upon such a statement of facts, such advice was given, it was still to be determined by the jury whether defendants acted upon it in good faith, believing that plaintiff was guilty of the offense charged. And I think the jury would have been justified, in this case, in determining that they did not, if the facts were as shown by plaintiff's witnesses. Could even an intelligent layman believe, under the advice of counsel, that plaintiff, under the circumstances related, was not acting under a reasonable belief that he had a right to go through the fence? If so, it would not require a lawyer to determine that the act could not be malicious. Of course, I assume the facts to be as the plaintiff's testimony tended to prove them to be. This must be assumed in favor of the decision. They may not be as testified, and, of course, the attorney who gave the advice did not base his opinion upon such facts. There was evidence, however, which tended to prove that McAdam knew of them. Of course, if the facts are all admitted, the question whether there was probable cause is a question of law, for the court. The rule in such cases is fully and correctly stated in Ball v. Rawles, 93 Cal. 222, 28 Pac. 937. The order is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

(108 Cal. 294)

CITY OF SANTA BARBARA v. ELDRED.

(No. 19,567.)

(Supreme Court of California. July 31, 1895.)

COMPLAINT—GROUNDS OF GENERAL DEMURRER—ASSESSMENT — DESCRIPTION OF LAND — SUFFICIENCY — NEW TRIAL—APPEAL—REVIEW—SUIT FOR TAXES—FAILURE TO PUBLISH DELINQUENT LIST.

1. That a complaint is ambiguous is not a ground of general demurrer.

2. That a complaint makes the essential facts appear only inferentially or as conclusions of law is not a ground of general demurrer.

3. An assessment record, in which the first column is headed "Description of Property According to Map Book of the City of S.," the second column "Lot," and the third "Block," and which, in the respective columns, describes the property as "City Lot," "2," "110," shows that it is in S.

4. A city assessment need not state that the taxpayer owned the property on the first Monday of March.

5. Nor need it state that the city had a map book.

6. A city assessment is not invalidated by slovenly entries thereof by the tax collector.

7. Where the statement on motion for a new trial does not allege that the evidence is insufficient to support a finding, a new trial will not be granted on that ground.

8. Where defendant specifies in his statement on motion for a new trial that the evidence does not justify a finding that interest was due, and nothing appears in the statement to justify the allowance of interest, the judgment will, on appeal, be modified by striking out the interest.

9. In an action to recover a tax, defendant cannot object that the delinquent list was not published as required by law.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by the city of Santa Barbara against A. Eldred to recover a tax. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

B. F. Thomas, for appellant. Thos. McNulta, for respondent.

TEMPLE, J. This is the second appeal in this case (see 95 Cal. 378, 30 Pac. 562), and is taken from the judgment and from a refusal of a new trial. The action was brought to collect a municipal tax, and to the complaint a general demurrer was interposed. It was overruled, and defendant answered. He now specifies a great many alleged defects in the complaint. Many of them are, in effect, that the complaint is ambiguous or uncertain. Such objections cannot be reached on general demurrer. Nor can the other objections—which merely amount to criticisms upon the sufficiency of the statement, as that the essential facts appear only inferentially, or as conclusions of law, or by way of recitals—prevail on such demurrer. There must be a total absence of some material fact, to justify us in sustaining a demurrer of this character.

The only points which I think worthy of notice on the demurrer are the objections to the assessment. It is claimed that it is invalid, because:

1. It does not show that the real estate is situated within the city of Santa Barbara. The first column after taxpayers' names is headed "Description of Property According to Map Book of the City of Santa Barbara." The next column is headed "Lot," and the next "Block." In the first of these columns are the words "City Lot"; in the second, "2"; in the third, "110." I think this sufficient to show that the property is in Santa Barbara.

2. It is not essential to the assessment that it should state that the taxpayer owned the property assessed on the first Monday of March, or that the city had a map book.

3. The slovenly entries by the tax collector, intended to show that a portion of the tax had been paid, do no injury. Interpreted as claimed by appellant, they are meaningless, and would do no harm.

4. There is no uncertainty in the figures which show the total value of all property after equalization. Ordinance 113, which provides for the levy and collection of the tax, ought to have been more fully set out, at least in effect. The allegations are, however, sufficient to support a judgment, and, as no special demurrer was interposed, they are sufficient on this appeal.

The delinquent list as published stated that the tax and costs amounted to $246.91, when, as it is contended, the correct amount was $245.91; just one dollar too much. The common council of the city of Santa Barbara, as they were authorized to do under the ordinance, which provided for the levy and collection of taxes, passed a resolution to the effect, as to all assessments upon which taxes amounted to less than $300, that where the property has been offered for sale at least once, and there is no purchaser in good faith, the tax collector shall proceed to collect the same by civil action in the name of the city. The complaint recites that all this has been done, and that, therefore, the tax collector brings this suit in the name of the city of Santa Barbara. In his statement on motion for a new trial the defendant has not charged that the evidence is insufficient to support this finding. We cannot, therefore, grant a new trial upon that ground.

A recovery was had of the sum of $81.65 for interest. No interest is claimed in the complaint, and there is no allegation under which interest could be allowed. Furthermore, the defendant has specified in his statement on motion for a new trial that the evidence does not justify the finding that interest was due. If, therefore, there was anything in the ordinance to justify the finding, the city attorney should have seen that it was in the statement. The objection to the allowance of interest must therefore be sustained. A new trial will not be necessitated thereby, for the judgment can easily be modified by striking out the allowance of interest.

The defendant cannot object that the requirements of the statute were not pursued in the contract for publishing the delinquent list. His liability is created by a valid assessment, and, if that was made, no irregularity in the attempt to collect the tax will discharge him from the liability. The publication was for the proper period.

I think there was no error in admitting the block books, and the remark of the witness Gutierrez, that it appeared from them that Alice Eldred owned lot 3, is of no moment.

The defendant admitted, by not denying, that he owned the property. Besides, the assessment put the burden upon him. Pol. Code, § 3900.

The case is remanded, with directions to the trial court to modify the judgment by deducting the interest allowed. In all other respects the judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

108 Cal. 326

Ex parte LACEY. (Cr. 33.)

(Supreme Court of California. Aug. 1, 1895.)

HEALTH ORDINANCES—VALIDITY.

An ordinance prohibiting the establishment or conducting of any steam shoddy or carpet-beating machine within 100 feet of a church, schoolhouse, or residence, passed under Const. art. 11, § 11, authorizing any city to make and enforce all such police and sanitary regulations as are not in conflict with general laws, is not unreasonable, and does not deprive any one of property without due process.

In bank.

Petition of James Lacey for writ of habeas corpus. Denied.

D. P. Hatch and R. B. Treat, for petitioner. C. McFarland, for respondent.

GAROUTTE, J. The petitioner has been convicted and imprisoned for violating a city ordinance of the city of Los Angeles which provides: "No person or persons shall establish or conduct any steam shoddy machine, or steam carpet-beating machine, within one hundred feet of any church, schoolhouse, residence or dwelling-house." He now alleges the judgment void, upon the ground that the ordinance is void, and seeks his release by writ of habeas corpus. He claims the ordinance void upon the ground that it interferes with certain of his inalienable rights vouchsafed to him by the constitution. Upon the part of the city, it is claimed that the passage and enforcement of the ordinance is but the exercise of a police power granted to it in terms, by the constitution of the state. The constitution of the state of California (article 11, § 11) provides: "Any county, city, town or township may make and enforce, within its limits, all such local, police, sanitary and other regulations as are not in conflict with general laws." It will thus be observed that Los Angeles city is vested with certain powers by direct grant from the constitution, and that grant of power is not confined within narrow limits, but is broad and far-reaching in its scope and effect. Under this grant of power the city had the right to pass this ordinance, unless it is in conflict with general laws; and we know of no general laws which conflict with it, unless it can be said to be violative of those general principles of constitutional liberty which form the very foundation of both the state and federal constitutions. We see nothing in the language of this ordinance contrary to these great principles of our government. We see nothing there depriving petitioner of any fundamental right. In the exercise of its police and sanitary power, the city has attempted to regulate the business of beating carpets by steam power. Under its constitutional grant, it had the right to regulate this business. The use of steam power, of itself, within municipal territory, has always been recognized as a proper subject of regulation; and, in addition, here it may well be assumed that the dust and other disagreeable and unhealthy matters arising in such quantities from the beating of carpets, as would naturally be indicated by the use of steam power, are a constant source of danger and menace to the good health and general welfare of the neighborhood where located.

Conceding the business covered by the provisions of this ordinance not to constitute a nuisance per se, and to stand upon different grounds from powder factories, street obstructions, and the like, still the case is made no better for petitioner. This is not a question of nuisance per se, and the power to regulate is in no way dependent upon such conditions. Indeed, as to nuisances per se, the general laws of the state are ample to deal with them. But the business here involved may properly be classed with livery stables, laundries, soap and glue factories, etc.,—a class of business undertakings, in the conduct of which, police and sanitary regulations are made to a greater or less degree by every city in the country. And in this class of cases it is no defense to the validity of regulation ordinances to say, "I am committing no nuisance, and I insist upon being heard before a court or jury upon that question of fact." In this class of cases a defendant has no such right. To the extent that it was material in creating a valid ordinance, we must assume that such question was decided by the municipal authorities, and decided against petitioner and all others similarly situated. This court said in Ex parte Shrader 33 Cal. 284: "The legislature can add to the mala in se of the common law the mala prohibita, of its own behest. * * * The power to regulate or prohibit, conferred upon the board of supervisors, not only includes nuisances, but extends to everything expedient for the preservation of the public health and the prevention of contagious diseases. Now, there are many things not coming up to the full measure of a common-law or statute nuisance that might, both in the light of scientific tests and of general experience, pave the way for the introduction of contagion, and its uncontrollable spread thereafter. Slaughterhouses, as ordinarily, and perhaps invariably, conducted in this country, might, within the limits of reasonable probability, be attended with these consequences. A competent legislative body has passed upon the question of fact involved, and we cannot go behind the finding. So far as we can know by this record, the power conferred has been exercised intelligently, and in good faith." It must be borne in mind that the court was not discussing this question from the standpoint that the conduct of a slaughterhouse within municipal territory constituted a nuisance per se. In the case of Johnson v. Simonton, 43 Cal. 249, which involved the constitutionality of an ordinance of the board of supervisors of San Francisco prohibiting the feeding of still slops to milch cows, the court says: "If, indeed, it be a fact that the milk of cows fed in whole or in part upon still slop is unwholesome as human food, there can be no doubt of either the authority or the duty of the board to enact the ordinance in question, and the scientific correctness of the determination by the board of the matter of fact involved is not open to inquiry here." In the case of In re Jacobs, 98 N. Y. 98, the court declares the following rule for testing the validity of ordinances enacted under the police power of a municipality: "When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property, without due process of law, the courts must be able to see that it has at least, in fact, some relation to the public health; that the public health is the end naturally aimed at; and that it is appropriate and adapted to that end." Tried by this rule, the ordinance in question fairly and fully fills the requirements of the law. It cannot be urged that petitioner is deprived of his property without due process of law, for, as is said by Judge Dillion in his work upon Municipal Corporations (section 141), in speaking of police and sanitary regulations: "It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances.

They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either damnum absque injuria, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." This ordinance is not unreasonable nor arbitrary nor discriminating. It treats all persons alike who are engaged in the business named therein. All have the same rights, and all are subject to the same burdens. It is not unreasonable in the limits of distance fixed. As to the location of the exact spot distant from a church or a schoolhouse or a dwellinghouse, where an ordinance would cease to be reasonable, it is not for this court now to say. The limits here prescribed are those with which we are to deal, and those limitations of distance may well be said to be reasonable. We see no substantial objection that can be made to the validity of this ordinance. Upon the contrary, the subject-matter covered by it is clearly one with which the city had the constitutional right to deal, and the businesses there enumerated are unmistakably those which the municipal authorities had the right to regulate, in the interest of the comfort and good health of the people of the city. The power is vested in the city, by direct grant from the constitution, to control and regulate business undertakings of the character here involved, and petitioner's constitutional rights have in no way been trespassed upon. It is therefore ordered that petitioner be remanded.

We concur: McFARLAND, J.; HARRISON, J.; VAN FLEET, J.; TEMPLE, J.

108 Cal. 135

GAROUTTE v. WILLIAMSON. (No. 15,955.)

(Supreme Court of California. Aug. 14, 1895.)

On petition for rehearing. Denied.

For former opinion, see 41 Pac. 35.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause. Not because I think the plaintiff failed to prove facts entitling him to a judgment, but because, in my opinion, the cause was tried in the superior court, and has been decided here, upon an erroneous view of the law.

The issues of fact were submitted to the jury under instructions to the effect that if the bank held the warehouse receipt, properly indorsed by plaintiff's assignors, as security for a loan, at the time defendants purchased and took possession of the wheat, the plaintiff could not maintain the action. It is conceded in the opinion of the court that this theory was correct, but the judgment is affirmed on the ground that the defendants failed to prove the existence of the bailment at the date of the conversion. In my opinion, the existence of such a bailment at the date of the conversion was no defense to an action to recover compensation for an injury to the reversionary interest of the pledgors commenced after payment of the debt and return of the pledge, and, therefore, I am satisfied that the actual result of the litigation is just. But I cannot assent to the grounds upon which the decision of this court is placed. If the theory of the defense was a sound one, it is clear to my mind that the facts were fully proved.

TEMPLE, J. I dissent from the order refusing a rehearing, because I am convinced that under the instructions the verdict is not warranted by the evidence. I agree with the chief justice as to the law which ought to have governed at the trial.

5 Cal. Unrep. 115

DOWLING v. ADAMS et al. (No. 15,913.)

(Supreme Court of California. Aug. 21, 1895.)

CERTIFICATE OF SURVEYOR—AUTHORITY OF CLERK TO SIGN.

Where a city surveyor is required to sign a certificate as to a public improvement, it cannot be signed by his clerk, who had no specific directions from him to sign it. Rauer v. Lowe (Cal.) 40 Pac. 337, followed.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Troutt, Judge.

Action by one Dowling against one Adams and others. Judgment was rendered for plaintiff, and defendants appeal. Reversed.

Horace W. Philbrook, for appellants. J. C. Bates, for respondent.

PER CURIAM. Action upon a street assessment. The testimony on behalf of the defendants showed that the certificate of the city and county surveyor, which was recorded in the office of the superintendent of streets, was not made by that officer, but that his name was signed thereto by a clerk in his employ, without any specific directions therefor. The testimony upon this point is almost identical with that given in Rauer v. Lowe (Cal.) 40 Pac. 337. Upon the authority of that case, the judgment is reversed.

108 Cal. 527

LEWIS v. CHAMBERLAIN et al. (No. 19,541.)

(Supreme Court of California. Aug. 21, 1895.)

SUPPLEMENTARY PROCEEDINGS — ORDER FOR EXAMINATION OF THIRD PERSON—DENIAL OF INDEBTEDNESS.

Code Civ. Proc. § 720, provides that if, in proceedings supplemental to execution, a person alleged to have property of the judgment debtor claims an interest therein adverse to him, the judge may authorize the judgment creditors to institute an action against such person for the recovery of such interest or debt. Section 719 provides that the judge may order any property of a judgment debtor in the hands of any other person to be applied towards the satisfaction of the judgment. *Held* that, where an affidavit for the examination of the judgment debtor's wife alleged that she held property belonging to the judgment debtor which was conveyed to her to shield it from the judgment, and she filed a verified answer denying that she held any property belonging to the judgment debtor, or that any property was conveyed to her for the purpose stated in the affidavit, the judge could only authorize that suit be brought against her to recover the property claimed, and could not further proceed with her examination.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by William Frisbie Lewis against E. W. Morse and another. Judgment was rendered for plaintiff, and he obtained an order for the examination in supplementary proceedings of Myra I. Conklin and others. From an order dismissing the proceeding, plaintiff appeals. Affirmed.

Works & Works, for appellant. M. A. Luce and Conklin & Hughes, for respondents.

HAYNES, C. Appeal from an order dismissing proceedings supplementary to execution. Lewis obtained judgment in the superior court of San Diego county against E. W. Morse and N. H. Conklin for a large sum of money, upon which execution was issued, and returned nulla bona. He afterwards filed in said court an affidavit, entitled in said cause, alleging the foregoing facts, and further alleging, on information and belief, that defendant Conklin, for the purpose of avoiding payment of said judgment, conveyed a large amount of property owned by him to Myra I. Conklin, his wife, and to Ralph L. Conklin, his son, who hold said property in their own names, and are thereby aiding and assisting him to shield it from sale to satisfy plaintiff's said judgment. Like allegations were made of conveyances by defendant Morse to his wife, Mary C. Morse, and that she had conveyed part thereof to one Daniel Schuyler. And upon this affidavit he asked that an order be issued, requiring the said judgment debtors and Mary C. Morse, Myra I. Conklin, Ralph L. Conklin, and Daniel Schuyler "to appear and be examined as to the property of said Morse and Conklin, and for such other relief as is provided by law." Mrs. Conklin filed a written and verified answer to plaintiff's affidavit, specifically denying that she held any property belonging to her husband in her name or possession or control, and alleged "that she in good faith claims and owns in her own right all property now in her name or possession, or under her control, or that was in her possession or name or control when any of the papers in this cause were served upon her." She further denied that her husband had conveyed to her any property for the purpose charged in plaintiff's affidavit, and alleged that she then was, and since 1867 had been, the wife of said N. H. Conklin, and prayed that she be no further examined therein, and that she be discharged with her costs. Mrs. Morse filed a similar verified answer. Upon the hearing, Mrs. Conklin was called by the plaintiff, and after testifying to her residence, that she was the wife of N. H. Conklin, and after giving the date and place of her marriage, was asked the following question: "What property, if any, did you have at that time?" Whereupon her counsel interposed the following objections: "(1) That Mrs. Conklin cannot be examined under the statute in this proceeding, because she is the wife of the defendant Conklin, and he objects to her being examined. (2) That —and, of course, we shall have to prove this by laying a predicate—that she claims all the property in her own right, and it is in her possession; and when she claims it the court cannot make examination in this proceeding, but suit can be instituted against her by plaintiff for the recovery of the property." The objections were sustained, and plaintiff excepted. The same objections were made to the examination of Mrs. Morse, the same ruling had, and exception taken. Defendants then consented that an order be made authorizing plaintiff to institute suit to recover said property, to which counsel for plaintiff replied that "he wanted the property turned over." Some other testimony was heard, and, the evidence being concluded, the court dismissed the proceeding; and this appeal is from the judgment of dismissal, the proceedings being embodied in a bill of exceptions.

Two questions are discussed by counsel for appellant: (1) Whether the wife was a competent witness, the husband objecting; and (2) whether any order could have been legally made by the court against Mrs. Conklin or Mrs. Morse other than one authorizing the plaintiff to bring an action against them for the recovery of the property alleged to have been conveyed to them by the judgment debtors, as provided in section 720 of the Code of Civil Procedure, they having, by their answers under oath, claimed ownership in good faith of the property conveyed to them respectively. The first of these questions need not be considered, as the judgment or order dismissing the proceeding must be affirmed under the second objection made by counsel for Mrs. Conklin and Mrs. Morse, plaintiff having declined to accept an order granting leave to bring an action for the recovery of the property.

This proceeding was brought under the provisions of the Code of Civil Procedure entitled "Proceedings Supplementary to the Execution," of which sections 717 and 720 are as follows:

"717. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, or upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same."

"720. If it appear that a person or corporation, alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just."

Section 718 provides for the examination of witnesses "in the same manner as upon the trial of an issue"; and section 719 provides that "the judge or referee may order any property of a judgment debtor * * * in the hands of such debtor or any other person * * * to be applied towards the satisfaction of the judgment."

I think it entirely clear, upon the face of the statute, that no order could be legally made requiring Mrs. Morse or Mrs. Conklin to surrender the property mentioned in the affidavit of the plaintiff, and its application in satisfaction of his judgment, otherwise than upon their admission that it was the property of the judgment debtor. To make such order in relation to property which they claimed to own in their own right, if it could have any effect or operation, would be to deprive them of their property upon a summary proceeding, and without due process of law. If the plaintiff claims or believes their title under the conveyances mentioned in his affidavit to be invalid, an issue as to such ownership and title should be properly made and tried in an appropriate action, in which the verdict of a jury or the findings of a court may be regularly had determining those questions, and upon which a judgment could be regularly entered by which the parties would be conclusively bound. But this precise question has been decided by this court in McDowell v. Bell, 86 Cal. 615, 25 Pac. 128, where, under facts similar to those involved in this case, the court below granted the order subjecting the property to the satisfaction of the judgment, and this court held that in granting such order the court below exceeded its jurisdiction; that "his only power in the premises was to make an order authorizing the judgment creditor to institute an action in the proper court" for the recovery of the property,—and granted a writ of prohibition restraining the enforcement of the order. Counsel for appellant cite Herrlich v. Kaufmann, 99 Cal. 271, 33 Pac. 857, to the effect that the Code provisions for supplementary proceedings are a substitute for a creditor's bill, and say: "To hold that because the party brought in to answer says, 'I claim this property in my own right,' he cannot be required to answer at all, and the court can only order that a suit be brought, would make the proceeding a mere farce, instead of a substitute for a creditor's bill." It is quite evident, however, that the Code provisions relating to proceedings supplementary to execution, without the provisions contained in section 720, could not take the place of a creditor's bill, where, as here, the judgment debtor had "conveyed" the property to a third person, who claimed title under such conveyance. The order dismissing the proceeding should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

108 Cal. 513

BANK OF LASSEN COUNTY v. SHERER.

(No. 18,394.)

(Supreme Court of California. Aug. 9, 1895.)

NOTE—EXECUTION—TRANSFER—JURY FEE.

1. There is no error in requiring a party, in accordance with a rule of court, to deposit jury fees as a condition to having a jury.

2. Validity of a note made payable to the order of the maker, and indorsed by him with proper spelling of his name, is not affected by the fact that in signing the note the "s" was omitted from his given name, "Josiah."

3. A note made payable to the order of the maker, and delivered by him indorsed, is thereafter transferable by delivery, like a note payable to bearer, without further indorsement.

Department 2. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by the Bank of Lassen County against Josiah Sherer. Judgment for plaintiff. Defendant appeals. Affirmed.

Spencer & Raker and F. C. Spencer, for appellant. Goodwin & Goodwin, for respondent.

McFARLAND, J. This action is upon three promissory notes made by defendant, Sherer, and judgment was rendered against him for the amount of the three notes. He appeals from the judgment and from an order denying a new trial.

The contest is only over the note for $260.50, mentioned in the first count of the complaint, except so far as certain general objections hereinafter stated, to the validity of the judgment, cover the whole case. We will briefly notice the main points made for reversal.

1. As to the alleged disqualification of the judge who tried the case, it is sufficient to say that the transcript does not show that either he or his uncle, J. T. Masten, owned any stock of the corporation plaintiff at the time of the trial and decision of this case; while the affidavits filed at the hearing in this

court—in response to affidavit filed by appellant—show affirmatively that the judge never owned any of said stock, and that the uncle, who at one time had owned two shares of said stock, had sold it before the commencement of this action.

2. The judgment cannot be reversed on account of contradictory findings. It was averred in the complaint that the plaintiff is a corporation, and the appellant, for the purpose of a defense which was not tenable, also averred in the answer that the plaintiff is a corporation; and, as the court found that all the averments of the complaint are true, and all the averments of the answer are untrue, it is contended by appellant that the findings are contradictory, because they are to the effect that respondent is and is not a corporation. There is, perhaps, a possibility of this point being somewhat ingenious, but findings have no office to perform concerning a matter about which there is no issue.

3. The court did not err in requiring appellant, upon his demand for a jury, to deposit $24, as required by a rule of the court. This was held in Conneau v. Geis, 73 Cal. 178, 14 Pac. 580, and we see no good reason for departing from the conclusion reached in that case. In the case at bar there is no doubt that the $24 required by the rule to be deposited is for jury fees; and no suggestion was made by counsel for appellant, when he demanded a jury, that said money was for any other purpose.

4. The evidence supports the findings. The note was made by the appellant, Josiah Sherer, payable "to the order of myself," and was indorsed by him in blank; and the fact that in signing the note at the bottom he left the letter "s" out of the word "Josiah" makes no difference. In the indorsement the name was properly spelled. The proof that he made the note was entirely sufficient to support the finding on that point. Appellant delivered the note, indorsed as aforesaid, to one Fuller. It was delivered by Fuller to one Hawes, who was the manager of the company for which Fuller was acting, and by Hawes to respondent. Respondent became thus the legal holder of the note, with the right to bring an action thereon. It was like a note payable to bearer. Curtis v. Sprague, 51 Cal. 239. The evidence shows, we think, that respondent obtained the note before its maturity, but there was ample proof of consideration. There are no other points necessary to be noticed. Judgment and order appealed from affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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108 Cal. 522

HYDE v. BUCKNER, Sheriff, et al. (Sac. 4.)

(Supreme Court of California. Aug. 19, 1895.)

WITNESS—IMPEACHMENT—TITLE OF GRANTEE—DECLARATIONS OF GRANTOR.

1. On an issue between a grantee and a creditor of the grantor as to whether the deed was given as security, where the creditor called the grantor, who testified that the sale was absolute, it was error to allow another witness for the creditor to testify that the grantor told him he conveyed the land as security.

2. The title of the grantee cannot be impeached by evidence of declarations of the grantor made many years after the conveyance.

In bank. Appeal from superior court, Kings county; Justin Jacobs, Judge.

Action by J. D. Hyde against W. V. Buckner, sheriff, and others, to restrain the sale of land under execution. Judgment was rendered for defendants, and plaintiff appeals. Reversed.

E. O. Larkins, W. B. Wallace, and U. T. Clothfelter, for appellant. Horace L. Smith and Bradley & Farnsworth, for respondents.

TEMPLE, J. This action was brought to restrain the sale, under execution against the property of Peter Van Valer, of certain lands conveyed by Van Valer to plaintiff in October, 1884. The question is whether that deed was intended to secure an indebtedness, and was, therefore, a mortgage. That it was given as security is affirmed by the judgment creditor and denied by the plaintiff. Defendant recovered judgment, and this appeal was taken by plaintiff from the judgment and from a refusal of a new trial.

The main contention here is that the evidence does not sustain the finding of the court upon the issue above stated. After a careful consideration of the evidence, as shown in the record, I do not think the conclusion reached upon that issue can be disturbed here. The evidence is voluminous, and discussion of it would not be useful.

I think, however, the court erred in permitting defendants to prove by the witness Mannheim statements made by Van Valer, nine years after the execution of the deed, impeaching the title conveyed thereby to plaintiff, by showing that it was given as security for a loan. Van Valer had been called by defendants, and, as their witness, had testified, in substance, that the transaction was a sale, and that the relation of debtor and creditor did not continue between himself and Hyde after the execution of the deed; and, further, that there was no understanding, express or otherwise, that Van Valer could repurchase for at least three months after the execution of the deed. Defendants then called Mannheim, and asked him to tell what Van Valer had said to him about the transaction in August, 1893. This was objected to as incompetent. The objection was overruled, the court saying: "I think the evidence is competent for the purpose of ascertaining what the intention of the parties was." The witness then proceeded to testify that Van Valer stated that he had conveyed the land to Hyde simply as security for a loan. This evidence was clearly incompetent to disprove or impeach the title which Hyde claimed to have acquired from Van Valer. It was admissible only to show why the defendants had called a witness who was adverse to them, and not then, unless they were surprised by his testimony. Beyond this it was entitled to no weight whatever. It could have no force in making an affirmative case for the defendants. Hall v. The Emily Banning, 33 Cal. 522; In re Kennedy's Estate, 104 Cal. 429, 38 Pac. 93. In view of the reason given by the judge for the ruling, we cannot presume that the evidence had no weight in the determination of the principal issue.

The judgment and order are therefore reversed and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.; HARRISON, J.; VAN FLEET, J.

108 Cal. 535

WARREN et al. v. FERGUSON. (No. 15,941.)

(Supreme Court of California. Aug. 21, 1895.)

APPEAL—SERVICE OF NOTICE ON CODEFENDANT—CERTIFICATE OF CITY ENGINEER—AUTHORITY OF ASSISTANT TO MAKE.

1. Where, in an action against several parties to establish a lien on land, judgment is rendered against defendants, and the effect of an appeal by one defendant is to establish that there was no lien on which the judgment could be rendered, the appeal will not be dismissed for failure to serve notice thereof on the other defendants. Insurance Co. v. Fisher (Cal.) 39 Pac. 761, followed.

2. A certificate as to the regularity of assessment proceedings signed by an assistant in the city engineer's office by verbal appointment is not sufficient, under St. 1889, p. 168, making such a certificate by the engineer prima facie evidence of the regularity of the assessment. Rauer v. Lowe (Cal.) 40 Pac. 337, followed.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Troutt, Judge.

Action by Warren and others against Ferguson on a street assessment. Judgment was rendered for plaintiffs, and defendant appeals. Reversed.

T. Z. Blakeman and Benj. Healey, for appellant. J. C. Bates, for respondents.

PER CURIAM. Action upon a street assessment. The respondents have moved to dismiss the appeal upon the ground that a codefendant with the appellant was not served with the notice of appeal. It was held in Insurance Co. v. Fisher (Cal.) 39 Pac. 761, that when, in an action to enforce a lien upon a piece of real estate, judgment has been rendered against several defendants, if the effect of an appeal from that judgment is to establish that there was, in fact, no lien upon which the judgment could be rendered, a reversal of the judgment will not injuriously affect the other defendants, and, therefore, that the appeal will not be dismissed for a failure to serve them with the notice of appeal. The engineer's certificate, which the plaintiff offered in evidence, in connection with the warrant, assessment, and diagram, was signed "Wm. M. Fitzhugh, City Engineer. Holcomb;" and the defendant objected to its introduction upon the ground that it did not purport to be signed by the city engineer, but by one Holcomb. The plaintiff thereupon introduced evidence substantially the same as that presented in Rauer v. Lowe (Cal.) 40 Pac. 337, from which it appeared that the certificate had never been signed by the city engineer or by any deputy of his, but that his name had been signed by Holcomb, who was merely an assistant in his office by virtue of a verbal employment. The defendant thereupon renewed his objections, but the court overruled them, and allowed the certificate to be read, and rendered judgment in favor of the plaintiff. Under the principles given in Rauer v. Lowe, supra, this was error. The rule in respect to the acts of an officer de facto, suggested by the respondent, has no application. The statute has declared that certain documents, one of which is the certificate of the engineer, shall be "prima facie evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based, and like evidence of the right of the plaintiff to recover in the action." St. 1889, p. 168. But for this provision of the statute, it would have been incumbent upon the plaintiff to establish every act of the municipality and its officers which is required in order to create the lien of the assessment. If, instead of so doing, the plaintiff would avail himself of the statutory privilege to establish his right of recovery by the prima facie evidence, he must offer competent evidence of every portion of the substituted proofs. In the present case it was essential that the plaintiff should produce a certificate of the city engineer as a part of the evidence which the statute has made a portion of the prima facie evidence necessary to establish his right of action. Upon his failure to do so, the court should have disregarded the evidence offered, and rendered judgment for the defendant. The judgment is reversed.

WILLIAMS v. CUNEO. (No. 15,747.)

(Supreme Court of California. Aug. 21, 1895.)

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by one Williams against one Cuneo on a street assessment. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Horace W. Philbrook, for appellant. J. C. Bates, for respondent.

PER CURIAM. Action upon a street assessment. The case of Rauer v. Lowe (Cal.) 40 Pac. 337, invoked on behalf of the appellant, has no application to the present case. The provision making the certificate of the city engineer a portion of the proof for establishing prima facie evidence of the regularity and correctness of the assessment and prior proceedings was first incorporated into the statutes by the act of March 14, 1889 (St. 1889, p. 157), and the thirty-seventh section of that act provides: "Any work or proceedings commenced under the act of which this is amendatory shall in no wise be affected thereby, but shall in all respects be finished and completed thereunder, and this act shall in no wise affect said work or proceedings." The proceedings for the improvement for which the assessment herein was made were commenced October 29, 1888, and the sufficiency of the evidence is to be determined by the statutes then in force. The other points urged in support of the appeal have been determined adversely to the appellant in the cases of Fletcher v. Prather, 102 Cal. 413, 36 Pac. 658; White v. Harris, 103 Cal. 528, 37 Pac. 502; Byrne v. Luning Co. (Cal.) 38 Pac. 454; and Rauer v. Lowe, supra. The judgment and order are affirmed.

(108 Cal. 496)

WALSH v. COSUMNES TRIBE, NO. 14, IMPERIAL ORDER RED MEN.

(No. 18,377.)

(Supreme Court of California. Aug. 9, 1895.)

BENEFICIAL SOCIETIES—SICK BENEFITS—FURNISHING STATEMENT—INSANITY AS AN EXCUSE—WAIVER.

1. Under the provisions of the by-laws of a beneficial society that no sick benefits shall be granted to "resident brothers" for more than a week prior to application therefor, and an "absent brother" claiming benefits must send a statement of his case, attested by the sachem of a tribe near the place where he may be, one out of the jurisdiction of the tribe or lodge to which he belongs, is an "absent brother," without regard to the place of his legal residence.

2. Compliance with the requirement of the by-law of a beneficial society that a member claiming sick benefits must furnish a statement of his case is not excused by his insanity.

3. Evidence that, on application to a beneficial society for sick benefits, a point was raised that the member was not entitled to benefits, because he had brought on his sickness by drinking, and that the sachem of the tribe was appointed a committee to explain this to the member's wife, and that he did this, does not show that refusal of benefits was put on this ground alone, and that failure to comply with the society's by-laws requiring a statement of the member's case was thus waived.

Department 1. Appeal from superior court, Sacramento county; Matt. T. Johnson, Judge.

Action by Jane S. Walsh, administratrix of J. M. Walsh, deceased, against Cosumnes Tribe, No. 14, Imperial Order Red Men. Judgment for defendant. Plaintiff appeals. Affirmed.

C. W. Baker and McKune & George, for appellant. Johnson & Johnson, for respondent.

VAN FLEET, J. Action to recover sick benefits alleged to have accrued to plaintiff's intestate in his lifetime from defendant, and remaining unpaid at his death. The by-laws of the defendant provided: "Sec. 3. No benefits shall be granted to sick resident brothers for more than one week prior to application for same being received by this tribe or its officers, and only after a recommendation of at least a majority of the visiting and relief committee. Sec. 4. An absent brother, claiming benefits under this article, must send to the sachem a true statement of his case, attested by the sachem under the seal of a tribe near the place where he may be. If no tribe be near, then his case, complaint, and its cause, shall be stated in writing by a regular physician, and attested by two respectable witnesses." The court found that when Walsh became a member of the defendant order he resided in Sacramento county, and continued there to reside until his death; that on July 23, 1881, he was, by the superior court of said county, declared insane, and was regularly committed to the asylum for the insane at Napa, where he remained until he died; that during all the years from July 23, 1881, up to his death, on February 17, 1893, he was sick, and unable to attend to his business; and that the defendant did not, during that time, pay him any sick benefits. The court further found, however, "that said J. M. Walsh, nor any one in his behalf, did not at any time send to the sachem of defendant a true or any statement of his case, attested by the sachem, under the seal of a tribe near said Napa, or any statement at all, nor did he, in writing, send to defendant any statement of a regular physician concerning his complaint or case at any time." From these facts the court concluded, as a matter of law, "that plaintiff is not entitled to recover any sick benefits for the illness of the said J. M. Walsh during the time he was in the insane asylum at Napa, because he was an absent brother, within the meaning of section 4 of article 5 of the by-laws of defendant"; and, upon this ground, plaintiff's right to recover benefits was denied.

Appellant contends that the findings do not warrant the conclusion and judgment. The argument of appellant is that, Walsh having been a resident within the jurisdiction of the defendant tribe at the time he became insane, his commitment and removal to a public asylum did not affect his legal status in this respect, and that, therefore, he continued to be a "resident brother," within the meaning of section 5 of the by-laws above quoted. This argument assumes that the term "resident," as there used, has reference to the legal residence of a member. We do not so construe the provision. The by-laws in question were designed to provide a just and convenient method of establishing, as between the tribe and its members, the rights of brothers claiming benefits; and having in view the contingency of brothers becoming sick or disabled while without the jurisdiction of the tribe, and the impracticability of having its relief committee visit such cases, it became necessary to provide some substitute means by which the genuineness and propriety of such claims could be shown. For this purpose the members are divided into two classes, "resident brothers" and "absent brothers," and appropriate methods provided for establishing the claims of each class. It is with reference to this purpose alone that the terms employed are used. The term "resident brother" is simply intended to designate one who, at the time of his claiming benefits, is within the jurisdiction of the tribe. An "absent brother" is one who happens at the time to be either permanently or temporarily without the jurisdiction. The language is employed solely in this sense, and does not involve in any way the question of the legal residence of a member. When, therefore, plaintiff's intestate was removed from the jurisdiction of his tribe to the insane asylum, he became an "absent brother," within the intent and meaning of the by-laws, notwithstanding his legal status as a resident of Sacramento remained unaffected. But appellant would seem to contend that the insanity of Walsh in some way operated to exempt him from the necessity of complying with the provision in question. We find no such exception or exemption in the constitution or by-laws of defendant, and we are not referred to any principle or authority which, in the absence of such exception, makes the insanity of a member an excuse for noncompliance with the requirement. The requirement is a reasonable and proper one, and intended for the mutual protection of the tribe and its members. It forms a part of the contract between the tribe and its members, by which they are equally bound, and we perceive no good reason why it should not be held binding in this instance. The insanity of Walsh did not prevent a compliance. The act required was one that could be performed by a third party in his behalf, and, in fact, even in any ordinary illness not involving mental incapacity, would usually be so performed. The act would not, in its nature, be essentially different from the payment of an assessment or dues; and it has been repeatedly held that insanity or other disability does not excuse a member from the necessity of keeping up dues and assessments, for the reason that they may be paid for him by another. "Where there is no provision of the contract of insurance which declares, either expressly or by necessary implication, that sickness, insanity, or similar incapacity shall excuse the nonpayment of an assessment on the day it is due, the courts cannot grant relief against such contingencies." Nibl. Mut. Ben. Soc. § 295, and cases there cited; Bac. Ben. Soc. § 384. Such requirements do not call for the personal act of the member, unless specially so provided in the contract (Nibl. Mut. Ben. Soc. § 272), but may be done on his behalf, and even though he knew nothing about it, or be incapable of knowing (Id. § 295). In this instance there is no hardship in holding a compliance with the by-laws necessary. It appears that the intestate had a guardian, regularly appointed, for his person and estate. It was the duty of such guardian to look after the intestate's interests in the premises, and it was undoubtedly within the scope of his authority to furnish to the defendant tribe the certificate required.

Appellant further contends, however, that defendant is estopped from relying on a want of compliance with the by-laws in question as a defense, for the reason, as she claims, that when application was made to the defendant for the allowance of benefits to plaintiff's intestate, after his commitment to the asylum, the defendant denied such application upon the sole ground that said intestate had caused his illness and insanity by his own immoral conduct, and that, having placed its refusal upon that ground, defendant is deemed to have waived all others. There is some considerable conflict in the authorities as to how far the principles of estoppel and waiver, as applied to regular life insurance companies, are applicable to beneficial societies of the character of the defendant, for a discussion of which subject, see Bac. Ben. Soc. c. 13. But, whatever the correct doctrine may be, it is not strictly pertinent to inquire, since in no event, in our judgment, do the facts upon which plaintiff relies bring defendant within the rule invoked. The facts relied upon as the basis for the alleged estoppel is the following entry, appearing in the minutes of the defendant tribe, under date of August 21, 1881: "A statement was made that, Bro. J. M. Walsh being now an inmate of the Napa Insane Asylum, his wife thought him entitled to sick benefits. A point was raised that, Bro. J. M. Walsh having brought on his sickness by an overindulgence in alcoholic beverages, under the law he was not entitled to sick benefits. Upon motion duly made and carried, the acting sachem is appointed a committee of one to call upon Mrs. J. M. Walsh, and explain to her the situation and law as to Bro. J. M. Walsh's eligibility to receive sick benefits." And the further entry in said minutes, under date of September 1, 1881, as follows: "The special committee previously appointed to interview Mrs. J. M. Walsh reported having discharged the duty imposed, and having explained to her the law and status of Bro. J. M. Walsh in the tribe." In the first place, it is doubtful if these entries show the making of any formal application for benefits on behalf of the intestate, or more than a mere suggestion looking to such application; but, assuming them to be sufficient in that regard, it does not appear that the application was denied on the ground contended for, or denied at all. It appears "a point was raised" that the brother had brought on his infirmity "by an overindulgence in alcoholic beverages," and on that ground was not entitled to sick benefits, but it does not appear that the tribe adopted this view. The sachem was appointed a committee to call on Mrs. Walsh, and "explain to her the situation and law" as to her husband's eligibility to receive sick benefits, which he did. It was the law that he could not be allowed benefits without furnishing the certificate required by the by-law, and non constat that the sachem did not so inform her. These facts wholly fail to sustain the construction put upon them by appellant, and do not tend to estop defendant from now making the defense relied upon.

In view of this conclusion, the various other points discussed become immaterial. The judgment is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

108 Cal. 529

McCULLOUGH et al. v. OLDS et al. (No. 19,413.)

(Supreme Court of California. Aug. 21, 1895.)

DEED—SUFFICIENCY OF DESCRIPTION—REFERENCE TO MAP—IDENTITY OF MAP.

1. A deed of two lots did not mention the state, county, or city in which they were located, but described them as lots 3 and 4, and as containing 10 acres each, in R.'s (the grantor's) subdivision of lot 1,103, said subdivision being recorded in a certain book and page in the records of S. county. In the book mentioned, at the page stated, was a map indorsed "Plan of lots in M. valley belonging to R. The foregoing survey of lots is a subdivision of 160 acres situated in M. valley, and being 1,103 on the official map of S." Lots 3 and 4 on the map were shown to be 10 acres each. *Held*, that the description in the deed was sufficient.

2. The mere fact that at the corner of a map was written a statement that one lot was "surveyed for J." at a date later than that at which the map was received for record, and signed by "P., County Surveyor," does not show that the entire map was a survey by P.

3. Where a deed describes the land according to a map "recorded" in Book 1, page 184, of the county records, proof of a map "pasted" on the page mentioned sufficiently identifies the map referred to.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; John R. Aitken, Judge.

Action by D. S. McCullough and others against L. E. Olds and others to quiet title to land. Judgment was rendered in favor of defendant Olds, and from an order granting a new trial he appeals. Affirmed.

Works & Works, for appellant. Hunsaker & Britt and W. J. Hunsaker, for respondents.

BELCHER, C. This is an action to quiet the plaintiffs' title to two lots of land in the city of San Diego, described in the complaint as "Lots three and four, containing each ten acres of land, being a portion of pueblo lot 1,103, according to the official map of the pueblo lands of the city of San Diego made by Charles H. Poole, and also described as lots three and four, being in the ten-acre lot range of lot 1,103, according to the subdivision thereof, a plat of which is recorded in the office of the county recorder of San Diego county, in Book number one of Deeds, at page 184." All of the defendants except the appellant disclaimed any interest in the said lots. The appellant answered, denying the plaintiffs' ownership "of the real estate described in plaintiffs' complaint, or any part thereof," and admitting that she claimed an interest "in the said real property adverse to the plaintiffs." The case was tried, and the findings and judgment were in favor of appellant. The plaintiffs moved for a new trial, and the motion was heard by the successor of the judge who tried the case, and granted. From that order this appeal is prosecuted.

At the trial, plaintiffs introduced in evidence a patent from the United States, which bore date April 10, 1874, and conveyed to the president and trustees of the city of San Diego certain lands which formerly constituted the Mexican pueblo of San Diego, and included the land in controversy. Plaintiffs next introduced in evidence a deed from the trustees of the city of San Diego to Joseph Reiner, which bore date July 25, 1853, and conveyed to the grantee that certain property lying and being situated within the limits of the city of San Diego, and known and described as lot 7 in the Mission valley, containing 160 acres, as indicated upon the map of the city made by Clayton & Hesse, civil engineers, in 1851. And thereupon it was admitted by appellant that lot No. 7 in Mission valley, containing 160 acres, according to the map made by Clayton & Hesse in 1851, was identical with pueblo lot numbered 1,103, according to the official map of the pueblo lands of San Diego made by Charles H. Poole. Plaintiffs next produced from the county recorder's office Book 1 of Deeds, and offered in evidence the map and entries found on page 184 thereof. The map was pasted on the page, and the entries or indorsements were as follows: "Original delivered to James Reiner February 4, 1858. Plan of lots in Mission valley belonging to James Reiner, Esq. County surveyor's office, San Diego, January 12, 1856. Wm. H. Leighton, deputy county surveyor. The foregoing subdivision or survey of lots is a subdivision of one hundred and sixty acres situated in Mission valley, and being numbered one thousand one hundred and three on the official map of San Diego. Joseph Reiner. Received for record January 28, 1858, at 10 o'clock a. m., and recorded February 4, 1858, at 4 o'clock p. m., at request of Joseph Reiner. Geo. A. Pendleton, Recorder." Across the map were lines dividing it into blocks or lots, four of which, extending through the center from left to right, were marked as 660 feet square, and numbered: "1, 10 acres," "2," "3," and "4." At the upper left-hand corner was a lot, marked "A, 10 acres," on which was written: "Surveyed for Joshua Sloane, June 15, 1868. James Pascoe, County Surveyor." Plaintiff next offered in evidence a deed from Joseph Reiner to Cave J. Couts, dated February 10, 1858, and recorded April 15, 1858. By this deed the grantor remised, released, and quitclaimed to the grantee "lots number three (3) and four (4), containing ten acres each, in Reiner's subdivision of lot 1,103, * * * said subdivision recorded in book one (1), page 184, records of San Diego county." Plaintiff also offered other deeds from Couts and his grantee, through and under which they claimed title to the lots in question.

Appellant objected to the Reiner deed and the other subsequent deeds upon the grounds: (1) "That the deed from Reiner to Couts does not sufficiently describe the property or any property, and that it does not state the state, county, or city in which the property is situated." (2) "That the map offered in connection with the deeds does not appear to be the map referred to in the deeds." (3) "That the deeds refer to a map recorded in Book 1 of the Records of San Diego, page 184, while the map offered in evidence is not recorded, but simply pasted in the book, and that no map is recorded in the book offered at page 184, or elsewhere." (4) "That the deed and map, taken together, do not sufficiently describe the property, or any property, and that they do not show the county, state, or city." (5) "That said map does not purport to be map of 1,103, but a map of a survey made for Joshua Sloane June 15, 1858." The court sustained the objection and refused to admit the said deeds in evidence, and thereupon, the case being submitted without further evidence, rendered its decision and judgment in favor of appellant. The new trial was evidently granted upon the theory that the trial court erred in excluding the offered deeds; and the only question presented here for consideration is, did the Reiner deed contain a description of the premises in controversy sufficient to pass the title thereto to Couts, or was it void for uncertainty?

It is a general and well-settled rule of law that "a deed, for a description of the land conveyed, may refer to another deed or to a map, and the deed or map to which reference is thus made is considered as incorporated in the deed itself." Devl. Deeds, § 1020, and cases cited. So, also, it is a familiar rule that when a tract of land has been subdivided into blocks or lots, and a map thereof made on which the blocks or lots are designated by numbers, a description of the blocks or lots in a deed by the numbers so designated is sufficient, provided the map can be produced and identified. Of course the description of the premises in the deed must be sufficiently definite and certain to enable the land to be identified, or it will be void for uncertainty. But "if a surveyor, by applying the rules of surveying, can locate the land, the description is sufficient. And generally the rule may be stated to be that the deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed." Devl. Deeds, § 1012. And see 5 Lawson, Rights, Rem. & Prac. § 2285, where it is said, citing numerous authorities, that "if, notwithstanding an uncertain description, the intention of the parties can be gathered from the deed, or from oral proof, the grant is not void."

The objection that the description in the deed to Couts was void for uncertainty, because it did not state the state, county, or city in which the property is situated, is not tenable. Such a statement was not necessary, if without it the property could still be located and identified. Beal v. Blair, 33 Iowa, 318; Kykendall v. Clinton, 3 Kan. 85; Atwater v. Schenck, 9 Wis. 160; Kile v. Yellowhead, 80 Ill. 208; Smith v. Crawford, 81 Ill. 296; Devine v. Burleson, 35 Neb. 238, 52 N. W. 1112. The deed in question described the lots by numbers, and as containing 10 acres each in Reiner's subdivision of lot 1,103, said subdivision being recorded in Book 1, page 184, records of San Diego county. There was record evidence that Reiner owned lot 7 in Mission valley, and it was agreed that that lot was the same as lot 1,103. It seems clear, therefore, that Reimer in making his deed to Couts had in mind and referred to the lot which he owned and had had subdivided and platted. Under these circumstances we do not think it can be said, as matter of law, that the description was so defective as to be void for uncertainty.

The objection that the map offered in connection with the deeds does not appear to be the one referred to in the deeds, but the map of a survey made for Joshua Sloane in June, 1868, is based on the indorsement found on the upper left-hand corner of the map. But that indorsement cannot have the effect claimed for it. At most it would seem to indicate only that in June, 1868, Pascoe, as county surveyor, made a survey for Sloane of the 10-acre lot "A," and then made the indorsement as a certificate of such survey.

The objection that the map, having been only pasted in the deed book and not recorded, could not be used to help out the description in the deed, is rested upon the authority of Caldwell v. Center, 30 Cal. 540, and Cadwalder v. Nash, 73 Cal. 43, 14 Pac. 385. In the case first cited the plaintiff produced a map from the recorder's office, and the defendants objected to it on the ground that "it was made with pencil and not with ink," and that "it is pasted in between the leaves of the book, but not recorded." This court, after conceding that the parties to a deed, instead of setting out in full the metes and bounds or other complete designation of the tract intended to be conveyed, may describe it in whole or in part by reference to some instrument, as a deed, map, etc., which contains or furnishes such a description of the land that it when read in connection with the deed will completely identify the land, said: "The objection should have been sustained. Had the deed referred to a map to be found in that place and condition, it would have been admissible in evidence, for it would have constituted in effect a part of the deed as much as if it had been copiea into it. But the deed calls for a map duly recorded in the recorder's office, and by the utmost stretch of liberality the one produced cannot be regarded as recorded. The act concerning county recorders provides that the several instruments entitled to record shall be recorded 'in large and strong bound books, and in a fair, large and legible hand.' The necessary implication from this provision is that the instrument must be copied into the proper book of record; and in view of the purpose to be subserved by the recording of the several classes of instruments mentioned in the act —the making and preservation of accurate and durable official copies of such instruments—a copy made in pencil or other materials that would not permanently remain would not be within the spirit of the act. The map should for these reasons have been excluded." In the second case cited the deed was held void for uncertainty, because it appeared that the reference to the map therein was equally applicable to two different maps, and it was decided that, in such case, parol evidence was inadmissible to identify the one referred to. Without commenting on the cases cited, it is enough to say that there was no statute in 1858, and is none now, so far as we are advised, providing for the recording of maps. It is, however, a matter of common knowledge that it has been customary to deposit maps in the office of the county recorder, and to refer to them as "recorded," or "of record," in that office. And, when such a map is thus referred to, it may be identified by extrinsic evidence, and the fact that it is not recorded or of record, within the ordinary meaning of those words, is wholly immaterial. In the case of Saunders v. Schmaelzle, 49 Cal. 59, the deed, for a description of the property to be conveyed, referred to another deed "recorded in Sacramento"; and it was held that the description in the deed given was not vitiated by the fact that the deed referred to was falsely stated to be recorded in the county where the property was situated. And in Water Co. v. Swartz, 99 Cal. 278, 33 Pac. 878, a sheriff's deed described the property conveyed as the north half of block 36, Colton addition, a plat or map of which addition "is of record in the office of the county recorder of San Bernardino county, state of California." The map offered in evidence was found in a book of maps kept in the recorder's office, and it was objected that it was not admissible, as it was not acknowledged so as to entitle it to record. It was held that "a map thus deposited within the recorder's office is properly referred to in an instrument of conveyance as being 'of record' therein, and may be received in evidence, even though it be not acknowledged." The map offered in evidence in this case was not objected to; but, if it had been, we think it admissible, notwithstanding the deed referred to it as "recorded in Book one, page 184, records of San Diego county."

The other points discussed by counsel do not require special notice. The order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(108 Cal. 517)

JOSEPH v. AGER. (No. 18,336.)

(Supreme Court of California. Aug. 14, 1895.)

IRRIGATION DITCH—RIGHT TO MAINTAIN—QUESTION FOR JURY.

In an action to enjoin interference with an irrigation ditch, it appeared that plaintiff and his predecessors had for many years maintained a ditch on defendant's land to carry water from a creek. During a freshet the course of the creek was so changed that to connect plaintiff's ditch with it required the construction of 700 feet of new ditch, which plaintiff made against defendant's protest, though defendant offered to allow him to connect his ditch at a point where little damage would be done, and where the cost to plaintiff would have been less than that of the ditch he constructed. As constructed, the ditch damaged defendant $1,000, and defendant filled up part of it. *Held*, that the right of plaintiff to maintain the ditch as constructed was a question of fact, and that a verdict for defendant would not be disturbed.

Department 2. Appeal from superior court, Siskiyou county; Edwin Shearer, Judge.

Action by Antone Joseph against Jerome B. Ager to enjoin interference with a ditch, and for damages. Judgment was rendered for defendant, and from an order denying a new trial plaintiff appeals. Affirmed.

James F. Farraher, for appellant. H. B. Warren and Gillis & Tapscott, for respondent.

McFARLAND, J. This action was for an injunction to restrain defendant from interfering with a certain ditch dug by plaintiff on the land of defendant, and for damages alleged to have been caused by the filling up of part of said ditch by defendant. The verdict and judgment were for defendant; and plaintiff appeals from an order denying his motion for a new trial.

The appellant owns land on a natural watercourse called "Willow Creek," and respondent owns land on said creek adjoining, and immediately above, said land of appellant; and for many years appellant and his predecessors have exercised the right of maintaining a ditch up through a part of respondent's land, in which they have carried water from the north side of said creek down to their said land. As, owing to the nature of the creek, it was difficult to keep the head of the ditch always at the same place, they, during the years prior to 1890, several times extended the ditch somewhat further up the creek, but always keeping on the north side. But from the effect of a freshet in 1890 the creek changed its course, leaving its ancient channel at a point above the land of respondent, and running through the latter's land in a channel several hundred yards south of its old channel, and south of some land called the "Island," and beyond the reach of appellant's ditch. Thereupon, the appellant, notwithstanding the objection and protest of respondent, constructed a new piece of ditch from a point nearly 600 feet below the head of the old ditch, across respondent's land, to the new channel of said creek. This new piece of ditch is about 700 feet long; and after it had been dug, against respondent's objection, as aforesaid, respondent filled up a part of it, which act is the basis of this action. The evidence warranted the jury in finding that this new ditch, if maintained, would be a damage to respondent of at least $1,000; that respondent offered to allow appellant to make a connection between his old ditch and the new channel by means of a new piece of ditch at other points on respondent's land, where but little damage would be done respondent by such connection; and that, by accepting respondent's offer, appellant could have reestablished his ditch and water right, and enjoyed the use thereof as formerly, at less expense than he incurred by digging the said new ditch. The question whether or not the connection of appellant's old ditch with the new channel of the creek would be a substantial change of the servitude (Allen v. Water Co., 92 Cal. 138, 28 Pac. 215), and therefore not maintainable, does not arise, because respondent did not make that point. The general law applicable to this case is therefore well settled. The right to take water from the land of another for use on the premises of the person taking it is an easement founded on a grant, or on a prescription which supposes a grant. Such an easement does not give its owner the right to commit a trespass upon the servient tenement, or to exercise the easement after any manner which happens to suit his pleasure. His right is measured by the terms of his grant; or, where the supposed original grant does not appear, by the prescriptive use. This, however, includes what are called "secondary easements," such as the right to enter upon the servient tenement and make repairs, and to do such things as are necessary for the full exercise of the right. But these secondary easements must be exercised only when necessary, and in such a reasonable manner as not to needlessly increase the burden upon the servient tenement. Hargrave v. Cook (Cal.) 41 Pac. 18; Gale, Easem. p. 235 et seq., and notes. "As every easement is a restriction upon the right of property of the owner of the servient tenement, no alteration can be made in the mode of enjoyment by the owner of the dominant heritage, the effect of which will be to increase such restriction. Supposing no express grant to exist, the right must be limited by the amount of enjoyment proved to have been had." Id. p. 237. And the authors, on page 246, further say: "The servient owner has likewise his rights. The dominant owner's encroachments can be justified only to the extent of his easement. As to all beyond that, his acts constitute a private nuisance, for which an action may be maintained. With regard, therefore, to all artificial easements, he is bound to keep his works in such a state that they will cause no incumbrance to his neighbor beyond that warranted by the easement; and if he neglects this he brings himself within the ordinary case of a violation of the rule, 'Sic utere tuo ut alienum non laedas,' and is, of course, liable to an action. The servient owner has in this, as in other cases of nuisance, the privilege of taking the remedy into his own hands." In Ware v. Walker, 70 Cal. 591, 12 Pac. 475, cited by the appellant, the court say that the plaintiff therein exercised his right "in a reasonable and proper manner, and, as found by the court, without damage to the defendant."

The court, we think, fairly gave the case to the jury, in view of the principles above stated, and we see no prejudicial error committed in its rulings. The case therefore resolves itself into questions of facts properly submitted to the jury, and, as there was evidence amply sufficient to sustain their verdict, there is no reason for disturbing it. The order denying the motion for a new trial is affirmed.

We concur: **TEMPLE, J.**; **HENSHAW, J.**

(112 Cal. 314)

PACIFIC MUT. LIFE INS. CO. v. SAN DIEGO COUNTY. (No. 19,407.)[1]

(Supreme Court of California. Aug. 21, 1895.)

TAXES—PAYMENT UNDER PROTEST—SUIT TO RECOVER.

Pol. Code, § 3819, as amended by St. 1893, p. 32, providing for actions against counties to recover illegal taxes paid under protest, does not authorize an action against a county for taxes collected by it for the use of a school district within the county.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the Pacific Mutual Life Insurance Company against the county of San Diego to recover taxes paid under protest. A demurrer to the complaint was overruled, and from judgment sustaining a demurrer to its answer defendant appeals. Reversed.

M. L. Ward, Dist. Atty., and Parrish & Mossholder, amici curiæ, for appellant. C. H. Rippey and Rippey & Nutt, for respondent.

BRITT, C. Action brought professedly under section 3819, added to the Political Code in 1893 (St. 1893, p. 32), for the recovery of alleged illegal taxes paid by plaintiff, under protest, to the tax collector of the defendant county. It is stated in the complaint that the taxes complained of were levied by the board of supervisors of the county "as and for a special school tax for the city of San Diego school district." The illegality alleged is that the question whether such tax should be raised was not submitted to a vote of the electors of the district, as required by sections 1830–1835, Pol. Code. Defendant demurred to the complaint upon the special ground, among others, that the taxes paid by plaintiff "are neither county nor state taxes, nor any taxes under the control of the defendant." The court overruled the demurrer, and defendant answered, alleging, with other matters, that the levy was made pursuant to a certain judgment obtained by said school district which became final on appeal to this court. San Diego School Dist v. Board of Sup'rs, 97 Cal. 438, 32 Pac. 517. The court sustained a demurrer to the answer, and rendered judgment for plaintiff. We need not inquire whether the answer stated a defense.

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[1] Rehearing granted.

The funds of the school district are not subject to the control of the county so as to allow a reimbursement of the county for the amount of the judgment, if it should be paid (Const. Cal. art. 11, § 16; Pol. Code, § 1837); and if said section 3819, Pol. Code, admits of a construction which would uphold an action of this character, its constitutionality in that particular would admit of debate, for the credit of a county cannot be pledged for the payment of the liabilities of municipal or other corporations. Const. Cal. art. 4, § 31. But it was held in Elberg v. San Luis Obispo Co. (decided in department 2 of this court August 3, 1895) 41 Pac. —, that said section 3819, Pol. Code, was not designed to authorize the recovery from a county of illegal taxes collected for the use and disposition of a high school district within the county. This case differs from that in no particular favorable to plaintiff. See, also, School Dist. No. 1 v. Town of Bridport, 63 Vt. 383, 21 Atl. 570; Stone v. Woodbury Co., 51 Iowa, 522, 1 N. W. 745; Taylor v. Avon Tp., 73 Mich. 604, 41 N. W. 703. The judgment should be reversed, and the court below directed to sustain the demurrer to the complaint.

We concur: VANCLIEF, C.; SEARLES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to sustain the demurrer to the complaint.

5 Cal. Unrep. 125

PEOPLE v. EVANS. (Cr. 1.)

(Supreme Court of California. Aug. 29, 1895.)

HOMICIDE — VERDICT — WHEN DISTURBED — EVIDENCE—APPEAL—OBJECTIONS WAIVED —HARMLESS ERROR.

1. Where, in a murder case, the only dispute is as to the identity of the murderer, and there is a sharp conflict in the evidence, the supreme court will not disturb the verdict because not entirely satisfactory.

2. A verdict of guilty will not be set aside because of the erroneous admission of evidence which is not injurious to defendant.

3. On trial for the murder of T., it was not error to admit evidence that, some time before the murder, defendant, referring to the killing of a certain girl, said that the man who killed her did not intend to kill her; that he was very sorry for killing the girl; that he meant to kill T., and he would have him yet before he stopped.

4. Where it appears deceased was shot, and there is evidence that defendant, when arrested, said he could not shoot a rifle, or had not shot a gun for a long time, it is proper to admit evidence that he is an expert with the rifle.

5. The people and defendant consented that the preliminary evidence as to the admissibility of an alleged written confession by defendant and a fellow prisoner, and the argument on defendant's objections, should be heard in the absence of the jury. *Held*, that the action of the court in proceeding in accordance with such arrangement would not be reviewed, in the absence of objection and exception in the trial court.

6. Where the defense is alibi, it is not error to allow the people, in rebuttal, to contradict the witnesses who testified to the alibi, by disproving the collateral facts testified to by them on their direct examination as a means of fixing the time when they saw defendant at the place distant from the scene of the crime.

7. It is not error to permit the people to rebut the circumstances called out on cross-examination of the witnesses to an alibi, though no foundation is laid for contradiction, where no objection is made on such ground.

In bank. Appeal from superior court, Amador county; John F. Davis, Judge.

William Evans, convicted of murder, appeals from the judgment and from an order denying a new trial. Affirmed.

F. E. Dunlap, D. B. Spagnoli, and J. G. Swinnerton, for appellant. Atty. Gen. Fitzgerald, for the People.

BEATTY, C. J. The defendant was convicted of murder, and appeals from the judgment and an order denying him a new trial.

It was clearly proved that on June 15, 1893, Michael Tovey, a messenger for Wells, Fargo & Co., while seated by the side of the driver on a stage going from Ione to Jackson, in Amador county, was shot and killed by a man who stood behind and was partly concealed by a buckeye tree growing within 10 or 12 feet of the roadside. The circumstances leave no doubt that the killing was premeditated, and that the crime was murder of the first degree; the only dispute being as to the identity of the slayer. He was distinctly seen, at a distance of not more than 20 feet, by the driver of the stage, and by a passenger who sat behind the driver on top of the stage; but his face was blackened with charcoal, and the lower part of it concealed by the foliage of the tree behind which he stood, and, while the stage driver testified positively that the defendant was the man, the passenger was equally positive that he was not. To corroborate the driver, the prosecution introduced evidence of remarks in the nature of threats by the defendant against the deceased, made prior to the killing; evidence that the defendant, after the killing, spoke of it with apparent pleasure; evidence of similarity of the clothes worn by the defendant and the man who fired the fatal shot; evidence of similarity of walk (a sort of limp) and of general appearance; and evidence of statements and admissions by the defendant implying his guilt, besides other circumstances having some slight tendency, perhaps, to connect him with the killing. On the part of the defense, evidence was introduced to explain or contradict most of the evidence for the people, and, in addition, there was very strong and positive testimony of a number of witnesses to the effect that at the time of the killing the defendant was at a farm many miles distant from the scene. As to the alleged statements and admissions of the defendant, they rested upon the uncorroborated testimony of a man who was confined in jail with him, and there was evidence that he and the officers in charge had conspired, by the administration of whisky and opium, to induce the defendant to sign a written confession under circumstances so questionable that the court would not admit it in evidence. In rebuttal, the people offered evidence contradictory of the witnesses who had been called to prove the alibi. And the result was a case presenting a sharp conflict of evidence on every material point, except the mere corpus delicti, which was fully proved. Under these circumstances, we cannot assume to overrule the verdict of the jurors, who saw and heard the witnesses, upon the ground that the proofs do not seem to be entirely satisfactory to us.

During the trial many exceptions were reserved to rulings of the court upon objections to testimony, but, if any of the rulings complained of were technically erroneous, they were clearly not injurious to the defendant. The stage driver, for instance, while testifying for the people, was asked the question, "Has your stage ever been robbed, Mr Radcliffe?" to which the defendant interposed the usual formal and general objection that it was incompetent, irrelevant, and immaterial. The objection being overruled, the witness answered, "Yes, sir." This is all that the bill of exceptions shows in regard to this matter; and, while it does appear that the evidence was irrelevant, it is equally apparent that it was of no consequence.

Mrs. McNeil, a witness for the people, was allowed to testify, over the same general objection by defendant, that, some time previous to the killing of Tovey, the defendant, referring to the killing of the Rudosini girl, had said that the man who killed her did not intend to kill her; that he was very sorry for killing the girl; that he meant to kill Tovey, and he would have him yet before he stopped. The court did not err in overruling the objection to this testimony. If true, it proved a claim on the part of defendant to an intimate knowledge of the feelings, motives, and intentions of the slayer of the Rudosini girl, and might justify the inference that he was himself the person who had slain her, in an attempt to kill Tovey, and that he was the person who intended "to have him before he stopped." In short, it was a threat which indicated a motive for the commission of the crime.

When the defendant was arrested, he stated—at least it was testified that he stated—that he could not shoot a rifle, or that he had not shot a gun for a long time. It was not error to allow proof that he was an expert with the rifle.

When the people offered in evidence the written confession which the defendant was alleged to have made, and the admissions and statements testified to by his fellow prisoner, the people and the defendant both consented that the preliminary evidence and the argument upon the defendant's objections to the offered evidence should be taken and heard in the absence and without the hearing of the jury. It is now claimed that the order and action of the court, taken in conformity with this consent, was error, and highly injurious to the defendant. It is not necessary to consider whether the action of the court in this matter would have been proper if objected to. It was not objected to at the time, there was no exception taken at the time, and there is nothing to review.

It was not error to allow the people in rebuttal to contradict the witnesses who had testified to the alibi by disproving the collateral facts testified to by them on their direct examination as a means of fixing the time when they saw the defendant at a place distant from the scene of the homicide. These circumstances were an essential part of their testimony, and highly material. The same is true of the circumstances called out on the cross-examination. As to some of these matters, it may be true that no sufficient foundation was laid for contradiction, but no objection was made on that ground in the one or two instances in which it should have been sustained; as, for instance, in the testimony of Wenzelberger in contradiction of Lucas.

The instruction complained of (No. 5 given by the court) is free from error. If the defendant desired a fuller instruction, he should have requested it.

There are other exceptions specified in the record, but the foregoing are all that were mentioned or referred to in the argument, and all that call for special notice. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.; HARRISON, J.; GAROUTTE, J.; HENSHAW, J.; VAN FLEET, J.

108 Cal. 562

SAN LUIS OBISPO COUNTY v. FARNUM et al. (No. 19,488.)

(Supreme Court of California. Aug. 27, 1895.)

BOND OF COUNTY AUDITOR—BREACH.

Where a county auditor's bond was conditioned that he should "well and faithfully perform all official duties required of him by law," and another officer paid over to the auditor certain moneys collected for licenses, which the law required to be paid directly to the county treasurer, the sureties on said bond are not liable for the auditor's default, though he himself is.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by the county of San Luis Obispo against C. A. Farnum and others on a bond. Plaintiff had judgment, and defendants appeal. Affirmed as to Farnum, and reversed as to the others.

Graves & Graves and Wilcoxon & Bouldin, for appellants. F. A. Dorn, for respondent.

HAYNES, C. This action is upon the official bond of C. A. Farnum as county auditor of said county. The other defendants are R. E. Jack and J. P. Andrews, the sureties of Farnum upon said bond. The complaint alleges that Farnum, as such auditor, at divers times between January 2, 1891, and January 3, 1893, received from the license-tax collector of said county divers sums of money collected for license taxes due said county, the sum of $1,218.16 of which he, said Farnum, had failed and refused to pay to the county; alleged the making and approval of the bond; and attached a copy of the bond to the complaint. The bond is in the statutory form, conditioned that he should "well and faithfully perform all official duties now required of him by law, and shall well and faithfully execute and perform all duties of such office of auditor of

San Luis Obispo county required by any law to be enacted," etc. A general demurrer was interposed by the defendants, which was overruled, and the defendants answered. The cause was tried by the court, and a finding that all of the allegations of the complaint were true (except that the amount was reduced to $1,187.06) was filed, and judgment entered against all the defendants therefor; and from this judgment all appeal upon the judgment roll.

The demurrer should have been sustained as to the sureties, and the judgment must be reversed as to them, because no cause of action is stated against them, nor are any facts found which support the judgment. A cause of action is stated against Farnum, independently of the allegations relating to the bond, which may be treated as surplusage. That the money in question, having been collected by the tax collector for licenses, belonged to the county, is not questioned; but that it came to the hands of defendant Farnum as auditor is a conclusion of law wholly unsupported by the facts found. There is no provision of law authorizing the auditor to receive it, nor any authorizing the tax collector to pay over such moneys to him, or to any one except the county treasurer. Having received the money, it was Farnum's duty to pay it over to the treasurer; but such duty did not arise out of his office, nor was it at all different from the duty which would have rested upon him to pay it over had he been a plain citizen, not holding any county office. Farnum did not even receive the money colore officii, for under no circumstances was he authorized or required by law to receive it. The condition of the bond sued upon is not that Farnum should be personally honest, or pay his personal debts, or discharge those private duties and obligations which he may have assumed; but the condition is that he "shall well and faithfully perform all official duties required of him by law." The "official duties" here specified are the duties required by law of the county auditor, and none other. "A surety cannot be held beyond the express terms of his contract. * * *" Civ. Code, § 2836. In the conclusions of law filed by the court below there is copied section 16 of article 11 of the constitution of this state, to the effect that all moneys belonging to or collected for the use of the county coming into the hands of any officer thereof shall be immediately deposited with the treasurer; and apparently the court concluded that because it was county money, and because Farnum was a county officer, a failure to pay it over was a breach of official duty, for which his sureties were liable. But the constitutional provision only relates to those officers who rightfully or officially receive money for the county. Under this provision of the constitution, as well as under the provisions of the Political Code relating to licenses, it was the official duty of the tax collector to pay the money over to the treasurer, and his payment of it to the auditor was unauthorized, and a breach of official duty for which he and his sureties were liable on his bond; but the sureties of Farnum surely never contemplated that the tax collector would pay money to the auditor in violation of law, and never undertook to be liable therefor.

The case of Best v. Johnson, 78 Cal. 217, 20 Pac. 415, is conclusive of the question here. We may properly add, however, an extract from People v. Pennock, 60 N. Y. 421, 426. That was a suit upon the bond of a town supervisor. The supervisor was authorized to receive and disburse certain of the town's money. Certain other funds for the temporary relief of the poor, for which there was a special tax levy, were required to be paid by the tax collector to another officer. In this instance, however, the warrant for the collection of the taxes directed the tax collector to pay it to the supervisor, and that was done; and the action upon the bond was for the recovery of that money, the supervisor having failed to account for it and pay it over to the proper officer. The condition of the bond was for the faithful discharge of his official duties as supervisor, and that he would account for and pay over "all moneys belonging to his town and coming into his hands as such supervisor." The court said: "The condition of the bond must be construed, and the liability of the sureties limited, in reference to the statutes making the supervisor a custodian of public moneys. The statutes make a part of the contract of the surety. When he undertook that his principal should account for and pay over all moneys that should come to his hands as supervisor, the intendment is that such moneys as should, pursuant to law, be received by him in his official capacity, and in virtue of his office, were referred to, and not such as he might receive by color of office, or because he was supervisor, but without right, and of which some other official was the legal recipient and disbursing agent, having the right to receive them directly from the collector. The principal of the appellant was an intruder in respect to the moneys collected for the support of the poor, and of roads and bridges, and acted, in taking them into his hands, officiously, and not officially. Liabilities of sureties are strictissimi juris, and cannot be extended by construction or enlarged by the acts of others." There is nothing in San Luis Obispo Co. v. Pettit (Cal.) 34 Pac. 1082, cited by counsel for respondent, inconsistent with the views we have expressed. The judgment should be reversed as to the defendants Jack and Andrews, with directions to dismiss the action as to them, and as to defendant Farnum the judgment should be affirmed.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed as to the defendants Jack and Andrews, with directions to dismiss the action as to them, and as to defendant Farnum the judgment is affirmed.

SAN LUIS OBISPO COUNTY v. FARNUM et al. (No. 19,490.)

(Supreme Court of California. Aug. 27, 1895.)

Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by the county of San Luis Obispo against C. A. Farnum and others on a bond. Plaintiff had judgment, and defendants appeal. Affirmed as to Farnum, and reversed as to the others.

Graves & Graves and Wilcoxon & Bouldin, for appellants. F. A. Dorn, for respondent.

PER CURIAM. This is an action upon the official bond of C. A. Farnum as county auditor, the other defendants being his sureties on said bond. The breach alleged is the failure to pay over to the county treasurer certain moneys said Farnum received from the tax collector, which said last-named officer had received for county licenses. The only distinction between this case and No. 19,488 (Same Plaintiff v. Farnum [this day decided] 41 Pac. 445), is that the moneys were received in a subsequent term of office of said Farnum as auditor, for which the bond in suit in this action was given. The same findings and judgment were made and entered as in the former case, except as to amount and names of the sureties, and it is submitted on the same briefs. Upon the authority of San Luis Obispo County v. Farnum (this day filed) 41 Pac. 445, it is ordered that the judgment appealed from be affirmed as to the defendant Farnum, and as to all the other defendants it be reversed, with directions to dismiss the action as to them.

108 Cal. 567

SAN LUIS OBISPO COUNTY v. FARNUM et al. (No. 19,491.)

(Supreme Court of California. Aug. 27, 1895.)

LIMITATIONS—ACTIONS FOR MONEY RECEIVED BY OFFICERS WITHOUT AUTHORITY.

Where money belonging to the county is received by the county auditor, his liability therefor being not on his bond, but for money had and received, action against him is barred in two years, under Code Civ. Proc. § 339, subd. 1, prescribing the limitation of an action on a liability not founded on a writing.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by the county of San Luis Obispo against C. A. Farnum and others. Judgment for plaintiff. Defendants appeal. Reversed.

Graves & Graves and Wilcoxon & Bouldin, for appellants. F. A. Dorn, for respondent.

HAYNES, C. This is an action upon the bond of C. A. Farnum, as county auditor of the county of San Luis Obispo, to recover the sum of $896.10, alleged to have been received by him, as auditor, from the license-tax collector of said county, the same being moneys collected for license taxes due the county from various individuals, and which Farnum had failed to pay over to the county treasurer; the other defendants and appellants, R. Jack and I. Goldtree, being the sureties upon said bond. The complaint alleges that said moneys were received by Farnum at divers times, unknown to plaintiff, between January 2, 1889, and January 3, 1891, which dates cover and include the entire term for which said bond was given. This action was commenced May 29, 1893. The defendants demurred to the complaint: (1) That the facts stated do not constitute a cause of action; and (2) that the cause of action stated is barred by the provisions of section 337, and subdivision 1 of section 338, and subdivision 1 of section 339, of the Code of Civil Procedure. The demurrer was overruled, the defendants answered, denying all the allegations of the complaint, and alleging that the cause of action is barred by the provisions of the Code above mentioned. The court found for the plaintiff, and entered judgment against all the defendants for the sum of $739.80. This appeal is by all the defendants from said judgment upon the judgment roll.

As to the liability of appellants Jack and Goldtree as sureties upon the bond of Farnum, as auditor, this case cannot be distinguished from the case of San Luis Obispo County v. Farnum (No. 19,488; this day filed) 41 Pac. 445, and upon the authority of that case this judgment must be reversed as to the sureties upon said bond. In that case it was held, however, that, treating the allegations of the complaint in relation to the bond as surplusage, there was, nevertheless, a cause of action stated against Farnum; and that, though he did not receive the money in his official capacity as auditor, it was money belonging to the county which he had no right to retain, and therefore affirmed the judgment as to him. In that case, however, there was no question made upon the statute of limitations, while here it is directly pleaded. The court below could not have found the sureties liable unless he concluded that Farnum was liable upon his bond, and, if so, the limitation of four years under section 337, Code Civ. Proc., applied. But the money having been received by Farnum without authority of law, and not officially, no liability upon his bond was created. If he were liable upon the bond, his sureties must have been liable also. But it was money belonging to the county which he had no right to receive, but, having received it, he was liable personally in an action for money had and received, and that action was barred in two years, under subdivision 1 of section 339, Id. Assuming, therefore, that the money was received on the last day of his term of office, January 3, 1891, the action was not brought within two years, and the demurrer should have been sustained upon that ground as well as upon the first. The judgment should, therefore, be reversed as to all the defendants.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed.

108 Cal. 589

SCHWERDTLE v. PLACER COUNTY et al.

(No. 18,436.)

(Supreme Court of California. Aug. 27, 1895.)

DEDICATION OF HIGHWAY—ADVERSE USER—ABANDONMENT—JUDICIAL NOTICE.

1. Adverse user of land as a highway by the public for 30 years establishes the presumption of a dedication.

2. Where the public have acquired an easement in land for a highway by adverse user, the taxation and payment of taxes on the same will not constitute an abandonment.

3. Placing gates, with consent of a member of the board of supervisors, across a highway, and maintaining the same for the statutory period of limitations, does not establish an abandonment of the easement by the public.

4. Judicial notice cannot be taken that title to land is in the public.

5. Judicial notice is taken by courts of the statutes of their own state and of the United States.

Department 2. Appeal from superior court, Placer county; Matt. F. Johnson, Judge.

Action by Dorothea Schwerdtle against the county of Placer and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Isaac Joseph and D. E. Alexander, for appellant. A. K. Robinson, L. L. Chamberlain, and F. P. Tuttle, for respondents.

HENSHAW, J. Appeal from the judgment alone. Action to quiet title to a strip of land, and to restrain defendant Glines from committing threatened acts of trespass upon the property.

The land in dispute is claimed by the county as a public highway, and Glines is one of its road overseers. The defendant county pleaded "that for more than twenty years last past prior to the filing of the complaint that certain piece of road * * * known as the 'Dotan's Bar and Carrolton Road,' as it ran through and across the lands described in plaintiff's complaint, was, and is now, a public highway, known, recognized, and treated as such by the road officers of Placer county, and duly constituted such in the manner required by law." Upon this somewhat vague averment trial was had, and the court found: "That the plaintiff is the owner in fee, and as such owner was in the possession, of said real property, for more than five (5) years continuously prior to the commencement of this suit. That during said five years prior to the commencement of this suit state and county taxes were regularly levied upon all of said real property; all taxes have been paid by plaintiff within said five years; and during all of said time said real property was and now is inclosed by substantial fences. That prior to the erection of said fences by plaintiff the country in the neighborhood of said real property was an open country, and that persons that traveled over it could travel in any direction, and cattle could roam over the entire country at will. That across said property there passes a road known as the 'Dotan's Bar and Carrolton Road.' That from the year 1850 down to about the year 1887 the said road was continuously open, and notoriously used by the public in general, adversely to the plaintiff, without let or hindrance, as a public highway for all purposes, and was during all of said times entirely open and unobstructed. That in the year 1887 plaintiff asked permission of one of the members of the board of supervisors to place gates across the road at the inlet and outlet of the same, which said permission was granted by said member, without authority of the board. That thereafter, and for a period of about five years, the public in general continued to use said road openly and notoriously, and without let or hindrance, other than the opening and the closing of said gates. That the said road, from about the year 1855 to 1887, was the common traveled road in going from Sacramento and Folsom to Dotan's Bar; that in the early days stages carrying the United States mail constantly traveled said road, and at intervals during said time the road master of the road district in which said road is situated performed work and labor upon the same where the same crosses the property of plaintiff. That plaintiff and her grantors, for a period of about twenty years prior to the closing of said gates, as hereinafter found, were in possession and occupancy of said land, and had full knowledge of the use of said road by the public as a highway for all purposes, and up to the time of the said closing of said gates offered no let or hindrance to the use of said road by the public as a highway, and in no way, manner, or shape, or form objected to the same." The court concluded as matter of law that the road was a public highway, and judgment passed accordingly. The answer is objectionable in averring as a conclusion of law that the land in controversy is a public highway. No facts are pleaded, and it cannot be determined whether the defense rested its claim upon dedication and acceptance, or upon rights acquired by user under the rules of prescription.

From the opinion of the trial judge, embodied in the brief of respondents, it appears that he based his decision upon the facts that the land until after the year 1870 was part of the public domain, and had been continuously used as a highway since 1850; that in 1866 the United States granted rights to lay out public highways over its lands (Rev. St. U. S. § 2477); that in 1870 the legislature of the state, by an act especially applicable to Placer county, accepted this right by declaring all roads in that county which had been used as public highways for two years or more before the passage of the act to be public highways (St. 1870, p. 457); that this act, operating with the statute of the United States, amounted to an acceptance of the grant or offer of dedication of the latter, and established the status of the land in controversy, then public land, as a highway, so that when it passed into private ownership it was taken subject to the easement.

Under the facts above recited, the reasoning and conclusion of the court are perfectly sound. McRose v. Bottyer, 81 Cal. 125, 22 Pac. 393. The difficulty of adopting them is that we have not the same facts before us. They are not set forth in the findings, and the opinion of the learned judge forms no part of the record. We take judicial notice of the statutes above adverted to, but cannot judicially know, and the findings do not disclose, that the land in controversy was a part of the public domain until 1870. It is, however, found that the public, from the year 1850 to the year 1887, used the road openly, notoriously, and continuously, and adversely to plaintiff. In the absence of any statute, the common-law rule as to the presumption of dedication by adverse user will apply in this state. Pol. Code, § 4468. The time of user at common law was not a fixed period. Five years, six years, and twenty years, depending on the varying circumstances, have been severally held sufficient. Elliott, Roads & S. p. 124. "A dedication may be made by deed or other overt act, or may be presumed from the lapse of time or acquiescence of the party. There is no precise limit of time from which dedication may be presumed. In some cases it has been decided that twenty years were necessary to raise the presumption of dedication, while in others it has been held that a much shorter period was sufficient." City of San Francisco v. Scott, 4 Cal. 114. The language of Hope v. Barnett, 78 Cal. 9, 20 Pac. 245, cannot be construed as conflicting with this universally accepted rule of the common law. This court there says: "Where the dedication is sought to be established by user as a highway, it must appear that such user was with the knowledge of the owner, with his consent, or without objection on his part." In that case the findings showed a use for only eighteen months or two years. If a dedication is sought to be established by a use which has continued a short time,—not long enough to perfect the rights of the public under the rules of prescription,—then, truly, the actual consent or acquiescence of the owner is an essential matter, since without it no dedication could be proved, and none would be presumed; but where this actual consent and acquiescence can be proved, then the length of time of the public use ceases to be of any importance, because, the offer to dedicate and the acceptance by use both being shown, the rights of the public have immediately vested. But where the claim of the public rests upon long-continued adverse use, that use establishes against the owner the conclusive presumption of consent, and so of dedication. It affords the conclusive and indisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license. Indeed, some of the courts have insisted that the rule is broader even than as above stated, while no court or text writer has confined it to narrower limits. Thus, in New York, under a statute declaring that all roads which have been used as public highways for 20 years or more shall be deemed public highways (1 Rev. St. N. Y. p. 521, § 100), it has been held that the intention of the owner is not material, and that such a user makes it a public highway, though the owner be a lunatic, an infant, or married woman, and has no knowledge thereof during the entire time. Devenpeck v. Lambert, 44 Barb. 599. And the soundness of this view of the law is not only stoutly supported by the authors of Elliott, Roads & S. (page 123 et seq.) but has received some approval from this court in the cases of Bolger v. Foss, 65 Cal. 250, 3 Pac. 871, and Freshour v. Hihn, 99 Cal. 443, 34 Pac. 87.

These cases, however, were decided, the first under section 2619 of the Political Code, since repealed, and the second under a statute exclusively applicable to Santa Cruz county. Their law is not pertinent to this case, nor do we by this affirm the rule there laid down. It is sufficient here to emphasize the fact that no declaration in Hope v. Barnett was meant or can properly be construed to declare a different rule from the one which is above set forth, and which finds abundant, and, indeed, universal, recognition from the authorities. Thus, Washb. Easem. (4th Ed.) p. 199, § 5: "If the user is permissive or by license, it will not ripen into a prescription." "The use of a way by the public for twenty years gives a prescriptive right of a public as well as a similar user does of a private way, and this right, when once established, continues until it is clearly and unmistakably abandoned. * * * And if the only evidence of a dedication be a public user, with the acquiescence of the owner, a user of the term of twenty years must be proved, or a time corresponding to the period of limitations in the state in which the land lies." Beall v. Clore, 6 Bush (Ky.) 680. In Com. v. Coupe, 128 Mass. 63, it is said: "Ways by prescription and ways by dedication rest upon entirely different principles. The first is established upon evidence of user by the public, adverse and continuous, for a period of twenty years or more, from which use arises a presumption of a reservation or grant and the acceptance thereof." Jennings v. Tisbury, 5 Gray, 73. And in Dill. Mun. Corp. (4th Ed.) p. 753, § 637: "Such intent [to dedicate] will be presumed against the owner where it appears that the easement in the street or property has been used and enjoyed by the public for a period corresponding with the statutory limitation of real actions. But where there is no other evidence against the owner to support the dedication but the mere fact of such user, so that the right claimed by the public is purely prescriptive, it is essential to maintain it that the user or enjoyment should be adverse." Says Thomp. Highw.

p. 48: "Where the acts of the owner are not so specific in their nature as clearly to prove his intention that the public should acquire a right of way, they are frequently aided by collateral evidence, and the circumstance of most common occurrence which is considered sufficient to support the claim of the public is the length of time during which they have had the uninterrupted use and enjoyment of the privilege." So Elliott, Roads & S. p. 123: "What the original intention of the owner was ceases to be of importance after the lapse of the limitation prescribed by the statute. Twenty years' use by the public, under claim of right evidenced by use, will give a right to the road or street, * * * no matter what may have been the owner's intention." And Ang. Highw. § 131, quotes the language of Shaw, C. J., in Reed v. Northfield, 13 Pick. 94: "We think it clear upon principle that public easements, as well as others, may be shown by long and uninterrupted use and enjoyment, upon the conclusive legal presumption that they were at some anterior period laid out and established by competent authority." Says Kent (3 Kent, Comm. p. *451): "If there be no other evidence of a grant or dedication than the presumption arising from the fact of acquiescence in the free use and enjoyment of the way as a public road, the period of twenty years applied to incorporeal rights would be required, as being the usual and analogous period of limitation." In this enunciation of the rule, framed with his wonted wisdom and conservatism, the learned chancellor was dealing with the common-law period for the acquirement of prescriptive rights. Under our law the statute of limitations for the commencement of actions affecting title to realty, and the period of time for the acquisition of title thereto by adverse possession, or of acquiring a prescriptive right to an easement, has been shortened to five years, which period would, by analogy, be made the time requisite for the acquirement by the public of such right. The rule thus being that the adverse user conclusively establishes the presumption of dedication to the public,—as, in the case of the individual, the prescriptive right establishes the presumption of a grant,—the finding of such adverse user for over 30 years is more than sufficient for this purpose, unless, as contended, the other findings are contradictory, or show an abandonment. Pol. Code, §§ 2619, 2631; Civ. Code, § 806; McRose v. Bottyer, 81 Cal. 122, 22 Pac. 393.

The finding in this case differs from that discussed in Cooper v. Monterey Co., 104 Cal. 438, 38 Pac. 106. Here the adverse user is expressly set out. There, as was said, the language of the finding did not negative the idea that the use might have been under mere license. The placing of the gates in 1887 was rather an acknowledgment than a denial of the public right, since permission to erect them was first asked of a member of the board of supervisors. The payment of taxes was upon the whole tract, which included the strip in dispute, and is thus within the rule of Smith v. City of San Luis Obispo, 95 Cal. 463, 30 Pac. 591. See, also, San Leandro v. Le Breton, 72 Cal. 170, 177, 13 Pac. 405. The judgment is therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

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108 Cal. 546

WEAVER v. McKAY et al. (No. 18,445.)

(Supreme Court of California. Aug. 24, 1895.)

SALE OF MORTGAGED PREMISES — ASSUMPTION OF DEBT—EVIDENCE.

1. Where the grantee of mortgaged premises accepted the conveyance providing for his payment of the "mortgaged debt," he cannot avoid a deficiency judgment against him on foreclosure by showing that the contract for the purchase provided for a conveyance merely subject to the "mortgage," in the absence of fraud by the grantor in making the conveyance.

2. That the contract of purchase of mortgage premises provided merely that the conveyance should be subject to the "mortgage" is not evidence of fraud by the grantor in inserting in the deed an agreement by the grantee to pay the "mortgage debt."

3. A certified copy of the record of a deed containing a recital that it was made subject to a mortgage debt on the land conveyed is admissible to prove the assumption of the mortgage debt by the grantee.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by N. M. Weaver against McKay, McCann, and others, to foreclose a mortgage. From a judgment for plaintiff, some of the defendants appeal. Affirmed.

Milton E. Babb, for appellants. J. H. McGoffey and E. W. Risley, for respondent.

TEMPLE, J. This action was brought to foreclose a mortgage executed by Margaret Griffith and R. B. Johnson to secure the payment of their note for $4,500 to plaintiff. After the mortgage was executed and recorded, appellants purchased the premises, and took a deed from R. B. Johnson, who had become the sole owner, in which was contained the following: "This conveyance is made subject to that certain mortgage made by Margaret M. Griffith, a married woman, and R. B. Johnson, to N. M. Weaver, dated February 10, 1891, for the sum of $4,500, and recorded in volume 79 of Mortgages, at page 433, records of Fresno Co., Cal., which said mortgage, and the note secured thereby, and the interest due and to grow due thereon, the grantees herein hereby assume, and agree to pay, discharge, and satisfy, and to hold grantees [grantors] herein harmless therefrom, as a part of the consideration of this conveyance." The deed was executed January 17, 1893, and was in performance of an agreement between Johnson and appellants made December 20, 1892. In that agreement it was stipulated that Johnson should receive from appellants a described tract of land, in consideration of which, and of $1,000 cash, he would convey to appellants various tracts, and among them the mortgaged premises. Some of the other tracts were also incumbered. As to one, it was stipulated that it should be conveyed subject to a mortgage of $1,850; as to the mortgaged premises in question here, that it should be conveyed "subject to the indebtedness thereon."

It is contended that the deed does not accord with the agreement, in this: that, by the agreement, appellants were to take the land subject to the mortgage, whereas by the deed they are made to assume the payment of the mortgage debt, and thereby to become liable to pay a judgment for deficiency, if the land does not sell for enough to pay the debt. They aver in their answer that they were induced to accept the deed containing this stipulation by the fraudulent assurance of Johnson that it was exactly like the other deed, which was only subject to the mortgage. Upon this issue the court found for the plaintiff, and the finding is abundantly sustained by the evidence.

Appellants' counsel contends, however, that because the agreement is set out in the answer in hæc verba, and its genuineness is not denied, it overcomes all other testimony upon the subject. If it be conceded that the stipulation contained in the agreement did not require that appellants should assume the payment of the mortgage debt, still, if they knowingly accepted as performance such a deed, it was no fraud upon them, and they have no claim for relief. Upon the issue as to whether they were induced to accept the deed by fraud, the written agreement is not evidence. I cannot understand the claim that setting out the contract in the answer tendered or made a distinct issue upon which there should have been a finding. It is set out as a part of the charge of fraud, and upon that issue there is a finding.

Exception was taken to the offer of the deed in evidence to prove the assumption of the mortgage debt by appellants, on the ground that such portion of the deed was no part of the conveyance, and did not need to be recorded, and therefore a certified copy of the record is not evidence. The construction contended for is too narrow, but, even had the stipulation been contained in a separate instrument it would be entitled to record under section 1158, Civ. Code. The judgment and order are affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

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108 Cal. 581

PEOPLE v. RYAN. (Cr. No. 16.)

(Supreme Court of California. Aug. 27, 1895.)

JURY—BIAS OF SUMMONING OFFICER—HOMICIDE—EVIDENCE.

1. Pen. Code, § 1064, provides for challenging a panel formed from persons drawn on a special venire on account of bias of the officer who summoned them. *Held*, that a deputy sheriff who admitted that he once had an opinion as to the guilt of defendant, but that his opinion had since been dispelled, is not disqualified by bias.

2. Where a deputy sheriff who has summoned jurors on a special venire is challenged for bias under Pen. Code, § 1064, he may be asked by the court whether, if he were sworn as a juror, he could and would give defendant a fair trial.

3. On a trial for murder, evidence that a witness for the state employed counsel to defend himself on a previous trial for killing defendant's father in the affray wherein defendant kiled deceased was irrelevant and inadmissible.

4. On a trial for murder, a witness for the state was asked, without objection, whether he was acquainted with defendant's reputation for "truth, honesty, or integrity." The witness was then asked whether it was good or bad, which question was objected to generally. *Held* that, as the court's attention was not properly called to the form of the first question, and as defendant had opportunity on cross-examination to find what qualities the witness was testifying about, there was no error in overruling the objection.

5. An attorney for the people should not ask inadmissible questions for the purpose of exciting suspicions in the minds of the jurors prejudicial to defendant; nor repeat a question to which an objection has been sustained; nor, during the progress of the trial, make remarks unjustly injurious to defendant.

6. Where defendant and his father, on one side, and the deceased and others, on the other, engaged in an altercation, and in the midst of the quarrel defendant went out and got a pistol, but the testimony was conflicting as to whethed defendant from the outside or the others from the inside fired the first shots, and as to whether defendant's father had been shot before defendant first fired, the conclusions of the jury thereon will not be disturbed on appeal, though the evidence be susceptible of doubt as to the guilt of defendant.

In bank. Appeal from superior court, Kings county; Austin Jacobs, Judge.

William Ryan was convicted of murder in the second degree, and appeals. Affirmed.

Maurice E. Power and Rowen Irwin, for appellant. Atty. Gen. Fitzgerald and C. H. Jackson, for the People.

McFARLAND, J. Appellant was accused by information of the murder of one James McCaffery, and was convicted of murder in the second degree. He appeals from the judgment and from an order denying his motion for a new trial.

1. The first alleged error relied on for a reversal is the refusal of the court to allow the challenge of appellant to the panel of jurors summoned on a special venire, upon the ground that the deputy sheriff who summoned said jurors was disqualified under section 1064 of the Penal Code. Under the circumstances shown by the testimony on this point, it would have been, perhaps, more becoming in the sheriff to have selected some person other than the deputy in question to summon said jurors; but we cannot say that the court erroneously decided, on the evidence, that the said deputy was not disqualified by bias. It is true that, in one part of

the testimony of the deputy when on the witness stand, he did give an affirmative answer to the question whether or not he had an opinion as to the guilt or innocence of the appellant; but he afterwards said: "I have not formed or expressed any opinion as to the guilt or innocence of this defendant. I have no bias or prejudice against him. * * * I say that I had some sort of an opinion, but it has since been dispelled. * * * I simply had an opinion that McCaffery had been killed. As to whether or not he had been killed in a justifiable manner, or whether the party who took his life was justifiable or not, I had no opinion, and never have had. I have no opinion now." In answer to the question, "Have you any opinion now, of any kind or character, or have you had since the next day after the trouble, as to the guilt or innocence of this defendant?" he answered, "No, sir." He also said: "I mean that I had an opinion that he [defendant] was the man that shot McCaffery. Whether he was justified in it or not I don't know." (There was no real contention in the case that appellant did not kill McCaffery; but he was killed by a shot aimed by appellant at one George McCord, which shot appellant claims he was justifiable in firing.) Looking at all the evidence, we cannot see that the denial of the challenge was erroneous. As the witness did not base whatever opinion he may at one time have had upon public rumor or newspaper statements, as mentioned in section 1076, Pen. Code, it is contended by appellant that the court erred in asking him this question: "If you were impaneled and sworn as a juror to try this cause, could you and would you give the defendant a fair and impartial trial? But the provisions of section 1076 do not make it improper to ask that question in any case when the court is endeavoring to find out the real state of the juror's mind.

2. On the occasion at which the appellant killed McCaffery, the appellant's father, James O. Ryan, was killed by one of the party called by some of the witnesses the "McCord faction"; and, when George B. McCord was a witness for the prosecution, appellant's counsel, on cross-examination, asked him this question: "Did you employ an attorney to defend you with reference to the action that you took in the killing of James O. Ryan?" An objection by the prosecution to this question was sustained, and this is claimed by appellant to have been error. We do not think that this ruling was erroneous. If he had been asked, "Did you employ counsel to prosecute the defendant?" the question would have been proper, as showing his feeling as a witness; but employing counsel to defend himself on another charge would be an act not relevant to the case on trial.

3. The prosecution called several witnesses to impeach the appellant and one of his witnesses; and each of them was asked this question: "Are you acquainted with his general reputation in the community where he lives for truth, honesty, or integrity?" No objection was made to this question; but, the witness having answered in the affirmative, he was then asked, "What is it, good or bad?" and to this second question appellant objected, and his objection was overruled. Appellant's contention here is that the second question was improperly allowed because the said first question was in the disjunctive; the word "or" having been used between "honesty" and "integrity." It does not appear that the attention of the court below was called to the form of the first question; the objection to the second question being merely that it was "irrelevant, immaterial, and incompetent, and that no proper foundation was laid therefor." If, when the second question was asked, the attention of the court had been called to the fact that the first question was in the disjunctive, the attorney for the prosecution would probably have been required to state which, or how many, of the characteristics mentioned in the first question he was inquiring about. Moreover, appellant could not have been prejudiced by the mere form of the question, for he had ample opportunity upon cross-examination to find out what qualities or characteristics the witnesses were testifying about; and the whole matter is too unimportant to warrant a reversal of the judgment.

4. Appellant contends for a reversal on account of misconduct of counsel for the prosecution. This contention of appellant is certainly not frivolous; for the conduct of counsel for the people, in some of the instances pointed out by appellant, is, at least, censurable. An attorney for the people should not ask inadmissible questions for the purpose of exciting suspicions in the minds of the jurors prejudicial to the defendant; nor repeat a question to which an objection has been sustained; nor, during the progress of the trial, make remarks unjustly injurious to the defendant. Such conduct prevents a defendant from having that fair trial to which, whether really innocent or guilty, he is entitled. Moreover, it may defeat the punishment of crime by jeopardizing a conviction when the defendant is clearly guilty. Some allowance, however, must be made for the infirmity of human nature as exhibited by counsel in the heat of a trial; and in the case at bar, while, as before stated, the conduct of counsel was not free from blame, yet we do not think that it was of such gravity and importance as to warrant a new trial. The facts are not nearly on a level with those upon which the judgment was reversed in People v. Wells, 100 Cal. 459, 34 Pac. 1078, or in the other cases referred to in the opinion in that case.

5. The gravest question in this case is whether the evidence warranted a conviction of murder. The homicide occurred at a primary election held in a schoolhouse. Appellant's father, J. O. Ryan, who was a small man, over 50 years old, and a permanent crip-

ple, was one of the officers of the election. The appellant, who was between 21 and 22 years old, and at the time also a cripple, on crutches, was the second person offering to vote. There were present three of the McCord family, and McCaffery, who was a son-in-law of one of them. We infer from the evidence, although it does not expressly appear, that there was something of a feud between the McCords and McCaffery on the one side and the two Ryans on the other. When appellant offered to vote, one of the McCords challenged his vote upon the ground that he had sworn some time before, at an election in the city of Hanford, that he resided there, and demanded that he be sworn. His father directed him to swear his vote in, and he said he would do so. At that junction the McCords charged appellant with perjury. As to the exact language used, and as to how many joined in the charge, the testimony is conflicting. George McCord testified that he himself said: "Yes, I don't think you have any regard for your oath, and I believe that you would swear to anything." Other witnesses swore to much rougher language. In reply to the remark of George, the appellant called him a liar, there also being a conflict as to the exact language used by him. George then advanced towards appellant, who, George says, had raised his crutch above his head, and had advanced as if he intended to strike. This the appellant denies. Before George had advanced more than a step or two, he was caught by a man named Beckerlie, and for a few moments George and Beckerlie engaged in a tussle which resulted in both falling on the floor among the school desks. In the meantime another of the McCord party had struck appellant over the head with one of his crutches with such force as to break the crutch, and another had knocked the father, J. O. Ryan, down, for the alleged reason that he had put his hand towards his hip pocket, and it was supposed that he was about to draw a pistol. J. O. Ryan was struck and kicked several times, and was very roughly handled. The appellant, after quite a fight with others of the party, finally got out of the schoolhouse, having freed himself from McCaffery, who was on his back, by rubbing against the casing of the door. When appellant got out of the house, he went to his wagon, which stood a short distance away, and, getting a pistol from under the cushion, returned to the front of the house. At this time J. O. Ryan was outside of the house. Appellant testified that, as he approached the house from the wagon, a shot was fired from the house, and that his father told him that he was shot, and that George McCord had shot him, and for him (appellant) to shoot, and "pop it" to George McCord. Several shots were then interchanged between appellant from the outside of the house and George McCord from the inside, or at the door. One of appellant's shots penetrated some part of the woodwork of the building and killed McCaffery. One of George McCord's shots hit J. O. Ryan, making a wound which caused his death a day or two afterwards. There is a great conflict of testimony as to whether the first shot was fired from the house, by McCord, or at the house, by appellant. George McCord testified that he heard shots before he got loose from Beckerlie; that he heard McCaffery say that he was shot before he went to the door; that he went to the door after three shots had been fired from the outside, and saw appellant raising his pistol to fire again; that he (George), after getting to the door, fired his first shot at appellant; that he then saw J. O. Ryan with a pistol in his hand, and heard him telling appellant to fire; and that he (George) then fired at J. O. Ryan. Soon afterwards appellant and J. O. Ryan went away. There is a conflict of evidence as to whether or not J. O. Ryan had a pistol at any time during the melée.

The foregoing is a mere skeleton statement of the affray. The filling up would be an immense quantity of conflicting testimony on many material points. An examination of the mere cold, lifeless transcript tends to leave a doubt in the mind as to whether or not appellant was properly convicted, or whether, at the most, he was guilty of any crime higher than manslaughter. If, as he returned from the wagon,—knowing how his father had been treated in the house,—a shot was fired from the house, and he was told by his father that he was shot, he had reasonable grounds for believing that the life of his father and himself was in danger, and he had the right to defend either. If, however, when he returned from the wagon, the affray was over; if no shot was fired from the house until after he had himself shot; and if his father and himself could have walked away without further danger, and he shot out of revenge,—then he was guilty. The determination of these questions depended upon a variety of absolutely contradictory evidence given by numerous witnesses; and in such a case the conclusions of the jury, and of the judge who refused a new trial, must be taken as final. They not only had better opportunities than we have to pass upon the credibility of witnesses, and to weigh the evidence, but it is their exclusive province to do so, under the law, when there is a mass of evidence to both sides of an issue. We could not rightfully set aside a verdict merely on account of a doubt which we might have of its correctness. We could set it aside only when it clearly appeared to us to be wrong; and this we cannot say of the verdict in the case at bar. Judgment and order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.; TEMPLE, J.; VAN FLEET, J.

108 Cal. 101

TEBBE v. SMITH. (Sac. 19.)

(Supreme Court of California. July 12, 1895.)

ELECTION CONTEST—EVIDENCE—INTRODUCTION OF BALLOTS—MARKING BALLOTS—CONDUCT OF ELECTION.

1. Where a statute prescribes a mode of preservation of ballots, on proof by a contestant of a substantial compliance therewith, the ballots are admissible to overcome the prima facie correctness of the official canvass.

2. Where, in a contested election case, the ballots are admitted in evidence on proof by the contestant of a substantial compliance with the statute prescribing the mode of preservation, the burden is on the contestee to show that the ballots have in fact been tampered with, or have been exposed so that they might have been tampered with, and a naked showing that it was possible for one to have molested them is not sufficient.

3. Where, in a contested election case, the ballots are introduced in evidence, the question whether they have been tampered with is one of fact, for the jury.

4. Pol. Code, § 1197, provides for a margin on ballots one-half inch wide, at the right hand of the names, so that the voter may clearly indicate, in a manner afterwards provided, the candidate for whom he votes, and directs the clerk to have printed on it, "To vote for a person, stamp a cross (×) in the square at the right of the name." Section 1211 provides that any ballot not made as provided in the act shall be void, and shall not be counted. Section 1205 provides that the voter shall prepare his ballot by making a cross after the name of the person for whom he intends to vote. Section 1215 provides that no voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him. *Held*, that ballots with crosses placed opposite the candidate's name, but without the square, should be counted as votes for the candidate opposite whose name the mark is placed.

5. Under Pol. Code, § 1215, providing that no voter shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him, a ballot with the letter "J" written in pencil in the blank space left for the insertion of the name for justice of the peace is void, and should not be counted.

6. Pol. Code, §§ 1160, 1162, provide that the polls must be opened at sunrise, and kept open until 5 p. m., and that a ballot box must not be removed from the polls, or the presence of bystanders. *Held*, that the votes cast at a precinct where the polls were not opened till 10 a. m., and the ballot box was taken by the election officers with them to dinner, are void, and should not be counted.

7. On all the ballots cast at a certain election there appeared, written on the blank space under the office of justice of the peace, "G. G. Brown — Republican." The evidence showed that the writing was all done by the same person, but did not show who did the writing, nor whether it was upon the tickets when they were put in the voters' hands, and that there was but one person in the precinct lawfully assisted in marking his ballot. *Held*, that under Pol. Code, § 1211, providing that any ballot which is not made as provided in this act shall be void, and shall not be counted, all the ballots, except the one of the voter lawfully assisted, should be rejected.

In bank. Appeal from superior court, Siskiyou county; J. F. Ellison, Judge.

Action by George A. Tebbe against Clarence S. Smith, contesting defendant's election to the office of county superintendent of schools. From a judgment for plaintiff, defendant appeals. Reversed.

Warren & Taylor and L. F. Coburn, for appellant, cited the following authorities: McCrary, Elect. 291–293; Coglan v. Beard, 67 Cal. 303, 7 Pac. 738; Kreitz v. Behrensmeyer (Ill. Sup.) 17 N. E. 242; Fenton v. Scott (Or.) 20 Pac. 98; Albert v. Twohig (Neb.) 53 N. W. 583; Powell v. Holman (Ark.) 6 S. W. 505; Bechtel v. Albin (Ind. Sup.) 33 N. E. 970; Kirk v. Rhoads, 46 Cal. 398; Whittam v. Zahorik (Iowa) 59 N. W. 61; In re East Coventry Election (Pa. Quart. Sess.) 3 Pa. Dist. R. 377; Louck's Case, Id. 127; Sego v. Stoddard (Ind. Sup.) 36 N. E. 204–208; Taylor v. Bleakley (Kan. Sup.) 39 Pac. 1045; Richardson v. Jamison, Id. 1050; State v. Walsh (Conn.) 25 Atl. 1; Kearns v. Edwards (N. J. Sup.) 28 Atl. 723; Spurgin v. Thompson (Neb.) 55 N. W. 299; People v. Seale, 52 Cal. 71, 621; Russell v. McDowell, 83 Cal. 70, 23 Pac. 183; Attorney General v. McQuade (Mich.) 53 N. W. 944; People v. Board of County Canvassers of Onondaga Co., 129 N. Y. 395, 29 N. E. 327.

Gillis & Tapscott and James F. Farraher, for respondent, cited the following authorities: Hartman v. Young (Or.) 20 Pac. 17; People v. Livingston, 79 N. Y. 288; O'Gorman v. Richter (Minn.) 16 N. W. 416; 6 Am. & Eng. Enc. Law, 425; People v. Holden, 28 Cal. 133; Dorey v. Lynn (Kan. Sup.) 3 Pac. 558; Coglan v. Beard, 67 Cal. 306, 7 Pac. 738; Blankenship v. Israel (Ill. Sup.) 24 N. E. 615; McCrary, Elect. 291–293; People v. Burden, 45 Cal. 241; Coglan v. Beard, 65 Cal. 58, 2 Pac. 737; Kreitz v. Behrensmeyer (Ill. Sup.) 17 N. E. 235, 242; Fenton v. Scott (Or.) 20 Pac. 98; Albert v. Twohig (Neb.) 53 N. W. 583; Powell v. Holman (Ark.) 6 S. W. 505; Bowers v. Smith (Mo. Sup.) 20 S. W. 101; In re Vote Marks (R. I.) 21 Atl. 962; In re Sharon Hill Election (Pa. Com. Pl.) 3 Lack. Jur. 286; Lay v. Parsons (Cal.) 38 Pac. 447; Spurgin v. Thompson (Neb.) 55 N. W. 299; State v. Russell (Neb.) 51 N. W. 465; Sego v. Stoddard (Ind. Sup.) 36 N. E. 204; Parvin v. Wimberg (Ind. Sup.) 30 N. E. 790; Inglis v. Shepherd, 67 Cal. 469, 8 Pac. 5; Louck's Case (Pa. Quart. Sess.) 3 Pa. Dist. R. 127; Coffey v. Lyman, 92 Cal. 137, 28 Pac. 91; Coffey v. Edmonds, 58 Cal. 521; Wyman v. Lemon, 51 Cal. 273; People v. Board of Sup'rs of Dutchess Co. (N. Y. App.) 32 N. E. 245; State v. Saxon (Fla.) 12 South. 218; Sprague v. Norway, 31 Cal. 174; Minor v. Kidder, 43 Cal. 237; Preston v. Culbertson, 58 Cal 209; People v. Seale, 52 Cal. 71, 621; Russell v. McDowell, 83 Cal. 70, 23 Pac. 183; People v. Cook, 59 Am. Dec. 468; Cleland v. Porter, 24 Am. Rep. 273; Piatt v: People, 29 Ill. 54; Board of Sup'rs v. People, 65 Ill. 360; Fry v. Booth, 19 Ohio St. 25; Soper v. Board (Minn.) 48 N. W. 1112; Farrington v. Turner (Mich.) 18 N. W. 544; Whipley v. McKune, 12 Cal. 360; State v. Nicholson (N. C.) 9 S. E. 545; McCrary, Elect. § 128; Finlay v. Walls, 4 Cong. Elect. Cas. 378; Bragdon v. Navarre (Mich.) 60 N. W. 277; Lindstrom v. Board (Mich.)

54 N. W. 280; Allen v. Glynn (Colo. Sup.) 29 Pac. 670; Schneider v. Bray (Nev.) 39 Pac. 326.

HENSHAW, J. Appeal from the judgment, taken within 60 days after its rendition. The evidence is brought up for review by bill of exceptions. By the official canvass of the supervisors, Smith was declared elected over Tebbe to the office of county superintendent of schools of Siskiyou county at the last general election, by a plurality of one vote. Tebbe then instituted this contest. The result of the judicial count was to increase contestant's total vote by three, no change being made in the number of votes accredited to contestee, and accordingly the judgment of the court declared contestant to be duly elected.

1. The first point urged is that the court erred in overruling contestee's objection to receiving the ballots in evidence. The evidence showed that the ballots and returns reached the county clerk through the proper channels. The sealing wax on some of the packages was broken when they were received from the express office. Other seals were broken in handling. The packages were placed on top of a large case in the clerk's office, and there remained, in the condition in which they had arrived, until the completion of the canvass by the supervisors, when they were put into three gunny sacks, each sack securely bound and sealed, and placed under the clerk's desk, where they remained until produced in court. Upon being opened, they were found to be in the same condition as when they were sealed by the clerk. There had been no opportunity for any one to tamper with the ballots, and in fact they had not been disturbed. They were left alone only when the office was closed and locked. During office hours they were never left alone, excepting upon one occasion, when the deputy stepped out for "a minute and a half," leaving one Robertson in the office. At that time the ballots were in the gunny sacks, and neither the sacks nor the ballots had been disturbed. Tebbe, the contestant, was a deputy clerk during this time; but he was never left alone in the office, and was given no key to it. We cannot see anything suspicious in this last circumstance. Upon the contrary, it reflects credit upon the prudence of the clerk, and the fair dealing of all concerned. Knowing of the impending contest, they took all reasonable precautions to avoid exposing either the ballots, or contestant's connection with them, to any suspicion. The principles of law and the rules of evidence governing cases such as this have been so often declared that a review of the many authorities is unnecessary. Those curious or interested in pursuing the subject will find in the reporter's notes, preceding, many instructive cases collated by the industry of counsel. Suffice it here to say that while the ballots are the best evidence of the manner in which the electors have voted, being silent witnesses, which can neither err nor lie, they are the best evidence only when their integrity can be satisfactorily established. One who relies, therefore, upon overcoming the prima facie correctness of the official canvass by a resort to the ballots, must first show that the ballots, as presented to the court, are intact and genuine. Where a mode of preservation is enjoined by the statute, proof must be made of a substantial compliance with the requirements of that mode. But such requirements are construed as directory, merely, the object looked to being the preservation inviolate of the ballots. If this is established, it would be manifestly unjust to reject them merely because the precise mode of reaching it had not been followed. So, too, when a substantial compliance with the provisions of the statute has been shown, the burden of proof shifts to the contestee, of establishing that, notwithstanding this compliance, the ballots have in fact been tampered with, or that they have been exposed under such circumstances that a violation of them might have taken place. But this proof is not made by a naked showing that it was possible for one to have molested them. The law cannot guard against a mere possibility, and no judgment of any of its courts is ever rendered upon one. When all this has been said, it remains to be added that the question is one of fact, to be determined in the first instance by the jury or trial judge; and, while the ballots should be admitted only after clear and satisfactory evidence of their integrity, yet, when they have been admitted, this court will not disturb the ruling unless we, in turn, are as well satisfied that the evidence does not warrant it. In this case we do not think the ruling was erroneous.

2. Nine ballots were received and counted by the court for contestant, which were marked with a cross, not in the square at the right of his name, but in the marginal space to the right, thus:

120	George A. Tebbe.....X......Democrat	

It is urged against the ruling that the ballots were not marked as required by statute, and that the marks so placed served as distinguishing marks, and rendered the ballot void. Pol. Code, §§ 1215, 1211. The provisions as to the marking of ballots are, in their nature, mandatory. Attorney General v. McQuade (Mich.) 53 N. W. 944; People v. Board of County Canvassers, 129 N. Y. 395, 29 N. E. 327; Taylor v. Bleakley (Kan. Sup.) 39 Pac. 1045; Ellis v. May (Mich.) 58 N. W. 483; Lay v. Parsons, 104 Cal. 661, 38 Pac. 447; Whittan v. Zahorik (Iowa) 59 N. W. 57. But as is said in Bowers v. Smith, 111 Mo. 45, 20 S. W. 101, "all statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor." If we should find a provision in our statutes requiring the voter to mark the cross in the square to the right of the candidate's name, we would feel constrained to adopt the rule and reasoning of the supreme court of Indiana, where such a provision exists, construing which the court said: "If we hold this statute to be directory only, and not mandatory, we are left without a fixed rule by which the officers of election are to be guided in counting the ballots." Parvin v. Wimberg, 30 N. E. 790. But our statutes contain no such mandatory provision. So far as they are pertinent to this discussion, the provisions are that "there shall be a margin on the right-hand side of the names, at least one-half of an inch wide, so that the voter may clearly indicate in the way hereafter to be pointed out the candidate and candidates for whom he wishes to cast his ballot." The clerk is, in printing the ticket, to place upon it the following: "To vote for a person, stamp a cross (X) in the square at the right of the name." Pol. Code, § 1197. The mandatory provisions as to voters are found in sections 1205 and 1215 of the same Code: "He shall prepare his ballot by marking a cross after the name of the person or persons for whom he intends to vote * * * and, in case of a constitutional amendment or other question submitted to the vote of the people, by marking in the appropriate margin a cross (X) against the answer he desires to give." Pol. Code, § 1205. "No voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him." Id. § 1215. It will be noted that these sections make no mention of the square, and that there is not even an express direction to the clerk to place a square opposite the names of the candidates. The voter is only commanded to place the cross in the marginal space to the right of the candidate's name, and when he has done this he has complied with the mandatory provisions of the law. True, the statute contemplates, at least inferentially, the making of a square, and that the square is the proper place for the marking of the cross; but it has not made the doing of this a prerequisite to the casting of a legal ballot. The intention of the voter is as plainly indicated by the one marking as by the other, and, as was said by the supreme court of Rhode Island in construing a similar law: "Our opinion is that a cross placed in the margin of the ballot on the right of the names of the candidates, opposite a candidate's name, should be counted as a vote for the candidate opposite whose name it is placed, whether the margin have any square in it, or not, and, if there be a square in it, even though the cross is without, or partly without, the square. All that chapter 731 [Laws 1889] requires, to make the cross effective as a vote, is that it shall be inscribed in the right-hand margin, opposite the name of the person intended to be voted for." In re Vote Marks (R. I.) 21 Atl. 962. As to the last contention upon this point, that the marks served to distinguish the ballots, it need but be suggested that it would not require much ingenuity or intelligence to place the cross, even within the square, in such a manner as would enable the ballot to be distinguished. When a legal mark is placed upon the ballot in a legal place, the ballot cannot be rejected because the mark, as placed, may serve some ulterior purpose. Section 1215 of the Political Code, in forbidding marks, does not include the cross legally placed. The ballots were, therefore, properly received.

3. The ballot from Sawyer's Bar precinct (Exhibit F) should have been rejected. It bore upon it the letter "J," written in pencil in the blank space left for the insertion of the name for justice of the peace. Doubtless, it may have been the intention of the voter to write a name, and he may have abandoned his intent after setting down the initial letter; but doubtless, also, the mark could serve as a distinguishing mark, and, being one having no lawful right upon the ballot, it renders it void. The case differs from Rutledge v. Crawford, 91 Cal. 526, 27 Pac. 779, where this court held that the impression (of printer's ink) upon the back of the ballot was as attributable to accident as design. Here the writing of the letter was an affirmative act of the voter. He had his remedy, having improperly marked his ballot, by calling for the issuance to him of a fresh ticket. Pol. Code, § 1207.

4. The account of the election at Lake precinct is a breeze from Arcady. The polls should have opened at 6:31 a. m. Smith received 13 votes in this precinct; Tebbe, 20. William Otey, called for contestant, testified: "On November 6th, last, I was at the polls of Lake election precinct, on the Fairchild ranch. * * * I got there between eight and nine o'clock in the morning. Served on the election board in my father's place. When I got there, Fairchild, Henry Seale, and the hands working on the ranch were there. I do not remember any one else. The polls were opened, I should judge, some time near ten o'clock. We took an adjournment when we went to dinner. Took the ballot box with us. Fairchild, the old gentleman, carried it. He was one of the election officers. * * * The other materials—ballots and everything—we left in the poll room when we went to dinner. We left the ballot box on the table while eating dinner,—on same table. That ballot box did not pass into the hands of other persons. I think there were bystanders around the polls at the time we went to dinner. * * * The house is about a hundred yards from the polling place. Between the house and schoolhouse there were some men. Some had voted, and some were working on the ranch. I think some other people took dinner with the board. When we were through, Fairchild carried the box back. No person was deprived of voting because the polls

were not opened earlier. I know that no one came there without voting that was entitled to vote." The law provides that the polls must open at sunrise, and be kept open until 5 p. m., and that the ballot box must not be removed from the polling place, or presence of the bystanders. Pol. Code, §§ 1160, 1162. It is the rule that mandatory provisions for the holding of an election must be followed, or the failure will vitiate it, while a departure from the terms of a directory provision will not render it void in the absence of a further showing that the result of the election has been changed, or the rights of the voters injuriously affected, thereby. Code Civ. Proc. § 1112; Russell v. McDowell, 83 Cal. 70, 23 Pac. 183. But the rule as to directory provisions applies only to minor and unsubstantial departures therefrom. There may be such radical omissions and failures to comply with the essential terms of a directory provision as will lead to the conclusive presumption that the injury must have followed. A substantial compliance with the terms of directory provisions is, after all, required. And such a substantial compliance is not had by strictly following some provisions, while essentially failing to observe others. There must be a reasonable observance of all the prescribed conditions. It is the duty of the courts so far to adhere to the substantial requirements of the law in regard to elections as to preserve them from abuses subversive of the rights of the electors. And, under this view, the question becomes a broader one than can be disposed of by answering that in the individual case no harm resulted. Thus, in Knowles v. Yeates, 31 Cal. 82, the contention of appellants was that, admitting that there was no fraud, and that the votes were cast by qualified electors, still the fact that in certain precincts the polls were opened, without reason, at long distances from the appointed places, was enough in itself to call for the rejection of the votes; and this court so held. Likewise, in the case of People v. Seale, 52 Cal. 71, where no question of fraud or injury was involved, but where, at an election called for voting a school tax, the polls were opened at 1 o'clock p. m., and closed at 6, instead of being opened at one hour after sunrise and kept open until sunset, as the law then required, this court, without hesitation, declared the election invalid. In this case we are quite willing to believe that the misconduct of the officers of Lake precinct was prompted by nothing worse than ignorance, and lack of appreciation of the responsibilities of their positions, and we may say, further,—for such is the evidence,—that no harm is shown to have resulted from their conduct; but, looking to the purity of elections and integrity of the ballot box, we are constrained to hold that conduct like this amounts, in itself, to such a failure to observe the substantial requirements of the law as must invalidate the election. And, while reluctant so to hold in this instance, we are confirmed in the opinion by consideration of the fact that any other interpretation would add grave perils to the safe conduct of our elections, which are already harassed by dangers enough. The votes of Lake precinct should, therefore, have been rejected.

5. Upon all the ballots cast in Cecilville precinct there appeared the following, written in the blank space under the office of justice of the peace: "G. G. Brown—Republican." The evidence discloses that this writing was all done by the same person, and, further, that there was but one person in the precinct lawfully assisted in the marking of his ballot, under the provisions of the Code. Pol. Code, § 1208. The record, unfortunately, does not disclose who did the writing, nor whether it was upon the tickets when they were put into the voters' hands. Left, then, to the presumption of the performance of duty by public officers, it must be held that the officers put legal tickets into the hands of the electors, and that the writing was afterwards put upon them. But an elector unable to write can, under our present laws, have a name inscribed upon his ballot in only one legal way, and that is by pursuing the method prescribed by section 1208 of the Political Code. This requirement is clearly mandatory, since it is further declared that "any ballot which is not made as provided in this act shall be void, and shall not be counted." Pol. Code, § 1211. In Ellis v. May (Mich.) 58 N. W. 483, the supreme court of Michigan, construing a similar statute, held that inspectors of election had no right to assist in the marking of ballots, except in the manner provided by law, and that ballots marked in any other than the prescribed manner were void. In the present state of the evidence, only the ballot of the voter lawfully assisted should be counted. It must be held, therefore, that the other ballots of Cecilville precinct should not have been counted. What is here said is addressed to the evidence as it appears in the record. It may be that, upon a new trial, additional evidence will remove the objections now found.

The other points do not require consideration. They are either covered by what has been said, or do not involve error. But for the foregoing reasons the judgment is reversed, and the cause remanded.

We concur: TEMPLE, J.; VAN FLEET, J.; HARRISON, J.

McFARLAND, J. (concurring). I concur in the judgment, and also in the opinion of Mr. Justice HENSHAW, except as to the Cecilville precinct. It will be observed that there is no evidence tending to show when "G. G. Brown—Republican," was written on the ballots. If there be a distinguishing mark on a ballot when it is voted, the ballot should not be counted; but, if the mark be placed on the ballot after it had been properly voted, then, at the trial of a contest, it should be counted. Now, upon the trial in court of an election contest, if a marked ballot be found, and there is no evidence as to the time of the marking, must the court presume that it was marked before it was voted? Such a rule would afford an evil-disposed person, who could get temporary access to the ballots after they had been counted, an easy and safe method of changing the result in a close contest, by simply marking—and thus invalidating—a few ballots in which the votes were for the prevailing party. Of course, fraud should be carefully guarded against; but it seems to me that the rule contended for would be much like closing a wicket and leaving open a barn door. I do not see that there are any presumptions upon which the problem can be solved. If we presume that the ticket was not marked when the election officers gave it to the voter, we must also presume that it was not marked when those officers counted it; and, if we are also to presume that the ballots were afterwards so securely kept that no one could get access to them, it is evident that all the presumptions, taken together, afford no aid in the solution of the question. In the case at bar it is not contended that there was any actual fraud committed, even in the matter of voting for justice of the peace; and, before throwing out votes honestly cast for superintendent of schools, I am inclined to think that there should have been some evidence tending to show that the marking of the votes for justice of the peace was done before the ballots were voted. And it is quite probable that such evidence could readily have been obtained. The returns should show whether or not the said ballots were counted for Brown, and the election officers ought to be able to throw some light upon the question whether the ballots were marked when they were examined during the process of counting.

I concur: GAROUTTE, J.

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108 Cal. 331

BURRIS v. KENNEDY et al. (No. 15,634.)

(Supreme Court of California. Aug. 2, 1895.)

PROBATE SALE OF LAND—VALIDITY OF DECREE—PRESUMPTIONS—IRREGULARITIES—QUIETING TITLE.

1. There are the same presumptions in favor of the validity of a decree of the superior court, sitting in probate, in proceedings, for the sale of a decedent's lands, as a judgment at common law.

2. Under Code Civ. Proc. § 1537, providing that a petition for the sale of a decedent's land must, among other things, contain a general description of all the land of which decedent died seised, and the value thereof, but that a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings if the defects be supplied by proofs on the hearing, and the general facts showing such necessity be stated in the decree, a sale is not invalid merely because the petition failed to describe all the land deceased died seised of, to give the value thereof.

3. In a proceeding for the sale of a decedent's land, the order to show cause was returnable on April 4th, and the proofs were made and a decree for a sale entered on that day. On April 11th another decree for a sale was made, reciting that the decree theretofore made had been vacated for error. *Held*, that a sale under the second decree was valid.

4. The sale of a decedent's land is not invalid because the administrator's bond, which was approved after a second decree of sale was made, referred to a former decree of sale, which had been set aside as erroneous.

5. A sale of a decedent's land is not void because the court erred in ordering a private instead of a public sale.

6. Where land was sold by an administratrix to a third person, who reconveyed it to her, the grantee of the heir of decedent cannot maintain an action against her to quiet his title to the land, on a complaint which fails to allege any facts showing fraud on her part.

7. In an action to quiet title by the grantee of an heir of a decedent against one who, as administratrix of decedent's estate, sold the land, and then procured a reconveyance to herself, defendant, by setting up as a defense the ratification of the sale to her, and that, if the sale to her is held void, she is entitled to be subrogated to the rights of creditors of the estate whose claims were paid out of the proceeds of sale, did not admit that her title was obtained by fraud, where she rested her defense on plaintiff's want of title.

In bank. Appeal from superior court, Alameda county; John Ellsworth, Judge.

On rehearing. Reversed.

For former report, see 38 Pac. 971.

Hutchinson & Campbell, for appellants.
Sharp & Bolton, for respondent.

TEMPLE, J. This is an action to quiet title, and the complaint contains only the allegations that plaintiff is the owner of the demanded premises, and the defendants claim title to the same adversely to plaintiff. Defendants claim under a probate sale. Plaintiff's grantor, Annie Church, now Mrs. Spaulding, and defendant Mrs. McNeil, were practically sole heirs of James Kennedy, deceased, from whom both parties derive title. I say practically, for James Kennedy died intestate, leaving a widow, Mrs. Spaulding's mother, who took one-half the estate, and, before the administration was closed, herself died testate, leaving Miss Church sole devisee. Her will was probated, and all her estate distributed to Miss Church. It is argued that plaintiff simply represents Miss Church, who is interested in this suit as plaintiff. Mrs. McNeil is the sole surviving child of James Kennedy, deceased, and his sole heir. She was also administratrix upon his estate. Respondent contends that the probate sale under which the defendants claim is void, because:

1. Neither the petition for the sale nor the order of sale contains a statement of the jurisdictional facts. The determination of

this question depends somewhat upon the nature of the tribunal. The order was made by the superior court of Sonoma county, in 1887. That court has general jurisdiction derived from the constitution. We have in this state no probate court, but superior courts are given jurisdiction of all matters of probate, just as they are given jurisdiction of cases at law and in equity. The grant of jurisdiction in regard to matters of probate is contained in the general definition of the jurisdiction of the court. After stating various classes of cases, or matters of which the court has jurisdiction, it is said, "And of all such special cases and proceedings as are not otherwise provided for." The court is not, therefore, while sitting in probate, a statutory tribunal, and does not derive its power from the act of the legislature; nor are probate proceedings classed by the constitution as special proceedings. If the administration of an estate can be called a "judicial remedy," then it is classed as a special proceeding in the Code, which divides all "remedies" into adversary actions and special proceedings. It is a proceeding in rem which is not, in the technical sense, such a special proceeding, unknown to the framework of the common law, as will change the presumptions which attach to the action of the court, making it pro hac vice a court of inferior and limited jurisdiction. If this was ever a matter of doubt it was set at rest by the case In re Burton, 93 Cal. 459, 29 Pac. 36. It was there said: "No distinct 'court of probate' has been created or recognized by the present constitution of this state. The constitution has created superior courts, and has given them original jurisdiction of the subject-matter of various classes of actions and special proceedings, more or less distinct from each other; among which are 'all actions at law which involve the title or possession of real property,' and 'and all such special cases and proceedings as are not otherwise provided for,' and 'all matters of probate.'" It is further said: "The superior court, while sitting in matters of probate, is the same as it is while sitting in cases in equity, in cases at law, or in special proceedings; and, when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancillary to a proper judgment." It is true the court, although deriving its authority from the constitution, is controlled in the mode of its action by the Code, and so it is, to the same extent, when foreclosing a mortgage, or trying an action on a promissory note. In both cases it is pursuing the mode prescribed by a statute, but in neither does it derive its power from the statute. Indeed, while the legislature may regulate the mode in which the court shall exercise its jurisdiction, it cannot circumscribe its powers. This was not the case in former constitutions. By the constitution of 1849 a separate tribunal was created. The county judge was directed and authorized to perform the duties of surrogate and probate judge. And it was held that the legislature could grant only a special and limited power to a county judge when acting as probate judge; that it had and could be vested with none of the jurisdiction conferred upon other courts, unless by express authority found in the constitution. Such courts were said to have only a special and limited jurisdiction, and it was required that its records should show a strict compliance with the law directing and authorizing their action. This rule was found intolerable, and in 1858 an act was passed directing that the same force and effect and the like presumption should attach to their proceedings as to the proceedings in the district courts. This act has been held valid, and probate orders made since its passage can be collaterally attacked only on such grounds as would have been valid against like orders made by the district court. Irwin v. Scriber, 18 Cal. 499; In re Sprigg's Estate, 20 Cal. 121; Halleck v. Moss, 22 Cal. 266. The amendment of 1862 still left the probate court a separate and special tribunal, which did not have full probate jurisdiction. Bush v. Lindsey, 44 Cal. 121. In the constitution of 1879 all this was changed. The jurisdiction was given to the highest court in the state having a general common-law jurisdiction. The same presumption must now attach to decrees in probate proceedings upon collateral attack as to judgments in cases at common law or in equity, and the sufficiency of the proceedings or petition will be tested by the same liberal rule which applies to the pleadings in an ordinary action upon such attack.

From the view I take of the matter it is not important to determine whether the application to sell real estate is a step in the administration or not, although I do not doubt that it is. What is meant when it is said that it is an independent proceeding is simply that it is essential that the application should be made substantially as provided by statute; otherwise the court has no power to order the sale, or the administrator to sell. This I admit, claiming only that in entertaining the application and in passing upon it the court is not acting as a special tribunal to which a matter is referred, but is in the exercise of its general jurisdiction over the subject-matter, derived from the constitution. One prominent purpose of administration is to pay the debts of the estate from the real and personal property of the deceased. The administrator is, by law, charged with this duty. To sell real estate to pay the debts, when there is not sufficient personal property, is as plainly a step in the administration as is the sale of personal property for the same purpose. But, although it is within the scope of the administration to sell either real or personal property, the legislature has the power to direct how this shall be done. I think the legislature could have authorized the administrator to do so without any order or decree of the court, or might have authorized the court to make the order without petition or notice. It has, however, prescribed that a petition shall be filed, and that notice should be given, and an opportunity for a hearing shall be afforded. Since the procedure is one in which there are no adversary parties present at all times in court, it is reasonable to hold, as has always been held, that these acts are essential to the power on the part of the court to order the sale. In that sense the petition and notice are jurisdictional. As in all other similar matters, however, if the court has by the petition and notice acquired jurisdiction, errors afterwards in the exercise of it, however gross, will not render the decree invalid. I think there has been no time since 1858 when a sale of real estate would have been held void because it omitted to give a description of all the real estate of which the deceased died seised, or the value or condition of the different parcels. Such are the alleged defects in this case. But, whatever strictness was formerly required, there can be no question since the amendments to section 1537 made in 1874.[1] As the statute now reads, no sale is invalid on account of the omission to state in the petition any of the matters enumerated, provided the general facts showing that a sale is necessary are proven and found. Section 1537 expressly requires the statement of some facts which have no bearing upon the question of the necessity of the sale. The description of the real estate or its value can throw no light upon that matter. These and some other matters are required to be stated, to enable the court to exercise its discretion more intelligently, after it has determined the sale to be necessary. General facts showing that a sale is necessary are set out in the petition, and the decree imports a finding of their truth, and that evidence to that effect was given at the hearing. The facts showing that a sale is necessary are that there are debts; that an allowance has been made for the support of the family; or that there are expenses of administration, and there is not sufficient personal property with which to pay them. Such facts are alleged in the petition, and, though erroneous, the decree is not void, nor the sale invalid on that ground.

2. Many irregularities in the proceedings in the probate court are pointed out and insisted upon as rendering the sale void. If the court had jurisdiction, errors in the exercise of it, however gross, would not render the decision invalid. It is charged that no order to show cause was made or published; that no bond was given; that a private sale was ordered when no appraisement had been made within the year, and that the records show that a sale was not necessary. The only points here sufficiently serious to require notice are the two first mentioned,—that no order to show cause was made, and no bond executed. They depend upon the same facts. The return day mentioned in the order to show cause was the 4th day of April, 1887. On that day a hearing was had and proofs made. A decree directing a sale was also made on that day. On the 11th—seven days later—another decree or order of sale was made, referring to the same petition, and reciting that the order theretofore made in the matter had been vacated for errors. Under this order made on the 11th the sale took place. It is not in form a nunc pro tunc order, but I think it sufficiently appears that it is such. It was evidently in lieu of the order made on the 4th, and must be regarded as the decree then rendered, although, by mistake, a different decree was then entered. The bond refers to the order as made on the 4th. The decree, as above stated, is actually dated as of the 11th, but sufficiently shows that its true date would have been the 4th. The bond was approved May 27th, long after the first order had been vacated and the nunc pro tunc order substituted. If the court erred in ordering a private sale rather than a public sale, or in determining that a sale was necessary, this was mere error, and does not affect the validity of the sale.

3. But it is contended that the sale is void for another reason. After the sale had been made, and two days before the confirmation, Mrs. McNeil, the administratrix, and a Mrs. Kennedy, contracted with Potter, who purchased at the administrator's sale, to purchase the property from him, or to make an exchange for other lands belonging to them. In pursuance of the contract, Potter, at the same time, conveyed the land to Mrs. McNeil and Mrs. Kennedy by grant. This was a violation of section 1576, Code Civ. Proc., and is therefore, respondent claims, void. There is no evidence, nor is it found, that the sale was made to Potter for the benefit of Mrs. McNeil and Mrs. Kennedy; but, supposing that until the date of the deed Potter was acting for himself, still Mrs. McNeil had no right to be interested in the purchase. Her duty as administratrix had not ended. It was incumbent upon her to prevent the confirmation if a better price could be obtained, or if a sale was not necessary. Yet, considering the sale as made to the administratrix per interpositam personam, it was not void. This was decided in Boyd v. Blankman, 29 Cal. 20, after an elaborate consideration, and that conclusion has never been overruled or modified. It was there

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[1] Code Civ. Proc. § 1537, provides that a petition for the sale of decedent's land must, among other things, contain a general description of all the land of which decedent died seised, and the value thereof, but that a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defects be supplied by proofs on the hearing, and the general facts showing such necessity be stated in the decree.

said: "We are of opinion that, by holding the sale to be void at the election of heirs or other persons interested in the estate, the mischief intended to be prevented by the statute will be obviated, and at the same time those who, in good faith and without notice of the constructive fraud of the administrator, had acquired the title through the agent who purchased the property for the use of the administrator, will be protected from losses." If the sale were absolutely void, as an illegal transaction, innocent purchasers would not be protected. Under the rule laid down, the unfaithful trustee may be prevented from making a profit from his violation of duty, and yet the beneficiary cannot avail himself of money laid out for his use, and keep the property too. He must rescind, and in doing so restore to the purchaser the money which has been paid to him as a consideration. Respondent claims that this case was overruled in Jones v. Hanna, 81 Cal. 507, 22 Pac. 883. Counsel are misled by the dissenting opinion rendered in that case in which that view was taken. In the opinion of the court that idea is expressly repudiated, and the point adjudged was very different from that raised in this case or in Boyd v. Blankman. There the administratrix had the personal property of the estate sold at auction. She asked the auctioneer to bid them in for her. He consented to do so, but demanded security for the price and for his commissions. Bihler, who was the appellant in Jones v. Hanna, became such surety, giving to Jones, who was to purchase for Mrs. Hanna, his note. The suit was on this note, and the court held it void, as against public policy. It was given to secure Jones upon his contract to assist Mrs. Hanna to violate her trust. The sale to Jones for Mrs. Hanna was not declared void. A simple illustration will show the difference in the cases. A. desires to defraud B. by inducing him to sell to A. his land for half its value. He employs C. to assist in deceiving and defrauding B., and for such services promises him $1,000, and gives his note for that amount. The fraud having been consummated, the court will not aid C. in the collection of his note, but will hold it void. But B. cannot assume that his deed is void and sue A. in ejectment to recover the land. He must rescind, and bring his action, alleging the acts of fraud. In Jones v. Hanna, plaintiff was suing on such a note,—at least the court so held. Bergin v. Haight, 99 Cal. 52, 33 Pac. 760, has no application. There it was charged that the administration itself was a fraud. Administration was not sought to pay debts or to pass the property to heirs, but as means of a fraudulent acquisition of the property by the plaintiff. No debts were paid, and no costs which benefited the heirs. There was no occasion for rescission. And, besides, no such point was raised or attempted to be. It is said that, inasmuch as the deed was made before the decree of confirmation, the sale was directly to the administratrix, and therefore not within the rule laid down in Boyd v. Blankman. The title passed to Mrs. McNeil by inurement when it passed to Potter. It was the exact case, then, of a purchase by the administratrix per interpositam personam, as in the case of Boyd v. Blankman. In such cases the sale is always virtually to the administrator, and it is that fact which renders it voidable. In Burris v. Adams, 96 Cal. 664, 31 Pac. 565, which was an action by the same plaintiff, and in which the attorneys on both sides were the same, it was held that a complaint in all respects similar to that in the case at bar was insufficient, because the facts constituting the fraud were not averred. There is no reason why that rule should not apply to this case. Plaintiff sues upon the theory that he is the owner; not to have a title which defendant has procured by fraud declared fraudulent and therefore void. Counsel says the objection cannot prevail here, for all the facts are set out in the answer. The answer contains several defenses, but in none of them is it admitted that the title of defendant was obtained by fraud. One defense consists in a denial of plaintiff's title. This was all the answer defendant required. The other defenses were that plaintiff was estopped; that the sale had been ratified; and that the defendants, in case the sale was held void, were entitled to be subrogated to the rights of creditors of the estate whose claims they had paid. The facts were alleged with reference to these last defenses, and were material only to them. Until plaintiff showed his title, they were not material, and even then defendants need not rely upon them. They could prove, as they did, under the denial of plaintiff's title, that plaintiff never had title, by showing that they had it themselves. The fact that the action was brought to quiet title rather than to recover possession does not require any different pleading on the part of defendants. It is not a bill of discovery, and defendants are not required to state the nature of their claim for the benefit of plaintiff, or simply to have it passed upon by the court. As the record stands, defendants are entitled to recover upon the first issue made by them, to wit, the denial of plaintiff's title. But in no event would the answer change the theory of plaintiff's action or constitute notice that he relied upon fraud. He would have been compelled in this case not only to set up the fraud, but to seek a rescission of the fraudulent sale. Perhaps he would not have been required to make a tender, as prescribed in the Code. It may sometimes be impossible to do that. In such cases a party desiring to sue to enforce a rescission must at least offer, as a condition, to make such restitution as the court shall direct; and if the parties cannot be placed substantially in statu quo this court may refuse the relief. The judgment and order are reversed, and a new trial awarded.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.; HENSHAW, J.; VAN FLEET, J.

McFARLAND, J. I concur in the judgment. I also concur in the opinion of Mr. Justice TEMPLE, as I understand it. I do not understand that opinion as declaring anything more on the subject of jurisdiction than this: that while the superior court, when dealing with probate matters, is to be considered as a court of general jurisdiction, with the same presumptions attaching to its acts as in any other action or proceeding over which it has jurisdiction, still, a proceeding to sell real property of an estate must be instituted as provided by statute; and that the court has no more jurisdiction to decree a sale without a petition than it would have to render a judgment on a promissory note where no action had been instituted by the filing of a complaint. As thus understood, the opinion is not in conflict with Pryor v. Downey, 50 Cal. 398, and the long line of cases there cited, and referred to in Richardson v. Butler, 82 Cal. 174, 23 Pac. 9, which hold that "though the proceeding for the sale occurs in the general course of administration, it is a distinct proceeding in the nature of an action in which the petition is the complaint and the order of sale is the judgment." Pryor v. Downey, supra. After the act of 1858 the old county court was, as to probate proceedings, treated as a court of general jurisdiction; and the fact that the present constitution gives jurisdiction of probate proceedings to the superior court does not affect the rule as there stated. The petition for a sale is a necessary prerequisite to the jurisdiction of the court to order a sale; and I do not understand the opinion in this case to hold otherwise. In all other respects I fully concur in the opinion.

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5 Cal. Unrep. 94

BANK OF ESCONDIDO v. THOMAS et al.
(No. 19,580.)

(Supreme Court of California. July 25, 1895.)

PARTY WALL—ENJOINING USE—ACTION FOR COST.

1. In an action to enjoin defendants from using a certain wall as a party wall, the answer alleged that said wall rested in part on defendants' land. *Held*, that the issue as to whether plaintiff's building extended over the dividing line was sufficiently raised by the pleadings.

2. Where a board of directors consented to allow defendants to use a wall of the corporation's building as a party wall, and the defendants erected a building with the knowledge and acquiescence of said directors, the corporation will be estopped to assert that defendants have no interest in the wall; but its remedy, if any, is an action for the recovery of a proportionate part of the cost of said wall.

3. Where plaintiff's wall projects over defendants' land, equity will not enjoin defendants' use thereof as a party wall.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Bank of Escondido to enjoin W. W. Thomas and another from using a certain wall as a party wall. Defendants had judgment, and plaintiff appeals. Affirmed.

Cassius Carter, David L. Withington, and Withington & Carter, for appellant. E. W. Britt, for respondents.

BELCHER, C. The plaintiff is a corporation engaged in the business of banking. In 1887 it acquired the title to, and erected a two-story brick building on a lot in the town of Escondido, county of San Diego. The defendants owned the two adjoining lots on the west, and shortly after the completion of the bank building they commenced the erection of a two-story brick building thereon, and completed the same early in 1888. To lay the foundation for the west wall of its building, the plaintiff excavated a trench 3 feet deep and 3 feet wide, which extended over its line, and upon defendants' land, 11½ inches. In this trench the foundation was laid, covering the whole space at the bottom, but narrowing towards the surface of the ground. The wall erected on this foundation was 13 inches thick, and it projected over the plaintiff's line to the extent of ½ inch at the ground, 1½ inches at the second-floor joists, and 2½ inches at the top joists. When defendants were erecting their building, they claimed the right to use the plaintiff's wall as a party wall, and they inserted therein the joists for each of the three floors of the building, and also plastered the wall without lathing. They also, with plaintiff's consent, cut a doorway through the wall, on the second floor, so that free passage might be had between the said buildings. After the opening of this doorway the plaintiff was required to pay an additional rate of insurance on its building by reason thereof, and it claimed that defendants should pay such increased insurance, which they did for about a year. Then they put an iron door in the opening, after which no increased insurance was charged. By design, the defendants' building, in finish and general appearance, was made the same as the plaintiff's building; and when finished the two together presented "the appearance of virtually a single building," and ever since they have been known as the "Escondido Bank Block." Later,—some time in 1892, it would seem,—the plaintiff, by one of its directors, presented to the defendants a bill for $300, "for materials and work in partition wall." The bill was not paid, and thereupon, in June of that year, plaintiff commenced this action, alleging "that it is the owner and entitled to the possession" of its described lot of land; that defendants, and each of them, claim some estate or interest in said real property adverse to the plaintiff; and that their claims are without right,—and praying that it be adjudged that defendants have no estate or interest whatever in or to said real property, or any portion thereof, and that they be forever enjoined from asserting any claim to the same adverse to the plaintiff. By their answer the defendants disclaimed any right, title, or interest in the land described in the complaint, except the right to use the said wall as a party wall. The case was tried, and the court found, among other things, that the west wall of plaintiff's building was erected, extending over the dividing line of the lots, as before stated; that, with the knowledge and consent of plaintiff, the defendants inserted the joists of their building into the said wall, and used the same as a party wall, and that no objections were at any time made by the plaintiff to such use, until the commencement of this action; that said wall is, and since the construction of defendants' building has been, a party wall, and that plaintiff agreed with defendants that they might use it as such; that, with the consent of plaintiff, the defendants caused a doorway to be opened through the said party wall, and afterwards, to save extra insurance, placed an iron door therein, as above stated; and that defendants claim no interest in the lot of plaintiff, except for the support of said wall, and their right to use the same as a party wall. Judgment was accordingly entered that defendants have an easement of support in the said land of plaintiff, of and for the said wall, which stands partly on the plaintiff's lot and partly on the defendants' lot, and that defendants have a right to use such wall as a party wall, and "that defendants have not, nor have any of them, any right, title, or interest in or to the land of plaintiff, except as herein expressly adjudged." From this judgment, and an order refusing to grant a new trial, the plaintiff appeals.

1. In support of the appeal, it is claimed that the finding to the effect that plaintiff's wall extends over the dividing line of the lots to the extent of from ½ an inch to 2½ inches is not within the issues raised by the pleadings. We see nothing in this point. The answer sets up the facts in regard to the construction of the two buildings, and alleges "that the said wall of the plaintiff's building has, ever since the construction thereof, about the 1st day of July, 1887, as aforesaid, rested, and does yet rest, in part, on the said land of the defendants, and that the said wall is a party wall, and ever since about the 1st day of March, 1888, has been used as a party wall" by the defendants and the plaintiff. This was quite sufficient to raise the issue passed upon.

2. It is unnecessary to consider at length all the points made in the case, and discussed by counsel. It was shown that during all the time of the construction of the defendants' building the plaintiff was occupying its banking house, immediately adjacent, and its officers, without raising any objection, daily saw and knew what was being done by defendants. In January, 1888, at a meeting of its board of directors, the subject of the use of the wall by defendants was considered. What was then said and done is thus epitomized in the testimony of Mr. Watson, one of the directors: "Mr. Thomas stated that they were going, or had commenced, to put up a building. He stated it was to be of the general finish of the bank, and wanted to join on our wall. I think either Mr. Graham or myself made a motion that we allow them to do that; that we considered the building would enhance the value and appearance of the bank sufficiently to reimburse the bank for the use of the wall. My impression is there was unanimous consent. I think this was while the board was in session. I am not positive there was any motion, but it was the tenor of the conversation, and I understood it was agreed to on that basis." There was other testimony of like effect, clearly showing that defendants' right to use the wall as a party wall was recognized and acquiesced in by the plaintiff and its officers until after it presented its $300 bill "for materials and work in partition wall." The officers of the plaintiff were its agents, and the rule is that notice to an agent is constructive notice to the principal; and the rule applies to corporations as well as individuals. Jefferson v. Hewitt, 103 Cal. 624. It is true that the defendants were two of the seven directors of the bank during all the time the buildings were being constructed, but that fact is not material, and cannot affect the conclusion reached. Under the circumstances shown, we think the plaintiff should be held estopped from claiming that defendants have no right to use the wall as a party wall, and that its remedy, if any it had, was an action to recover from defendants their just proportion of the cost of the materials and labor used in the construction of the wall. And, in support of this view, see Zeininger v. Schnitzler, 48 Kan. 63, 65, 28 Pac. 1007.

3. There is another ground on which the judgment should be affirmed. It was held in Guttenberger v. Woods, 51 Cal. 523, that he who seeks equity must do equity; and therefore, so long as the plaintiff's wall, laid on his own land, projects over the defendants' land, the court will not compel the defendants to desist from using it as a party wall. The rule declared in that case is applicable here, and should be followed. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

108 Cal. 247

MASON v. CULBERT, County Clerk. (No. 18,426.)

(Supreme Court of California. July 27, 1895.)

JURY FEES.

Under Act March 1, 1872, declaring that jurors shall receive three dollars per day "for attendance upon courts of record," a juror who has been impaneled for trial of a case is not entitled to fees for days that he is excused from attendance on account of continuance of the case.

Department 1. Appeal from superior court, Amador county; John F. Davis, Judge.

Application of Mason for mandamus to Culbert as county clerk. Application denied, and petitioner appeals. Affirmed.

Chas. H. Crocker, for appellant. R. C. Rust, for respondent.

HARRISON, J. The appellant was one of a jury of 12 persons who were impaneled in the superior court of Amador county for the trial of William Evans on a charge of murder, October 16, 1893. The trial proceeded from day to day to and including October 28th, when two of the jurors became sick and unable to perform their duty as jurors, and the trial of the cause was continued from that day to November 4th; and upon November 4th, the two jurors being still sick and unable to attend, the cause was again postponed until November 11th, and from the latter date, for a similar reason, until November 27th, when, the two jurors still being sick and unable to attend court, the cause was continued for the term, and the jury finally discharged. All of the jurors impaneled were present in court each day until October 28th, and also upon the several days to which the cause was continued, until they were finally discharged; but on the days on which the continuances were granted on account of the sickness of the jurors they were all excused from attendance, and permitted to go to their respective houses and business during the intervening periods. Upon their discharge the jurors received warrants for the 16 days during which they were actively engaged in the trial, and were paid thereon, but they insisted that they were entitled to compensation for each of the 43 days from the time they were impaneled until they were finally discharged. The other jurors assigned to the appellant their alleged claims for jury fees, and he subsequently demanded of the respondent, as county clerk of Amador county, that he issue certificates of attendance for the days during which the trial had been suspended on account of the sickness of the two jurors; and, upon his refusal, asked for a mandate of the court directing him to do so. The court refused his application, and the present appeal is from this order.

The statute regulating the fees of jurors in Amador county was enacted March 1, 1872 (St. 1871-72, p. 188), and provides that they shall receive three dollars per day "for attendance upon courts of record." It was held in Jacobs v. Elliott, 104 Cal. 318, 37 Pac. 942, that, under this statute, a juror is entitled to be paid for only the days in which he is actually in attendance upon the court; and the only respect in which that case differs from the present is that in the present case the jurors were excused from attendance after they had been impaneled to try a cause, whereas, in the Jacobs Case, when the juror was excused from attendance, he had not been so impaneled. We are of the opinion, however, that the principles upon which that case was decided must govern this. A juror may be in attendance upon court without being impaneled to try any cause, and for every day of such attendance the statute authorizes him to be compensated. The per diem provided by the statute is not intended to be in the nature of a salary for the time that he is serving as a juror, or as wages for trying a cause, but rather as a compensation for the time during which he is withdrawn from his ordinary avocation and in actual attendance upon the court. After he has been drawn as a juror he may be excused from attendance for a definite period, and, after a jury has been impaneled and sworn, the remaining jurors may be excused from attendance until some future day. In such cases they are not "in attendance upon the court" during the period for which they are excused. Neither are the jurors who have been impaneled and sworn to try a cause in attendance upon the court during any period that they are excused therefrom, with the opportunity to be engaged in ordinary avocations, any more than if they had been relieved from attendance at their own request, or because the court may have taken an adjournment for its own convenience. The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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5 Cal. Unrep. 92

Ex parte CORRAN. (Cr. 9.)

(Supreme Court of California. July 24, 1895.)

LIEN FOR COMMISSIONERS.

The petitioner was employed to superintend a canvass for subscriptions to a publication, and held the subscriptions as security for wages and commissions due to the solicitors and himself; but it appeared that all wages were in fact paid, and that the commissions were not to be paid to the solicitors until the publication was issued. *Held*, that the petitioner had no right to hold such contracts as against the receiver.

In bank.

Petition for writ of habeas corpus, ex parte Corran. Writ denied.

John H. Dickinson, for petitioner.

HARRISON, J. In the action of Painter v. Painter, for the dissolution of a partnership, pending in the superior court of the city and county of San Francisco, a receiver had been appointed to take charge of the assets of the firm, and an order was made by the court, directing the petitioner herein to deliver to the receiver certain contracts belonging to the firm, which were in its possession; and upon his refusal to comply with the order he was adjudged guilty of contempt, and ordered to be imprisoned in the county jail until he should have complied with said order. The circumstances upon which the order of the court was made were as follows: Painter & Co. were engaged in publishing Langley's San Francisco Directory, and, by virtue of a contract entered into between them and the firm of Francis & Valentine, the latter firm was interested in the publication of the directory, to the extent of 20 per cent. on all copies thereof that should be sold by Painter & Co. In October, 1894, the receiver being without funds to proceed with the preparation for publishing the directory for the succeeding year, Francis & Valentine and J. Milton Painter, a member of the firm of Painter & Co., employed certain solicitors to make a canvass for the directory, and to secure contracts of subscription and of advertisements therein, and also employed the petitioner to manage and superintend the canvass. For this purpose, Francis & Valentine delivered to the petitioner and said solicitors a number of printed blanks for subscription to the directory and for advertisements therein, and under this employment the solicitors procured a number of contracts, which were turned over to the petitioner, and which are the contracts he was directed to deliver to the receiver. The petitioner resisted the motion in the superior court to compel him to turn over the contracts, upon the ground that he had a right to retain them as security for his claim for services in their procurement, and urges in his present application for a discharge that for this reason the court had no jurisdiction to pass upon the conflicting claims of title between him and the receiver, or to adjudge him guilty of contempt for refusing to part with the contracts. The power of the court to pass upon a controverted question of title to property in proceedings in this nature does not, however, arise in this case. The petitioner does not claim to be the proprietor of the contracts, but merely claims that the contracts are held by him "as security for commissions earned by the said solicitors, and wages due them in connection with the said contract, for salary due me as superintendent of such solicitors, and for moneys advanced by J. Milton Painter in connection with the securing of the contracts." He does not, however, state that any wages were due to the solicitors, and although the solicitors made affidavits in his behalf, in which they stated that the contracts were turned over to him in October, 1894, to be held by him until they should be paid their wages, at the rate of $2.50 per day, during the time they were employed, together with any commissions remaining due on account of their employment, they do not state that they have not since been paid the full amount of their wages; and it was shown by the affidavit of Francis that, with the exception of the commissions, the petitioner and said solicitors have been paid the full amount due them for their services in making said canvass. It was also shown to the court, and not disputed, that the solicitors were not entitled to receive any commissions that may have been earned by them until after the directory had been published, and the amount due for said subscriptions and advertisements had been collected. Under these facts, it cannot be claimed by the petitioner that the solicitors had any right to retain the contracts as security for their commissions. The petitioner does not claim that he was ever authorized by J. Milton Painter to retain the contracts as security for any moneys advanced by him. The court was therefore fully authorized to find that the reason assigned by the petitioner for retaining the contracts, so far as he claimed to hold them on behalf of the solicitors, had no foundation in fact, and was without merit. His claim to retain them as security for salary due him as superintendent of the solicitors was equally unfounded. We know of no principle of law which authorizes an employé to take or retain property of his employer until his wages shall have been paid. That the contracts were the property of Painter & Co. cannot be controverted. Although the petitioner, as well as the solicitors, state in the affidavits presented by them that they were not employed by Painter & Co., or by any one on their behalf, they do not either of them state by whom they were employed; and the affidavit of Francis shows with particularity by whom they were employed, and that the employment was on behalf of Painter & Co. It was immaterial to the petitioner whether the contracts could be utilized by the receiver, or whether the withholding of them would be without injury to him or to Painter & Co. If they were the property of Painter & Co., the receiver was entitled to their possession. The writ is discharged, and the prisoner remanded.

We concur: GAROUTTE, J.; McFARLAND, J.; TEMPLE, J.

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108 Cal. 173

O'CONOR v. ROARK. (No. 19,556.)

(Supreme Court of California. July 18, 1895.)

ATTACHMENT—AFFIDAVIT.

1. An affidavit for attachment, entitled in the action of "O., receiver," against, etc., stating that O., being sworn, alleges that he is the plaintiff in the above-entitled action, and that defendant therein is indebted to "him," shows that the indebtedness is to him in his character of receiver, within Code Civ. Proc. § 538, requiring it to show that defendant is indebted to plaintiff.

2. Under Code Civ. Proc. § 538, requiring the affidavit for attachment to specify the amount of indebtedness, it is enough to state

the principal indebtedness, without mention of interest and costs, for which, without stating amount, the complaint makes demand.

3. A statement, in an affidavit for attachment, of the amount of the indebtedness, over and above all set-offs "and" counterclaims, is a sufficient compliance with the requirement that it state the amount of the indebtedness over and above all set-offs "or" counterclaims.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Andrew J. O'Conor, receiver of the Consolidated National Bank of San Diego, against Ellen Roark. Defendant's motion to discharge a writ of attachment was denied, and she appeals. Affirmed.

Trippet & Neale, for appellant. V. E. Shaw, for respondent.

VANCLIEF, C. This appeal is from an order denying defendant's motion to discharge and quash a writ of attachment issued in the above-entitled action, on the ground that the affidavit upon which the writ was issued is defective and insufficient. The following is a copy of the affidavit: "In the Superior Court of the County of San Diego, State of California. Andrew J. O'Conor, Receiver of the Consolidated National Bank of San Diego, Plaintiff, vs. Ellen Roark, Defendant. State of California, County of San Diego—ss. Andrew J. O'Conor, being duly sworn, says that he is the plaintiff in the above-entitled action; that the defendant, Ellen Roark, in the said action, is indebted to him in the sum of seven thousand seven hundred and fifty dollars, over and above all legal set-offs and counterclaims, upon an express contract for the direct payment of money, to wit, an assessment and requisition of $100.00 per share upon the shareholders of the Consolidated National Bank of San Diego, levied and made October 25, 1893, by James H. Eckels, comptroller of the currency, under and by virtue of the laws of the United States of America, and against the defendant, Ellen Roark, as one of the stockholders in said bank, and who was on June 21, 1893, and ever since has been, and now is, the owner and holder of seventy-seven and one-half (77½) of the capital stock of said Consolidated National Bank of San Diego, and that the said defendant is a nonresident of this state. That the said attachment is not sought, and the said action is not prosecuted, to hinder, delay, or defraud any creditor or creditors of the said defendant. Andrew J. O'Conor." The grounds of the motion will be stated and considered in the order in which they are presented.

1. It is contended that the affidavit does not show that the defendant was indebted to the plaintiff in his representative character as receiver. The title of the action, prefixed as a heading to the affidavit, characterizes the plaintiff as "receiver of the Consolidated National Bank of San Diego"; and, referring to this heading, the affidavit states that the affiant, Andrew J. O'Conor, "is the plaintiff in the above-entitled action." This means that he is Andrew J. O'Conor, receiver of the Consolidated National Bank of San Diego. The next statement, "that the defendant in said action is indebted to 'him,'" plainly means that defendant is indebted to Andrew J. O'Conor, as characterized in the title of the action. The pronoun "him" relates to and stands for Andrew J. O'Conor, receiver of the Consolidated National Bank of San Diego,—the plaintiff in the action,—else it is not true, as stated in the affidavit, that Andrew J. O'Conor is the plaintiff in said action. It follows that the affidavit complies in this respect with the requirement of the Code of Civil Procedure (section 538) that it shall show "that the defendant is indebted to the plaintiff." As said by this court in Bank of California v. Boyd, 86 Cal. 388, 25 Pac. 20, "the indebtedness to the plaintiff is the principal element required in the affidavit, and when that appears by direct statement, and there is nothing in the affidavit inconsistent with such direct statement of indebtedness, the affidavit as to such indebtedness should, in our judgment, be held sufficient." In that case it is further said: "The same particularity of statement * * * is not required in the affidavit for the issuance of a writ of attachment as in the complaint." See, also, Flagg v. Dare (Cal.) 40 Pac. 804.

2. It is contended that the affidavit is fatally defective in that the sum of indebtedness therein specified differs from the amount of plaintiff's demand as stated in the complaint and in the writ; the sum of indebtedness specified in the affidavit being $7,750, whereas the amount of plaintiff's demand as stated in the complaint and also in the writ is $7,750 "with interest thereon from November 25, 1893, at 7 per cent. per annum." While section 540 of the Code of Civil Procedure requires the writ of attachment to command the sheriff to attach so much property "as may be sufficient to satisfy the plaintiff's demand," and to state the amount of such demand "in conformity with the complaint," there is no requirement that the affidavit shall specify the amount of the indebtedness in conformity with plaintiff's demand as stated in the complaint, nor that the writ shall state the amount of plaintiff's demand in conformity with the affidavit. Yet the nature of the indebtedness is sufficiently stated in the affidavit to show that it draws legal interest from the date of its maturity; so that, in legal effect, there is no substantial difference between the affidavit and the complaint in respect to interest. The indebtedness, the amount of which the statute (parenthetically) requires to be specified in the affidavit, is the principal thing, to which the right to legal interest pertains as a mere incident. An assignment of the principal debt, without reference to interest, would pass the incidental right to interest. However, I think it a sufficient answer to the

objection under consideration that the statute requires the affidavit to specify only the amount of the indebtedness, and not the amount of plaintiff's demand, in the complaint, which may be, and in this case is, for the principal debt, interest, and costs. It is to be observed, however, that the amount of neither the interest nor the costs for which judgment is demanded is stated in the complaint; and that the amount of neither could have been estimated at the time the affidavit was made, since such amount of each depended upon future contingencies.

3. The statute requires the affidavit to specify the amount of the indebtedness, "over and above all legal set-offs or counterclaims." But the language of the affidavit in this case is, "over and above all legal set-offs and counterclaims." And it is contended that the substitution of the conjunction "and" in the affidavit for that of "or" in the statute is such a departure from the statutory requirement as makes the affidavit ineffectual as the foundation for the writ of attachment. Counsel for appellant say: "There is a distinction between set-offs and counterclaims. * * * Counterclaim embraces both set-off and recoupment, and is more comprehensive than either." Conceding this, and that the word "or," in the statute, is used in its ordinary disjunctive sense (which I do not admit), still the affidavit must be held sufficient; for, if it be sufficient to state that the amount of indebtedness is over and above either set-offs or counterclaims, it must be sufficient to state that the amount is over and above both set-offs and counterclaims. Where a statute authorizes an act to be done upon the existence of any one of several distinct conditions, the existence of all such conditions would surely be sufficient to justify the act. I think the order should be affirmed.

We concur: BRITT, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

108 Cal. 214

SECURITY LOAN & TRUST CO. OF SOUTHERN CALIFORNIA v. KAUFFMAN et al. (McCALLISTER, Intervener. No. 19,497).

(Supreme Court of California. July 22, 1895.)

DECLARATION OF HOMESTEAD—RIGHTS OF WIFE—MORTGAGE FORECLOSURE—VENUE—INTERVENTION BY INSANE WIFE OF MORTGAGOR.

1. A declaration of homestead, properly executed and acknowledged by a married man, as the "head of a family," as authorized by Civ. Code, §§ 1260–1263, when filed for record, immediately inures to the benefit of his wife, whether she has knowledge thereof, or not, and though she is at the time insane.

2. The fact that a woman other than the mortgagor's wife joined in the execution of a mortgage on the homestead does not prevent the mortgagor's lawful wife from claiming the mortgage to be void as to the homestead.

3. Const. art. 6, § 5, requires all actions for the enforcement of liens to be commenced in the county in which the land is situated. Code Civ. Proc. § 392, provides that actions for the foreclosure of liens and mortgages on land must be tried in the county in which the subject of the action is situated, subject to the power of the court to change the place of trial. *Held*, that where an action for the foreclosure of a mortgage was commenced in the county in which the land was situated, and subsequently the portion of the county in which it was situated was organized into a new county, the court in which the action was commenced did not lose jurisdiction for trial of the action.

4. Where, in an action on a note, and to foreclose a collateral mortgage, defendant does not deny the execution of the note, plaintiff is entitled to judgment on it, though the mortgage, being on the homestead, is void because executed without consent of the wife.

5. Where an insane wife could, under Code Civ. Proc. § 387, intervene in an action for the foreclosure of a mortgage of land selected by her husband as a homestead, the appointment of a guardian ad litem for the wife before filing her complaint in intervention is proper.

6. An objection to the sufficiency of the proof on which a guardian ad litem was appointed for an insane wife on intervention in a suit to foreclose a mortgage on a homestead cannot be considered, in the absence from the record of the evidence upon which the original appointment was made.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Security Loan & Trust Company of Southern California against Jules Kauffman, Ezra McCallister, and others, on a note, and to foreclose a mortgage securing it. Amanda Fisher McCallister intervened. From a judgment for defendants and intervener, and an order denying a new trial, plaintiff appeals. Judgment as to defendant husband Ezra McCallister, on the note, reversed. As to other defendants and intervener, affirmed.

Jefferson Chandler and Shirley C. Ward, for appellant. Daney & Wright, for respondents.

HARRISON, J. The plaintiff seeks by this action to foreclose a mortgage purporting to have been executed to it by the defendants Ezra McCallister and Mary McCallister, "his wife." The execution of the mortgage and note was not denied by either of these defendants. The defendant Ezra, in his answer, alleged that his codefendant Mary was not his wife; that he was married in February, 1867, to one Amanda Fisher, and that she had ever since that date been his lawful wife; that on June 5, 1883, he was residing with his family upon the premises described in the mortgage, and on that day made and filed with the county recorder a declaration in which he claimed the said premises as his homestead; that the land was community property of himself and his said wife, Amanda; that the homestead had never been abandoned, and that the said Amanda did not join in the execution of the mortgage; and that she was a necessary party to the action. A guardian ad litem was appointed by the court for Amanda, upon the ground that she was insane and incompetent; and by leave of the court a complaint in intervention was filed on her behalf, in which the same facts were alleged as were alleged in the answer of Ezra. Upon the trial of the cause the court found in accordance with the allegations of this answer, and rendered judgment in favor of the intervener. The plaintiff has appealed.

1. The declaration of homestead filed by the defendant Ezra McCallister was as follows: "Know all men by these presents: That I do hereby certify and declare that I am the head of a family, and that I do now, at the time of making this declaration, actually reside with my family on the land and premises hereinafter described [here follows a description]. That my family consists of myself and my four minor children, to wit, Lawrence McCallister, aged eleven years; Annie, aged fourteen years; Eliza, aged twelve years; and Rhoda, aged six years. That it is my intention to use and claim the said lot of land and premises above described, together with the dwelling house thereon, and its appurtenances, as a homestead, and I do hereby select and claim the same as a homestead. That the actual cash value of said property I estimate to be two thousand dollars." It is contended on behalf of the appellant that, inasmuch as he failed to state in the declaration that he was a married man, he is precluded from claiming the privileges incident to the homestead of a married man, and that the homestead must be considered as that of "another person," provided for in chapter 3 of the title in the Civil Code relating to homesteads. The mode in which a homestead is to be created, as well as the legal incidents which attach to its existence, are purely statutory. Section 1260 of the Civil Code declares that a homestead, not exceeding $5,000 in value, may be selected and claimed "by any head of a family"; and in section 1261 the phrase "head of a family" is declared to include the husband, when the claimant is a married person. The homestead authorized by chapter 3 is for any person "other than the head of a family." Section 1262, Civ. Code, declares that the husband, or other head of a family, must execute and file with the recorder a declaration, which, by section 1263, must contain "a statement showing that the person making it is the head of a family." In Jones v. Waddy, 66 Cal. 457, 6 Pac. 92, it was held that a statement by the declarant that he is the head of a family is a statement of the ultimate fact required by this section, and is sufficient. It must be held, therefore, that the above declaration was sufficient to impress the land with the incidents of a homestead. McCallister was the head of a family, and so stated in his declaration, and he was also the husband of a living wife; and the property selected was the community property of himself and his said wife. As he was not required to state in his declaration whether he was married, or who were the members of his family, the statement or omission of those facts did not impair the sufficiency of the declaration, or prevent its inurement to the benefit of his wife. By filing the declaration for record, the land therein described was impressed with all the legal incidents which the statute gives to a homestead, one of which is an exemption from forced sale. Civ. Code, § 1240. The exception to this exemption which is provided in section 1241 has no application to the present case, for the reason that the mortgage set forth in the complaint was not executed "by the husband and wife," nor was McCallister, at the time of its execution, "an unmarried claimant." A declaration of homestead, properly executed and acknowledged by a married man, when filed for record, immediately inures to the benefit of his wife, whether she is ignorant thereof, or is fully acquainted with the transaction. Nor does the fact that she is insane deprive her of its benefits, or give to the husband any greater interest in the estate, or authorize him to incumber it, except in the mode provided by statute. St. 1873–74, p. 582. The filing of the declaration for record is a notice to all who may thereafter deal with the property that, if the declarant is a married person, the homestead cannot be conveyed or incumbered "unless the instrument by which it is conveyed or incumbered is executed or acknowledged by both husband and wife." Civ. Code, § 1242. Whether the declarant is a married person, or not, is a question of fact, which must be determined by whoever would take a conveyance or incumbrance of the property; and no statement or act of the husband alone can obviate the necessity of the wife's uniting in the instrument of conveyance or incumbrance, or deprive her of her estate in the property. The record of the declaration is a sufficient notice to all persons to put them upon inquiry; and if they fail to make such inquiry, or to take such steps as will protect them in their dealings with the husband, the loss should fall on them, rather than on the wife, who has in no respect contributed thereto. Inasmuch as the plaintiff procured Mary McCallister, who is described as the wife of Ezra, to unite with him in the execution of the mortgage, it cannot contend that it relied upon the recorded declaration as affording a presumption that McCallister was unmarried. The representations by McCallister that she was his wife, whether such representations were by direct statement, or the presumption arising from their having lived together as husband and wife, were but self-serving declarations and representations on his part, and could not, in any respect, bind or affect the respondent. Whether Mary was in fact the wife of Ezra, or whether she personated his wife, was to be determined by the plaintiff at its risk;

and its reliance upon any statements or information to that effect given by Ezra cannot serve as a protection against the claim of Amanda, or be a substitute for the truth. Whether Ezra would be estopped from denying the validity of the mortgage, if he alone were affected, need not be considered. See, however, Gagliardo v. Dumont, 54 Cal. 499. It is very clear that Amanda is not estopped from asserting the invalidity of the mortgage by any act of her husband, or from claiming to be his wife by the fact that he has recognized another woman as such.

2. At the time the action was commenced the land described in the complaint was situate in the county of San Diego, and the action was commenced in the superior court of that county, and was tried in that court January 11, 1894. Subsequent to the commencement of the action the county of Riverside was organized, under an act of the legislature approved March 11, 1893 (St. 1893, p. 158), and the land is included within the boundaries of that county. After the cause had been submitted to the court, and the court had orally announced its decision, the plaintiff moved the court to transfer the cause to Riverside county for trial, upon the ground that by the organization of that county the superior court of San Diego county had lost jurisdiction to proceed further in the case.

The constitution (article 6, § 5) declares that, "all actions for the enforcement of liens" shall be commenced in the county in which the real estate, or some portion thereof, is situated; and at the time this action was "commenced" the property was situate within the boundaries of San Diego. The constitution does not, however, require that the action shall be "tried" in the county in which the property is situated; and the statutory provision in section 392, Code Civ. Proc., that actions "for the foreclosure of liens and mortgages on real property" must be tried in the county in which the subject of the action, or some part thereof, is situated, "subject to the power of the court to change the place of trial," shows that "the place of trial" is not an element going to the jurisdiction of the court, but is a matter of legislative regulation. The provision for the transfer of certain actions to the superior court of the county of Riverside, which is contained in section 12 of the act providing for the organization of that county, shows the extent of this regulation which the legislature deemed necessary, and implies that only the actions there designated were to be transferred for trial.

3. There was no error in the appointment of a guardian ad litem for Amanda Fisher McCallister. She had an interest in the matter in litigation, and also an interest in the success of the defendant Ezra McCallister. The court was therefore authorized by section 387, Code Civ. Proc., to permit her to become a party to the action. Having been thus permitted to become a party to the action, and being insane, she could appear only by a general guardian, or a guardian ad litem. The court had the same authority to appoint a guardian ad litem for her before the filing of her complaint in intervention that it has to appoint a guardian ad litem for an infant plaintiff before the action is commenced. As this appointment is a traversable fact, which must be alleged in the complaint (Crawford v. Neal, 56 Cal. 321), it follows that it must be made before the complaint is filed. The objection to the competency or sufficiency of the proof of her insanity cannot be considered, as there is no record before us of the evidence upon which the original appointment was made. The evidence at the trial was sufficient to justify the court in finding that she was insane.

4. That portion of the judgment "that the plaintiff take nothing by this action" is not sustained by the other portions of the record. The defendant Ezra McCallister did not deny the execution of the note set forth in the complaint, and the plaintiff is entitled to a judgment thereon against him.

The judgment in favor of the intervener, Amanda Fisher McCallister, and the order denying a new trial as to her, are affirmed. That portion of the judgment that the plaintiff take nothing by this action is reversed, so far as the same applies to the defendant Ezra McCallister, and the superior court is directed to enter a judgment against him upon the promissory note set forth in the complaint. The costs of this appeal will be taxed against Ezra McCallister.

We concur: GAROUTTE, J.; VAN FLEET, J.

108 Cal. 235

KOEBIG v. SOUTHERN PAC. CO. et al.
(No. 19,558.)

(Supreme Court of California. July 25, 1895.)

VERDICT—ASSESSMENT OF DAMAGES.

Where plaintiff's testimony showed that the loss sustained was the amount claimed in the complaint, and defendants' counsel admitted the value of the property as alleged, it was error for the jury to assess damages in a less amount.

Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by Julius Koebig against the Southern Pacific Company and others to recover damages for the loss of certain goods. From the judgment therein rendered, and an order denying a new trial, plaintiff appeals. Reversed.

E. S. Pillsbury, Stephen M. White, and White & Monroe, for appellant. A. B. Hotchkiss, for respondents.

VAN FLEET, J. Action to recover of defendants $34,891.26 as damages alleged to have been occasioned by the destruction of certain brandies, wines, liquors, and other personal property, swept away by the Los Angeles river during high water, by reason, as alleged by plaintiff, of said river being obstructed and diverted by a railroad bridge constructed by the predecessor of defendants, and maintained by the latter, and which bridge, it is alleged, was so faultily and negligently constructed and maintained as to constitute a dangerous nuisance, in that it was not of sufficient space or size to admit of the flow of the waters of the river beneath it, whereby they were dammed up and caused to leave their banks and wash away and destroy the property in question. The cause was tried by a jury, which rendered a verdict for plaintiff of $500. From the judgment entered thereon, and an order denying a new trial, plaintiff appeals.

There is but one question necessary to be noticed. It is contended by plaintiff that there was no evidence to support the finding of the jury as to the amount of damage suffered by plaintiff, and that the verdict in that regard is against the instruction of the court, and therefore contrary to law. The court instructed the jury, among other things: "It is conceded that the property described in the complaint as having been destroyed was of the value stated in the complaint; and, if you find that said property was destroyed in the manner and under the circumstances as stated in the complaint, it will be your duty to render a verdict for the admitted value thereof." It is claimed by plaintiff that this instruction was based upon the fact that the evidence given, on the part of plaintiff, as to quantity and value of goods destroyed, clearly established the damages as alleged in the complaint, and that this evidence was wholly without conflict, and uncontradicted by defendants, who not only put in no evidence on the question, but admitted at the trial that, if liable at all, they were liable for the damages alleged in the complaint. Defendants deny this. They claim that the evidence given by plaintiff as to the quantity of goods destroyed was not direct or positive, or such as the jury were bound to believe; that there was no admission by defendants of the quantity of goods destroyed, but only as to the value per gallon of the goods which plaintiff should prove to have been eventually lost; and, further, that the instruction quoted does not, and was not intended to, charge the jury that the quantity of goods lost was admitted, but that the jury were at liberty to find, on that question, either for or against plaintiff's evidence. The position of defendants is not supported by the record. The evidence on the part of plaintiff was such as, in the absence of any countervailing proof by defendants on the subject, left the jury no room to find that any of the property was destroyed, if not all. The testimony of the witness Kohler was sufficiently direct and positive. He testified explicitly and in detail as to the various items lost, and their value, and then stated: "The total loss was $34,891.20. The various items which I have enumerated, composing that sum total, constitute, in my opinion, a fair and moderate estimate of the loss sustained," etc. The construction attempted to be put upon the testimony of the witness that he was then stating the quantity and value of goods originally swept away, and not what was actually lost, over and above the amount eventually recovered, is not borne out by an examination of the witness' whole testimony. But, furthermore, we think the record fully establishes plaintiff's claim that defendants admitted, not only the value, but the quantity, of the goods lost, to be as claimed by plaintiff. We can put no other construction upon the statements of defendants' counsel that will make them consistent with his conduct of the trial. During the examination of a witness by one of plaintiff's counsel on the subject of the lost property, it was suggested that he ask the witness as to value. Counsel for defendants thereupon said: "There is no dispute about the value. I concede that the valuation is reasonable, if we are liable at all." Were it not for what followed there might possibly be room for the claim of defendants that this admission referred only to the value per gallon, and not to quantity of goods lost. At a later stage in the trial, however, when a question arose between counsel as to the materiality of certain evidence, one of plaintiff's counsel said: "But we are suing for specific damages anterior to this time; specific and defined. It is not the damage to the freehold, but the damages described in the complaint for a list of articles which you admit yourself,"—to which defendants' counsel replied: "If we are liable at all." It is perfectly obvious from this that defendants' admission went to the quantity and value of the property, as alleged, and thereby covered the damages as claimed. Furthermore, that the court so understood counsel's position is apparent. This is clearly indicated by the instruction quoted, which is in no way modified by other parts of the charge. The jury are not left free to assess the amount of damages suffered by plaintiff in the event they find for the latter. As claimed by plaintiff, the only question left to the jury was whether the property was destroyed in the manner and under the circumstances alleged. If they found that issue in the affirmative, they were bound, under the court's instruction, to assess the damages at the amount claimed in the complaint. That they did so find is necessarily implied from the verdict, since a verdict in favor of plaintiff was a finding for him upon all the material issues. The verdict, however, not only ignores the admitted facts as to the amount of damages suffered, but plainly disregards the charge of the court upon that point. It is therefore, in that regard, both unsupported by the evidence and contrary to law. The judgment and order denying a new trial are reversed, and a new trial ordered.

We concur: HARRISON, J.; GAROUTTE, J.

108 Cal. 232

WHITNEY v. DAGGETT et al. (No. 19,415.)

(Supreme Court of California. July 25, 1895.)

JUDGMENT BY DEFAULT — VACATING — RECITAL OF SERVICE.

1. A motion to set aside a judgment by default merely because the judgment roll did not show that a copy of the summons by publication had been deposited in the post office was properly denied, where the entry of default and the judgment recite that defendant had been regularly summoned, and where no request was made for leave to answer, nor a defense on the merits exhibited.

2. Though the recital in a judgment that defendant was duly summoned is, in the absence of the affidavit of service, only prima facie evidence of that fact when the judgment is directly attacked, it must be rebutted before the judgment will be set aside.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by W. W. Whitney against Henry Daggett, C. J. Beauvais, and others, to foreclose a mortgage. From an order denying his motion to vacate the judgment therein rendered, C. J. Beauvais appeals. Affirmed.

Wm. Humphrey, for appellant. Parish & Mossholder, for respondent.

VANCLIEF, C. Action to foreclose a mortgage, in which C. J. Beauvais was made a party defendant on the ground that he "has, or claims to have, some interest in or lien upon" the mortgaged premises, as purchaser, mortgagee, judgment creditor, or otherwise, but which, whatever it may be, is subject and inferior to the lien of said mortgage. Judgment by default was entered against all the defendants on October 14, 1892. On November 10, 1893, C. J. Beauvais, alone, moved the court for an order setting aside and vacating the judgment and decree so far as the same refers to or concerns, and so far as the same affects, his interest in the property described in the judgment. The ground of the motion is, not that summons was not duly served on Beauvais, but "that the papers on file and records in said action fail to show that he was ever served with summons in said action." It appears that the court ordered summons to be served on Beauvais by publication; and the judgment roll contains a proper affidavit for such publication, in which it is stated that the residence of Beauvais was then at Phœnix, in the territory of Arizona. The judgment roll also contains an order for such publication, in which, besides all other requisites, it was ordered that a copy of the summons and complaint in the action be forthwith deposited in the United States post office at San Diego, Cal., postpaid, directed to said defendant at his place of residence, and also contains sufficient proof, by affidavit of the printer, of publication of the summons according to the order of the court, but contains no evidence that a copy of the summons or complaint had been deposited in any post office. Yet it is stated in the entry of his default, and recited in the judgment, that the defendant Beauvais had been "duly and regularly summoned to answer unto plaintiff's complaint herein," and had made default in that behalf, and that such default had been duly and regularly entered. At the hearing of the motion the mover offered no evidence except the judgment roll, and the plaintiff offered no evidence whatever. Nor did Beauvais offer or ask leave to answer the complaint, or pretend that he had any defense thereto. Nor did he show or claim that he ever had any interest in or lien upon the mortgaged property, nor that he was or would be at all affected by the judgment of foreclosure. The court denied the motion, and from the order denying it the defendant Beauvais brings this appeal.

There is no ground for any pretense that the motion was made under, or is warranted by, section 473 of the Code of Civil Procedure, since it was not made within a year after the entry of the judgment, and no showing of any defense to the action, or injury to the mover, was made. Therefore the motion was properly denied, unless the judgment appears, upon its face, to be void. Jacks v. Baldez, 97 Cal. 91, 31 Pac. 899; People v. Harrison, 84 Cal. 608, 24 Pac. 311. "A judgment void upon its face is one that appears to be void by an inspection of the judgment roll. The mere absence from the roll of a paper—for example, the return of the officer showing a service of the summons—cannot invalidate the judgment, when the judgment itself recites the fact that the defendant was duly served with process." People v. Harrison, supra. To the same effect is Freem. Judgm. § 130. In such case, however, the recital in the judgment is only prima facie evidence of service when, as in this case, the judgment is directly attacked, and is never conclusive except where the attack is collateral. McKinlay v. Tuttle, 42 Cal. 571. But in the case at bar there is no evidence, either in or dehors the record, having the slightest tendency to rebut the recitals in the judgment. I think the order should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(108 Cal. 261)

LAKESHORE CATTLE CO. v. MODOC LAND & LIVE-STOCK CO.

(No. 18,330.)

(Supreme Court of California. July 27, 1895.)

CHANGE OF VENUE—REFUSAL OF MOTION—PAPERS CONSIDERED—REVIEW.

1. Refusal to change the place of trial will not be disturbed where the allegations of the complaint show the action to have been brought in the proper county, though these facts are controverted by the affidavit presented by defendant on the motion for change.

2. On motion to change place of trial, the court may look into the complaint to see if there is any reason for retaining the cause, though it is not offered as an affidavit in reply to papers read in support of the motion, especially where the notice of motion states that it will be based on affidavits and "all the papers" in the action.

Department 1. Appeal from superior court, Modoc county; C. L. Claflin, Judge.

Action by the Lakeshore Cattle Company against the Modoc Land & Live-Stock Company. Defendant moves to change the place of trial. Motion denied, and defendant appeals. Affirmed.

Spencer & Raker and C. A. Raker, for appellant. Farrett T. Richards, G. F. Harris, and H. L. Spargur, for respondent.

HARRISON, J. Appeal from an order denying a motion to change the place of trial. The defendant is a corporation, whose principal place of business is in the city and county of San Francisco, and the present action was brought against it in the superior court for the county of Modoc. After the summons had been served upon the defendant, it made a motion to have the place of trial changed to San Francisco, upon the ground that that was the county of its residence. The motion was denied, and the defendant has appealed.

The facts alleged in the complaint show that the obligation of the defendant to the plaintiff arose in the county of Modoc, and, under the provisions of section 16 of article 12 of the constitution, the action was properly brought in that county. At the hearing of the present motion, the defendant attempted to controvert these averments of the complaint by the affidavit of Bayley, who was its president at the time of the alleged transactions, and urges that, as it appeared from this affidavit that the averments in the complaint were false, the court erred in denying this motion. Without determining whether a court would be authorized in any case to determine that the affidavits presented to it upon a motion of this nature were sufficient to overcome the allegations of the complaint, or to permit those allegations to be determined by affidavits, it is sufficient to say that there is a direct conflict between the affidavit of Bayley and the complaint in the present action, and that we cannot set aside the decision of the court thereon.

The appellant, however, urges that the court was not authorized to look into the complaint for the purpose of determining whether there was any reason for retaining the cause, and that the affidavit should alone have been considered in determining the motion, inasmuch as the plaintiff did not offer the complaint as an affidavit in reply to the papers read in support of the motion. The defendant, in its notice of motion, had stated that it would be based upon certain affidavits, "and upon all the papers, files, records, and proceedings in the above-entitled action," and at the hearing read this notice of motion, and also its demurrer to the complaint, in which reference was made to the allegations therein. After the moving papers had been read, the plaintiff's counsel, in the course of his argument, read the complaint to the court, and, to the query of the counsel for the defendant whether he was reading the complaint merely by way of argument, replied that he was. There was no error by the court in examining the complaint, even if it had not been read on behalf of the plaintiff. It was made a part of the record on the motion by the act of the defendant; and without such act, since it was a part of the records in the case, the court was authorized to examine it for the purpose of determining the motion. Hollenbach v. Schnabel, 101 Cal. 312, 35 Pac. 872. The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(108 Cal. 250)

CARDENAS v. MILLER. (No. 19,412.)

(Supreme Court of California. July 27, 1895.)

UNRECORDED CHATTEL MORTGAGES—VOID AS AGAINST CREDITORS.

An attachment is prior to a chattel mortgage executed before, but recorded after, issuance of the attachment, though the attaching creditor had actual knowledge of the mortgage; Civ. Code, § 2957, declaring that an unrecorded chattel mortgage shall be void as against creditors and subsequent purchasers and incumbrancers in good faith, not being modified by section 1217, providing that an unrecorded instrument is valid as between the parties thereto and those having notice thereof, the latter section being part of a chapter relating to the recording of transfers of real estate. 39 Pac. 783, affirmed.

In bank.

On rehearing. **For former opinion, see 39** Pac. 783.

PER CURIAM. Upon further consideration of this cause upon rehearing, we are satisfied with the conclusion reached in department, as expressed in the opinion of Mr. Commissioner SEARLS. The supposed conflict between the opinion of the department and the case of Fette v. Lane (Cal.) 37 Pac. 914, urged in the petition for rehearing, does not exist. The court were there considering the rights of a subsequent mortgagee taking with notice of a prior unrecorded mortgage, and the question as to the rights of an attaching creditor against the holder of such a mortgage was not involved. It is true that the learned commissioner who wrote the opinion in that case suggests, in passing: "Nor could the attachment of the property by defendant, after notice of plaintiff's mortgage, affect his lien, even if the attachment had not been dismissed." But the question of the effect of an attachment was not before the court, and what is there said with reference thereto was not necessary to a determination of the case. It is therefore to be regarded as mere dictum, and, as it announces a doctrine which we regard as inconsistent with the plain meaning and effect of our statute, it cannot be permitted to affect our consideration. Our statute makes a very plain distinction between creditors and subsequent purchasers and mortgagees. The latter are protected against the prior unrecorded mortgage only when they take their conveyances "in good faith and for value"; and, of course, they do not take them in good faith if they have actual notice of the prior mortgage. But not so as to creditors. As to them, good faith is not made a condition, but such a mortgage is declared void without qualification. As to them, the question of actual notice is made wholly immaterial, under the statute, and consequently knowledge on their part of the existence of such unrecorded mortgage will not protect its holder against their claims. The plain import of the statute is that nothing but a compliance with its terms will protect a mortgagee of chattels against creditors. This construction is in accord with that given to the statutes of a number of other states wherein a similar distinction is made in the law between creditors and subsequent purchasers and mortgagees. See Jones, Chat. Mortg. § 318, and cases cited. Our statute is expressed in language so clear and unequivocal, indeed, as to be susceptible of no other reasonable construction, unless the explicit terms of section 2957, Civ. Code, are to be regarded as modified by the provisions of section 1217; but, for the reason stated in the opinion of the department, it is clear to our minds that the latter section has no application. The judgment and order appealed from are affirmed.

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108 Cal. 359

CARPENTER v. SHINNERS. (No. 19,551.)

(Supreme Court of California. Aug. 3, 1895.)

QUIETING TITLE—PLEADING AS EVIDENCE—CONCLUSIVENESS OF TAX DEED—NOTICE OF SALE.

1. Under Code Civ. Proc. § 448, making failure of a party to deny by affidavit the genuineness and due execution of a written instrument made a part of an adverse pleading an admission of the same, the failure of plaintiff in an action to quiet title to deny by affidavit the genuineness and due execution of a tax deed set out in the answer is an admission only of the due execution and genuineness of it, and not of its legal effect.

2. Pol. Code, § 3786, makes a tax deed prima facie evidence that the assessment was made according to law, of the nonpayment of the taxes, of the sale at the proper time and place, and execution of the deed by the proper officer, and that the property has not been redeemed; section 3787 makes such deed conclusive evidence of the regularity of all proceedings from assessment to execution of the deed; Act March 13, 1883 (St. p. 93), requires the board of trustees of cities of the sixth class to provide by ordinance a system for the collection of its taxes corresponding as nearly as possible to the state system; and section 871 of the act declares that deeds on sale of lands for taxes due such cities shall have the same effect in evidence as deeds on sale for state taxes. *Held* that, when a deed of land sold for taxes of such city contains no recital of the ordinance, such ordinance must be proved before the deed will become prima facie evidence of compliance with its requirements.

3. A notice of tax sale published on February 11th for a sale on March 3d is a 20-day notice.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Henry W. Carpenter against M. Shinners. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Graves & Graves, for appellant. Wilcoxon & Bouldon, for respondent.

SEARLS, C. This is an action to quiet the title of plaintiff to lots 1 and 2 in block No. 132 in the city of El Paso de Robles, county of San Luis Obispo, state of California. The answer of defendant denied the allegations of the complaint, and, as a further defense to the action, set up title in himself under a tax deed, a copy of which is attached to the answer. Plaintiff failed to deny the genuineness and due execution of the tax deed by affidavit, as provided by section 448 of the Code of Civil Procedure. At the trial it was admitted that plaintiff was the owner of the land described in the complaint, unless the tax deed set out in defendant's answer defeated the plaintiff's title. The cause was submitted to the court upon the admission aforesaid and the tax deed, without further evidence. Written findings were waived, and judgment was thereupon entered in favor of the plaintiff, from which judgment, and from an order denying a motion for a new trial, defendant appeals.

The question presented relates to the sufficiency of the tax deed upon its face to defeat plaintiff's title. The contention of appellant may be summarized thus: (1) The admission of the genuineness and due execution of the tax deed, by failing to deny it as required by section 448, Code Civ. Proc., is an admission that it was duly executed by the party who signed it, and in the capacity in which he appears to have acted; that it is an admission that the deed is what it purports to be upon its face; and that the matters recited therein are true. (2) That such tax deed, except as against actual fraud, is conclusive. In support of the first position we are referred to Sloan v. Diggins, 49 Cal. 38, and Peterson v. Taylor (Cal.) 34 Pac. 724 (not reported in California Reports). The second proposition is supported by reference to Rollins v. Wright, 93 Cal. 395, 29 Pac. 58.

The effect of an admission of the genuineness and due execution of an instrument pleaded by a defendant, and not denied as provided by section 448 of the Code of Civil Procedure, is to avoid the necessity of proof of its genuineness and due execution, and nothing more; and, whether it is proven or its execution is admitted, its terms and legal effect are to be determined by an inspection of the instrument. It stands as an exponent of the facts therein set out, to be construed by the court, and the conclusions of law are to be deduced therefrom. Burnett v. Stearns, 33 Cal. 468. The question then remains, does the tax deed upon its face show a state of facts from which to conclude as matter of law that the legal title to the premises vested in defendant? The tax deed in question purports to be a conveyance of real estate sold for the nonpayment of city taxes for the year 1890 and 1891, is executed by Misenheimer, tax collector of the city of El Paso de Robles, county of San Luis Obispo, and most of the recitals in the deed indicate that the property therein described was sold for delinquent taxes levied by said city, yet, among the recitals of the deed, it is said: "Levy was duly made according to law upon the property of which description is first hereinafter given for taxes due to the state of California and to the city of El Paso de Robles for the year 1890," etc. There is no explanation of this statement in the record or in the brief of appellant. We can only surmise that it is a mistake arising from the use of a blank deed prepared for the collector of state and county taxes, and that the word "county" was erased and the "city" substituted, while the words "due to the state of California" were inadvertently left in the deed.

We pass the question involved in this statement for the reason that we think there is another and potent reason why the judgment and order appealed from must be affirmed. By the act to provide for the organization, incorporation, and government of municipal corporations, approved March 13, 1883 (St. 1883, p. 93), authority is given to "the board of trustees" to provide by ordinance a system for the assessment, levy, and collection of all city or town taxes, which system shall conform as nearly as may be to the provisions of the state laws on the same subject, except as to dates and the officers by whom the several acts are to be performed; and by section 871 of the same act it is provided that "all deeds made upon any sale of property for taxes or special assessments, under the provisions of this charter [chapter 7, relating to municipal corporations of the sixth class], shall have the same force and effect in evidence as is or may hereafter be provided by law for deeds for property sold for non-payment of state or county taxes." Under section 3786 of the Political Code tax deeds are made primary (prima facie) evidence that: "(1) The property was assessed as required by law. (2) The property was equalized as required by law. (3) The taxes were levied in accordance with law. (4) The taxes were not paid. (5) At a proper time and place the property was sold as prescribed by law, and by the proper officer. (6) The property was not redeemed. (7) The person who executed the deed was the proper officer. (8) Where the real estate was sold to pay taxes on personal property, that the real estate belonged to the person liable to pay the tax." By the next section the tax deed is made conclusive evidence (except in case of actual fraud) of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed. These provisions were upheld by this court in Rollins v. Wright, 93 Cal. 395, 29 Pac. 58. These presumptions of the regularity of the proceedings leading up to the execution of a tax deed proceed upon the theory that the revenue laws of the state provide the methods whereby property is assessed for taxation, taxes levied, and that when not paid the real estate upon which such taxes become a lien may be sold to realize the amount due. Of these laws courts take judicial notice, and, if the tax deed recites the performance of the acts required by law, the burden of proving a noncompliance is cast upon those who attack the regularity of the several essential acts. But we cannot take judicial notice of the ordinances of municipal corporations, or of the time when, if passed, they take effect. Lucas v. San Francisco, 7 Cal., at page 475; Harker v. Mayor, etc., 17 Wend. 199; Haven v. Asylum, 13 N. H. 532; City of Napa v. Easterby, 61 Cal. 517. So far as appears from the record, the tax proceedings were unsupported by any ordinance of the municipal corporation, and entirely without authority of law. We are of opinion that the passage and existence of an ordinance authorizing the tax proceedings should have been proven as a prerequisite to the deed becoming prima facie evidence of a compliance with such proceedings.

Again, if we assume that the recitals in the deed are prima facie evidence, not only of the facts they recite, but of laws authorizing the performance of such acts, then we must assume from such recitals that notice of the sale for delinquent taxes was required to be given not less than 21 and not more than 28 days, as is provided by section 3768 of the Political Code in cases of sales for state and county taxes. Yet, while the recital in the deed states that the notice as given was not less than 21 nor more than 28 days, still, when it gives the date of the first publication of such notice, which was February 11, 1891, and the date of sale, which was to occur and did occur on the 3d day of March, 1891, it may be seen that a notice of only 20 days was given of the sale. That the sale occurred on the 3d day of March is further verified by the certificate of sale, which bears the last-named date.

For these reasons, we are of opinion the judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(108 Cal. 351)

DICKERSON v. DICKERSON. (No. 19,397.)

(Supreme Court of California. Aug. 3, 1895.)

OBJECTIONS TO EVIDENCE — REVIEW — DIVORCE — CUSTODY OF CHILDREN.

1. A ruling on evidence, to which no exception has been taken, will not be considered on appeal.

2. An order denying a petition for custody of children, in proceedings for divorce, will not be disturbed unless it clearly appears from the evidence that the denial was an abuse of discretion.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action for divorce by Laura Dickerson against Warren C. Dickerson. Judgment for plaintiff, in which custody of the children was awarded plaintiff. From an order denying his petition for custody of one of the children, defendant appeals. Affirmed.

J. Marion Brooks, for appellant. Sweet, Sloane & Kirby, for respondent.

HAYNES, C. In the above-entitled action a divorce was granted the plaintiff on October 28, 1891, and by the decree she was awarded the custody of all the children of said parties,—three in number. On May 9, 1893, said defendant, Warren C. Dickerson, filed in said cause his petition praying that the custody of Artemus, the oldest of said children, then eight years of age, be taken from his mother, and awarded to the petitioner, upon the ground of the poverty and consequent inability of the mother to properly care for and educate him, and further charging that the plaintiff then was, and for a long time past had been, living with one Charles H. Davis, as his mistress, and alleged his own financial ability to properly care for and educate said boy. The answer denied all the material matters charged against her in the petition; alleged her marriage to Davis, and the unfitness of petitioner to have the custody of the child. The matter was heard May 13, 1893, and appellant's petition was denied. A bill of exceptions was afterwards settled and filed, in which the first assignment of error is to a ruling of the court sustaining an objection made by respondent to a question put by appellant to a witness. No exception was taken to the alleged erroneous ruling, and it will therefore not be considered here. Keenan v. Griffith, 34 Cal. 580; Russell v. Dennison, 45 Cal. 337; Lucas v. Richardson, 68 Cal. 618, 10 Pac. 183.

The remaining specifications go to the sufficiency of the evidence to justify the dismissal of appellant's petition. It is not necessary to review the evidence contained in the bill of exceptions. Applications of this character are addressed to the sound legal discretion of the court below, and its conclusion will not be disturbed unless it clearly appears that such discretion has been abused. So far from finding in the record such abuse of discretion, we think the conclusion reached was right. The serious charges made against the respondent were not sustained. Indeed, if appellant believed them, the fact that he did not petition for the custody of all the children is incomprehensible. So too, if the mother, because of her alleged poverty, was unable to properly maintain the child in question, we should have expected the father, who alleges his financial ability to provide for him, to have manifested his regard for his child by contributing something for his comfort and welfare, especially as he did not oppose that provision in the decree of divorce which gave respondent the custody of all the children, and in which he silently acquiesced for nearly two years. These things do not very strongly commend appellant's fitness for the important trust he seeks, nor indicate that the learned judge who heard the petition erred as to these matters of fact. The order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(112 Cal. 316)

ELBERG v. SAN LUIS OBISPO COUNTY. (No. 19,548.)

(Supreme Court of California. Aug. 3, 1895.)

SCHOOLS—ILLEGAL TAXATION—LIABILITY OF COUNTY.

Where several school districts, under St. 1891, p. 182, united for the formation of a high-school district, and taxes were levied by the board of supervisors, collected by the tax collector, and placed by him in the county treasury, but the county had no interest in or control over the fund, the county is not liable for moneys in said fund illegally collected.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Mark Elberg against the county of San Luis Obispo to recover back certain taxes. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

Wm. Shipsey and Graves & Graves, for appellant. F. A. Dorn, for respondent.

BRITT, C. Action to recover certain payments of taxes of the fiscal year 1893-94, made under protest, in July, 1894, to the tax collector of San Luis Obispo county, for the support of a high school in the San Luis Obispo union high school district,—a district assuming to be organized under the act to provide for the establishment of high schools, approved March 20, 1891 (St. 1891, p. 182). The levy of such taxes is claimed to have been illegal, in several respects. It appears from the complaint that 13 adjoining school districts in said county united for the formation of the high-school district, and the taxes in question were levied by the board of supervisors in September, 1893, at the request and upon the certified estimate of the majority of the clerks of said constituent districts, convened and jointly acting; that the moneys sued for, when paid to the tax collector, were by him placed in the county treasury, where they yet remain, in a fund called the "San Luis Obispo Union High School Fund." It is not alleged that the county has or asserts any interest in this fund, or the money sued for, or any right to control the same. Plaintiff prays judgment for $829.02, which amount includes the sums paid by him, and also by a number of other persons who have assigned to plaintiff their respective claims to recover the same. The action seems to be brought in consequence of the permission contained in the new section (3819) added to the Political Code in 1893. The court below sustained a demurrer to the complaint, interposed on the ground that the same does not state facts sufficient to constitute a cause of action against defendant, and rendered judgment dismissing the action.

The demurrer was rightly sustained. The county, as such, has no interest in the funds of the high-school district, nor any control over the same in the county treasury. St. 1893, p. 272. And we do not think it was the legislative intent, by the enactment of section 3819, Pol. Code, to permit an action against a county to recover taxes paid to and held by its officials, not for the benefit of the county, nor subject to its disposition, but for the use of, and to be disbursed by, a distinct organization,—a local district within the county. If judgment is obtained in such an action against the county, then it must be paid by the county; and no provision is made by which it may have recourse upon the district for the amount thus paid, as it has against the state in the case of enforced repayment of taxes which have already reached the state treasury. Pol. Code, § 3819. Manifestly, this would be unjust to those parts of the county not within the district, and we should not attribute to the legislature a design to allow such a result unless that construction is required by the terms of the statute,—as it is not in this instance. The judgment should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

108 Cal. 446

KAUFMAN v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. No. 10.)

(Supreme Court of California. Aug. 5, 1895.)

EFFECT OF APPEAL—STAY OF PROCEEDINGS.

An appeal from an order reinstating a cause which was previously dismissed stays all further proceedings thereon, within the meaning of Code Civ. Proc. § 946, providing that "whenever an appeal is perfected * * * it stays all further proceedings in the court below." Livermore v. Campbell, 52 Cal. 75, followed.

In bank.

Petition for writ of prohibition by C. H. Kaufman against the superior court of city and county of San Francisco and the Judge thereof. Writ granted.

Garber, Boalt & Bishop, for appellant. Frank Shay, for respondents.

McFARLAND, J. Petition for a writ of prohibition commanding the superior court of the city and county of San Francisco, and the judge thereof, to desist and refrain from any further proceedings on a motion in said court for an order requiring the petitioner to pay certain money into said court. The application for the writ was submitted here upon an objection by respondents, in the nature of a demurrer, to the sufficiency of the petition; and, for the purposes of the decision, the averments of the petition must be taken as true.

The petitioner in May, 1889, commenced an action in the nature of an interpleader in said superior court, entitled "Kaufman vs. Shain et al." The complaint in the said action was subsequently amended, and its averments were substantially these: That plaintiff (Kaufman, petitioner herein), as assignee of one Mackenzie, an insolvent, was in possession of $5,769.52, assets of said insolvent, which was claimed by various persons in hostility to each other, who are made parties defendant; that litigation was pending in which the rights of some of the defendants to said money was involved; that plaintiff claimed no interest in said money, and was willing to pay the same into court, and had done so. The prayer was that defendants be required to interplead, etc., and that plaintiff be discharged from all liability to defendants for said money upon his paying the same into court, or to such person as the court should declare entitled to the same. The defendants, Herrlich, Hanlon, and Davis, filed demurrers to the complaint. On October 10, 1890, the judge of said court caused to be entered on the minutes of said court an order sustaining the demurrer of said Herrlich and Hanlon, and adjudged further as follows: "It is further ordered that this cause be, and the same is hereby, dismissed." Thereafter, on March 14, 1894, on the application of defendant Davis, judgment of dismissal in pursuance of said order of October 10, 1890, was entered; which judgment, after a recital of said order of October 10, 1890, is as follows: "Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that C. H. Kaufman, plaintiff, do take nothing by this, his action, as against Joseph E. Shain et al., defendants, but that a judgment of dismissal be, and the same hereby is, entered herein that said defendants have and receive their costs incurred herein, amounting to the sum of $——. Judgment recorded March 14, 1894, B. 19, p. 433." Afterwards, on May 1, 1894, defendant Davis filed and served a notice of motion to amend the said order of October 10, 1890, by striking therefrom the words: "It is further ordered by the court that this cause be, and the same is hereby, dismissed;" and also, on said May 1, 1894, served a notice of motion to amend the said judgment of dismissal entered March 14, 1894, so as to make it affect only Herrlich and Hanlon alone, and not Joseph E. Shain et al. These motions were afterwards heard and submitted, and on August 20, 1894, the court made the following order: "The minute order of October 10, 1890, is amended by striking out the words, 'It is further ordered by the court that this cause be, and the same is hereby, dismissed,' and the judgment entered in the clerk's office, and recorded there on the 14th day of March, 1894, is set aside. August 20, 1894. [Signed] William T. Wallace, Judge." From this order of August 20, 1894, the said Kaufman, plaintiff in said action and petitioner in this proceeding, duly appealed to this court, and his appeal is now here pending. After the said order of October 10, 1890, dismissing said action, viz. on August 18, 1891, the judge of said court made an order authorizing Kaufman to withdraw from the county treasury, where it had been deposited, the said sum of money, less a small amount levied against it for taxes; and in pursuance of said order Kaufman withdrew said money. Before said appeal had been taken as aforesaid, the said Davis gave notice of a motion for an order requiring said Kaufman to pay said money into court, with interest; and said motion came up for hearing after said appeal had been taken, when the judge of said court, respondent herein, announced that as an appeal had been taken from the order of August 20, 1894, he would not proceed with the hearing of said motion, adding that he would not proceed unless compelled to do so by the supreme court of this state. Thereupon the said Davis, on September 21, 1894, petitioned the supreme court for a writ of mandate to compel the said judge to proceed with the hearing of said motion; and this court on January 5, 1895, after a hearing, denied said writ, and dismissed the proceeding. Nevertheless, the said Davis on February 1, 1895, again called up said motion to compel the said payment of said money into court; and after argument the judge (respondent herein) announced from the bench that he would entertain said motion, would consider it as submitted, and would grant the order for the said payment of said money into court; but that he would give petitioner sufficient time, before entering said order, to petition this court for a writ of prohibition. Thereupon the petitioner, Kaufman, commenced this present proceeding.

There can be no doubt that the writ should issue. The case is clearly within the rule of Livermore v. Campbell, 52 Cal. 75, and that case furnishes an answer to the positions taken by counsel for respondents. The order of August 20, 1894, setting aside the former judgment of dismissal, was undoubtedly an appealable order, as expressly held in Livermore v. Campbell; and, as was said in that case, "until such appeal is heard this court will not inquire whether the court or clerk had or had not jurisdiction to enter the judgment. The case being in this court by appeal, the court below cannot proceed in it until the appeal is heard and determined. Code Civ. Proc. § 946." As we said when the petition for a writ of mandate to compel the respondents to proceed with the motion was before us, "whether the appellant was really a 'party aggrieved'" is a question which we cannot determine on this proceeding. Davis v. Wallace (Cal.) 38 Pac. 1107. Let a peremptory writ issue as prayed for.

We concur: BEATTY, C. J.; VAN FLEET, J.; HENSHAW, J.; HARRISON, J.; GAROUTTE, J.

108 Cal. 431

YORE et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (No. 15,690.)

(Supreme Court of California. Aug. 5, 1895.)

DISSOLUTION OF CORPORATION — APPOINTMENT OF RECEIVER—ESTOPPEL BY PLEADING—LACHES.

1. Code Civ. Proc. § 565, provides that, upon the dissolution of any corporation, the superior court may appoint a receiver therefor; section 803 provides that a person usurping any franchise may, in an action by the attorney general, be excluded from such franchise. *Held* that, after judgment, in an action to oust a corporation from usurping certain privileges and franchises not conferred upon it by its charter, had been entered excluding it from such franchises, the corporation itself was not dissolved, and the court, therefore, acquired no jurisdic-

tion, under section 565, to afterwards appoint a receiver therefor.

2. Petitioners for a writ of prohibition to restrain the court from taking any further proceedings with respect to a receiver are not estopped from denying the jurisdiction of the court to appoint said receiver by reason of the fact that they, in an action against them by the receiver to determine their claims to a certain fund, answered, setting up their judgment against the corporation; nor because, in an action by them against the corporation, the receiver was substituted as defendant therein; nor by the fact that in said action a deposition was taken wherein the deponent described himself as the receiver of said corporation; nor because the petitioners did not move the court to desist from taking any further proceedings under the appointment until the receiver refused to satisfy their judgment against the corporation out of the funds in his hands,—the petitioners not having been parties to nor having any knowledge of the pleadings in the action wherein said receiver was appointed.

3. Nor are the petitioners guilty of such laches as destroys their right to apply for said writ.

Department 2.

Petition for writ of prohibition by Eliza Yore and others against the superior court of the city and county of San Francisco. Writ granted.

Mastick, Belcher & Mastick, for petitioners. W. J. Bartnett, Aylett R. Cotton, and Atty. Gen. Fitzgerald, for respondent.

McFARLAND, J. In the superior court, in an action entitled "The People, upon the relation of W. H. H. Hart, Attorney General, vs. Bankers' and Merchants' Mutual Life Association of the United States et al.," numbered on the register of said court 32,100, the court made an order appointing one A. G. Booth receiver; and this present proceeding is an original petition here for a writ of prohibition commanding the said superior court, substantially, to refrain from taking any further proceeding with respect to said receiver, upon the ground that the said court had no jurisdiction to appoint a receiver in said action. An answer was filed by the respondent here, and, upon a stipulation as to the facts, the case was submitted.

Prior to said action numbered 32,100, another action, numbered 30,718, had been commenced by the attorney general in the name of the people against said Bankers' & Merchants' Mutual Life Association, in the complaint in which said action it was averred that said association was a corporation duly organized under the laws of the state of California, having for its objects, as set forth in its articles of incorporation, the following: "To associate together for the purpose of equalizing the risk of death, and to pay to the nominee of such members as may die stipulated sums of money, to be collected of surviving members, upon the assessment or co-operative plan, and to do any and everything requisite, necessary, or convenient for accomplishing the said purposes." It is then averred in said complaint that said corporation had usurped certain other privileges and franchises, to wit: "Making contracts of insurance upon the lives of persons during life and for stated periods;" "of being an incorporated and organized mutual life, health, and accident insurance company or association for profit;" "of actually issuing contracts or policies of life insurance, to subsist both during life and for stated periods, as a regular business for profit," etc.; "of making and issuing written contracts in the form and after the manner of contracts of life insurance;" and certain other franchises in said complaint enumerated. The prayer of the complaint was for judgment that said corporation had intruded into the franchises thereinbefore enumerated, and that it be ousted from the franchises "so usurped and abused." Judgment was entered that the defendant was guilty of usurping and exercising "certain franchises, rights, and privileges, as charged and alleged in the complaint in said action," and that it be "wholly excluded from such rights, privileges, and franchises." It was further adjudged that said corporation pay a fine of $300 to the people of the state. After said judgment had been entered, and on the same day, the said action first above named, numbered 32,100, was commenced, and it was averred in the complaint therein that, by the judgment in said action numbered 30,718, the said corporation had been dissolved, and the said fine of $300 had been imposed; that the assets of said corporation were in danger of being squandered, and that it was necessary to appoint a receiver in order to protect the same, and to provide for the satisfaction of the people's said judgment of $300, and also to preserve and distribute moneys due from said dissolved corporation to other persons. The complaint prayed for the appointment of a receiver, and thereupon the said Booth was appointed by the court.

Jurisdiction to appoint the said receiver is given, if at all, by section 565 of the Code of Civil Procedure; and respondent rests the jurisdiction mainly upon that section. Something is said in the briefs about section 564; but the appointment of a receiver under that section is merely auxiliary to an action which "is pending," whereas, the said action numbered 32,100 is an independent action brought for the very purpose of the appointment of a receiver. It is based upon section 565 upon the theory that the state, having a judgment for a fine, is a creditor of the corporation. It is not necessary for us to determine whether the state, on account of its judgment for a fine, is a creditor within the meaning of that section, or whether it was definitely determined in the Havemeyer Case, 84 Cal. 327, 24 Pac. 121, that in such a case the state is not such a creditor, because the proceeding authorized by section 565 can be commenced only "upon the dissolution of any corporation," and the theory of the respondent that by said action numbered 30,718 the said corporation was dissolved cannot be maintained. In section 399 of the Civil Code it is declared that the involuntary dissolution of corporations is provided for in the Code of Civil Procedure from section 802 to section 810, inclusive; but it is rather singular that in turning to those sections of the Code of Civil Procedure we find no express provision about the dissolution of a corporation, or any mention of a corporation at all. The mind of the legislature, as expressed in those sections, seems to have been occupied almost entirely with a consideration of the usurpation of a public office. However, it is provided that a person usurping any franchise may, in an action brought by the attorney general, be excluded from such franchise by the judgment of the court; and it has been held that under this provision a corporation may be dissolved. But evidently it could be dissolved only by a judgment excluding it from exercising the franchise of being a corporation; and, in order to reach that result, there must be an averment of the usurpation of the franchise of being a corporation, and a judgment excluding the defendant from exercising said franchise, that is, from assuming to be a corporation. Now, in said action numbered 30,718 there was no such averment or judgment. The complaint does not allege that the defendant therein was usurping the franchise of being a corporation, and the judgment does not exclude the said defendant from exercising the franchise of being a corporation, and does not undertake in any way to dissolve the corporation. The complaint merely avers that the corporation has been illegally exercising certain enumerated franchises; and the judgment merely declares that the defendant is guilty of usurping rights and franchises, "as charged and alleged in the complaint," and adjudges that the defendant be excluded from "such rights, privileges, and franchises." The judgment, therefore, in that case, does not dissolve the corporation, and does not undertake to do so. The said corporation, therefore, not having been dissolved, the court acquired no jurisdiction to appoint a receiver under said section 565 of the Code of Civil Procedure; and the appointment of said Booth as such receiver was without any authority, and void.

The only other question in the case is whether or not the petitioners herein, Yore et al., are by certain of their acts, admitted by the stipulation to have been done, estopped from denying the jurisdiction of the court to appoint said receiver, or have been guilty of such laches as prevents them from maintaining this present application. The facts with respect to this part of the case are these: (1) Alexander Vensano and others commenced an action against said Booth, as receiver, to recover a claim against said corporation out of the funds in his hands; and in that action petitioners herein intervened and set up their prior claim to the fund. (2) An action was commenced by Booth, as receiver, against a number of claimants, including these petitioners, to determine their several claims to the fund; and in that action these petitioners answered, setting up a judgment which they had recovered against the said corporation, and asserting its priority over all other claims. (3) These petitioners commenced an action in Yuba county against the said corporation, in which, on the motion of said corporation, the said Booth, as receiver, was substituted as a defendant in the place of said corporation. (4) Until the 10th day of February, 1894, neither the petitioners nor their attorneys had seen or examined any of the papers or proceedings in said action numbered 32,100, nor had any information concerning the same beyond what was imparted, if anything, by the pleadings, papers, and proceedings in other actions mentioned in the stipulation. (5) In the said action of these petitioners against said corporation in Yuba county, the deposition of said Booth was taken on the 9th day of March, 1892, at the taking of which deposition the petitioners herein were represented by their attorneys, and in said deposition it was mentioned that said Booth was the receiver of said corporation, and was examined in respect to the papers of said corporation, etc. The petitioners herein obtained judgment against the said corporation, in said action brought in Yuba county, for $13,826.66, on the 3d day of May, 1893; and on the 15th of January, 1894, a writ of execution was issued on said judgment, a copy of which was delivered by the sheriff to said Booth, together with a notice that all debts, credits, etc., and personal property, in his possession and owing to said corporation, were attached; and said Booth answered to the sheriff that whatever money he had belonging to said corporation was held by him as receiver, and that he would not pay over any of the same unless ordered to do so by the superior court by whom he was appointed. Thereupon petitioners herein served a notice upon the attorney general, and also upon Booth, that they would move the court to desist from taking any further proceeding under said appointment of Booth as receiver, upon the ground that the court had no jurisdiction to appoint said receiver, which motion was afterwards heard by said court, and denied.

We do not think that by the acts just stated petitioners are precluded from maintaining the present proceeding. Of course, jurisdiction of the subject-matter of an action cannot be obtained by consent; and the conduct of petitioners, as above narrated, does not include the necessary elements of estoppel, at least as to future action. Neither do we think that they have been guilty of such laches as destroys their right to apply for the writ sought in this proceeding. They never appeared in the original action in which the receiver was appointed, except to move that the court desist from further proceedings therein. As to the other actions, Booth was acting as de facto receiver, and had the assets of the corporation in his possession, and said assets were about to be disposed of in said actions; and, under these circumstances, the appearance in said actions by petitioners for their own safety was not a concession of the validity of Booth's appointment as receiver, or a ratification thereof. They were not bound in those proceedings to attack Booth's right to the possession of the assets, even if it be conceded that an opportunity to do so was there presented. But, really, petitioners were not in a position to attack the validity of Booth's appointment as receiver until they were brought into a hostile attitude to him by the levy of their execution. The case of Smith v. Superior Court, 97 Cal. 348, 32 Pac. 322, cited by respondent, is not in point. In the first place, that case was certiorari; and as certiorari seeks mainly to annul something that has been already done, and is in its nature appellate, the general rule is that the application must be made within the time allowed for an appeal; while the main purpose of prohibition is to restrain future proceedings. In the second place, in Smith v. Superior Court, the petitioner had intervened in the original action in which the receiver had been appointed, had procured himself to be joined as plaintiff in said action, and had prayed judgment against the defendant therein, and demanded that the property of said defendant be sold by the receiver, and the proceeds applied by the receiver to the debts of the said defendant; and then, three years after the appointment of the receiver, he sought to have the appointment annulled. No such facts appear in the case at bar.

Under the above views, there are no other points necessary to be noticed. Let a peremptory writ issue as prayed for in the petition.

We concur: GAROUTTE, J., HENSHAW, J.

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108 Cal. 440

PEOPLE v. LEYSHON. (No. 21,200.)

(Supreme Court of California. Aug. 5, 1895.)

FORGERY—INFORMATION—VERDICT—SUFFICIENCY OF EVIDENCE—CONTINUANCE.

1. Pen. Code, § 470, provides that every person who, with intent to defraud another, falsely makes any notes, etc., or utters, or attempts to pass as true, any of the above-named forged matters, knowing the same to be false or counterfeited, with intent to defraud any person, is guilty of forgery. *Held*, that an information which charges defendant with having forged the name of certain persons to a note set out in the information, with intent to defraud one G., and with having knowingly, etc., uttered, and passed as true and genuine, the said note, with intent to defraud said G., etc., does not charge two offenses.

2. Where defendant was granted one continuance of 60 days on the ground of absence of a witness, it was not error to refuse to grant him a second continuance because of the absence of the same witness; defendant's affidavit showing that the witness has left the state, and that he "is informed," only, that such witness will, on a specified day, return to the place where the trial is to be had.

3. Pen. Code, § 686, provides that the deposition of a witness, taken, as therein provided, at a preliminary examination, may be read at the trial upon its being satisfactorily shown to the court that the witness is dead, or cannot, with due diligence, be found within the state. Section 1345 provides that such depositions are to be taken subject to like objections to the questions and answers contained therein as if the witnesses had been examined orally in court. *Held*, that where the court refuses a continuance on the ground of the absence from the state of a witness whose deposition was taken on the preliminary examination, defendant is not entitled to have such deposition admitted on the trial as absolutely true.

4. On trial of a person charged with forging the names of H. and C. to a note, there was a conflict in the evidence as to whether defendant had, or supposed he had, authority to sign H.'s name; but there was no evidence tending to show he had any authority, or upon which to found a belief of authority, to use C.'s name on the note. The making of the note by defendant, and the signing of the names of such persons, were admitted on the trial. *Held*, that a verdict of guilty was supported by the evidence.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

J. G. Leyshon was convicted of forgery, and appeals. Affirmed.

Zue G. Peck, for appellant. Atty. Gen. Fitzgerald, for the People.

SEARLS, C. Information for forgery. The defendant was charged with having forged the name of Mrs. Maggie Henry and Eliza J. Clark to a certain promissory note, set out in the information, with intent to defraud one A. J. Graham, and to have knowingly, willfully, feloniously, etc., uttered, passed as true and genuine, the said promissory note, with intent to defraud said A. J. Graham, etc. Defendant demurred to the information upon the ground that it charges two offenses, viz., the crime of forgery committed April 23, 1894, and also the crime of passing a forged note on the 24th day of April, 1894. The demurrer was overruled, and the ruling is assigned as error. Section 470 of the Penal Code provides that "every person who, with intent to defraud another, falsely makes, alters, forges, or counterfeits any * * * note * * * or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above-named false, altered, forged or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged or counterfeited, with intent to prejudice, damage or defraud any person * * * is guilty of forgery." As was said in People v. Frank, 28 Cal. 507: "Where, in defining an offense, a statute enumerates a series of acts, either of which separately, or all together, may constitute the offense, all such acts may be charged in a single count; for the reason that, notwithstanding each act may, by itself, constitute the offense, all of them together do no more, and likewise, constitute but one and the same offense." To like effect are People v. De la Guerra, 31 Cal. 459; People v. Harrold, 84 Cal. 567, 24 Pac. 106; People v. Gosset, 93 Cal. 641, 29 Pac. 246; People v. Smith, 103 Cal. 563, 37 Pac. 516. The information charged but one offense, and the demurrer was properly overruled.

The second error assigned relates to the action of the court in refusing a continuance upon the application of defendant. The record shows that the cause was originally set down for trial on the 29th day of August, 1894. On the last-named day a continuance was asked by defendant upon the ground of the absence of August Wodecki, a witness on behalf of defendant, who had been duly subpœnaed, and the cause was continued by the court to October 26, 1894. On the last-named day the cause was again called for trial, whereupon counsel for defendant moved for a continuance until January 15, 1895, on account of the absence of the said witness, August Wodecki, who was shown by affidavit to have left the state of California, and to be at Phœnix, Ariz., and from which place, the affiant is informed, "he will return to Los Angeles on or about January 10, 1895." The witness in question testified on the preliminary examination of defendant, and his deposition there taken is referred to in the affidavit, and made a part thereof. The substance of the showing was that Mrs. Maggie J. Henry, one of the persons whose name was charged to have been forged by defendant, had employed said defendant to transact for her various matters of business, and had declared the latter to be her adviser, and the manager of her outside business, etc. The affidavit also showed that, upon the failure of the witness to attend court in August, a writ of attachment had issued against him, but was never served. The court overruled the motion for a continuance, giving as a reason therefor that it was not satisfied "that the witness will ever be back here, or that he has not gone permanently from the state," and held that the defendant was entitled to use the deposition taken upon the preliminary examination in his favor as evidence in the case. Counsel for defendant contended that the prosecution should not only admit the deposition in evidence, but that the facts stated therein should be conceded to be absolutely true. This was not conceded by the prosecution, and the contention of appellant is that under such circumstances it was error to deny the continuance. The granting or refusing a continuance in a criminal case is a matter in which much must be left to the discretion of the trial court, and it is only in cases where it is apparent that such discretion has not been wisely exercised that this court will reverse its action. Where, as in this case, a second continuance is asked for upon the ground that a witness for the defendant is absent from the state, and hence beyond the jurisdiction of the court, it should be made to appear with reasonable certainty that the witness will return to the jurisdiction within such reasonable time as to prevent an unusual delay in the trial of the cause. The showing here as to the return of the witness is only that defendant is informed he will return. The sources of defendant's information are not given, and no reasons are assigned for his belief that he will return, if such be entertained. Indeed it is not stated in the affidavit that defendant believed the witness would return, but only that he was so informed. Under such circumstances, no surprise is felt that the court below failed to be convinced that the presence of the witness would be secured by a continuance. People v. Ashnauer, 47 Cal. 98; People v. Francis, 38 Cal. 188; People v. Ah Yute, 53 Cal. 613.

The contention of appellant, that the deposition of Wodecki, taken at the preliminary examination of defendant, should have been admitted as absolutely true, cannot be maintained. Under section 686 of the Penal Code, the depositions of witnesses, taken, as therein provided for, at the preliminary examination, may be read at the trial upon its being satisfactorily shown to the court that the witness is dead or insane, or cannot, with due diligence, be found within the state. People v. Curtis, 50 Cal. 95. These depositions, like those taken on behalf of the defendant conditionally, and in cases where witnesses are without the state, are to be taken subject to like objections to the questions and answers contained therein, as if the witness had been examined orally in court. Pen. Code, § 1345. There is nothing in the Code requiring other or different credence to be given to them than is accorded to the sworn testimony of witnesses who appear personally in court. This question is not regarded as being of much importance in the present case, for the reason that the showing was not sufficient to call for a continuance, had there been no deposition in the case.

The verdict cannot be set aside for the want of evidence in its support. The making of the promissory note by defendant, and the signing by him of the names of Mrs. Maggie Henry and Eliza J. Clark thereto, was admitted repeatedly during the trial. The defense interposed was that the business relations between defendant and the two women whose names appeared upon the note were such that defendant either had authority, or supposed he had authority, to sign their names thereto. As to Mrs. Maggie Henry, there was evidence tending to show some foundation for the position assumed by defendant; but there was a conflict in the evidence on this point, and, upon well-recognized principles, the verdict cannot, under such circumstances, be set aside for such cause. As to the name of Eliza J. Clark, signed by defendant, we find in the record not an iota of evidence tending to show in the defendant any authority, or upon which to found a belief of authority, to use her name upon the promissory note. As to her, the case presented a bald case of forgery, not relieved by any pretext worthy of consideration. The proof that defendant forged the name of Eliza J. Clark to the promissory note described in the information is sufficient alone to uphold the verdict, and for that reason the several rulings of the court upon the admission and rejection of testimony touching the business relations existing between defendant and Mrs. Maggie Henry need not be considered; for, if erroneous, such rulings do not, under the circumstances, call for a reversal.

The other errors assigned are either unimportant or unfounded. The judgment and order denying defendant's motion for a new trial, from which he appeals, should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying defendant's motion for a new trial, from which he appeals, are affirmed.

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108 Cal. 460

CITY AND COUNTY OF SAN FRANCISCO v. BURR et al. (No. 15,326.)

(Supreme Court of California. Aug. 6, 1895.)

STREETS—DISCONTINUANCE.

The adoption of an ordinance, and its subsequent ratification by the legislature, declaring a map to be the plan of a certain part of a city in respect to location and establishment of streets, works a discontinuance and abandonment of streets formerly existing in that part of the city, but not appearing on such map.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the city and county of San Francisco against E. W. Burr and others to have a certain space declared an open public street. Judgment for plaintiff. Defendants appeal. Reversed.

J. C. Bates, for appellants. H. T. Creswell, for respondent.

HARRISON, J. In 1847, Leavenworth, as alcalde of San Francisco, granted 26 100-vara lots in that portion of the pueblo which is called the "Laguna Survey." These lots were granted by reference to a map kept in the alcalde's office, on which they were designated by numbers. Upon this map there is delineated a space corresponding to a street, upon one side of which are located lots 4, 7, 9, and 21, and on the other side of which are located lots 3, 6, 12, and 22. The territory thus surveyed and mapped is situated west of Larkin street, and was disconnected with the other portion of the then town of San Francisco, and the open space between the two rows of lots aforenamed was not a prolongation of any of the streets then existing, nor did it intersect or connect with any of those streets. The present action is brought to have this space declared to be an open public street.

This delineation upon the map created the easement of a right of way in favor of the grantees' lots abutting thereon, and indicated an intention on the part of the town to dedicate the space as a highway, and a subsequent user thereof would have been regarded as an acceptance by the public sufficient to complete the dedication. The grantees of the lots might, however, lose or surrender the easement created for them, and the public could also abandon or discontinue the highway after its dedication had been complete. The street, when dedicated, became the property of the whole state, which, by its legislature, could deal with or dispose of it at its pleasure. "That the legislature possesses competent power to vacate a street in a city; that the legislature may delegate or commit such power to the municipal authorities of the city; that its exercise by the municipal authorities is dependent on the will and subject to the control of the legislature; and that, after such power has thus been committed to the municipal authorities, the legislature may revoke it in part, as well as in whole, or, without an express revocation, may itself exercise it in any particular instance,—are propositions about which there can be no controversy in this state. The plenary power of the legislature over the whole domain of streets is well illustrated by the decisions of this court in the litigation respecting Kearny, Second, and Beale streets in the city of San Francisco." Polack v. Asylum, 48 Cal. 492. The Van Ness ordinance, which was passed in 1855, provided for a plan for the location and dimensions of streets to be laid out within the city limits west of Larkin street and southwest of Johnston (now Ninth) street; and in pursuance of these provisions the plan or map known as the "Van Ness Map" was prepared, and by ordinance, October 16, 1856, "declared to be the plan of the city in respect to the location and establishment of streets and avenues, and the reservations of squares and lots for public purposes, in that portion of the then incorporated limits of said city lying west of Larkin and southwest of Johnston streets." This ordinance was ratified and confirmed by an act of the legislature approved March 11, 1858 (St. 1858, p. 52), and the streets delineated upon the Van Ness map became thereby open public highways. Sawyer v.

San Francisco, 50 Cal. 370. The space that had been delineated as a street upon the map of the Laguna survey does not appear upon this map, but, in lieu thereof, there are other streets, forming continuations of streets then existing, and running at a different angle with Larkin street. In Brook v. Horton, 68 Cal. 555, 10 Pac. 204, it was held that certain streets that had been dedicated as public highways by the adoption of the Van Ness map were superseded by streets that were laid out on the city engineer's map which was prepared under the acts of 1862 and 1864 (St. 1862, p. 407; St. 1863–64, p. 460); that the effect of the delineation of the streets upon the engineer's map under the provisions of these statutes was to discontinue and abandon the former streets. Under the principles of that case it must be held that by the adoption of the Van Ness map, and its confirmation by the legislature, the above-described space upon the Laguna survey map ceased to be a public highway. See, also, Seaman v. Hicks, 8 Paige, 655; Com. v. Railroad Co., 150 Mass. 176, 22 N. E. 913. The judgment is reversed.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN FLEET, J.; HENSHAW, J.

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108 Cal. 450

In re LEVINSON'S ESTATE. (No. 15,916.)

(Supreme Court of California. Aug. 6, 1895.)

ADMINISTRATOR—ACCOUNTING—JUDGMENT—SUFFICIENCY OF EVIDENCE—SPECIFICATION OF ERROR—ALLOWANCE FOR EXPERT WITNESSES AND COUNSEL.

1. On settlement of an account of an administrator, an order allowing the administrator's account, with the exception of one item, is not a judgment, within Code Civ. Proc. § 939, requiring an appeal to be taken "within 60 days after the rendition of the judgment," to entitle appellant to have the evidence reviewed. Estate of Rose, 22 Pac. 86, 80 Cal. 166, followed.

2. On appeal by legatees from an allowance of an administrator's account, the appellants claimed in the specifications of error that the evidence was "insufficient to justify the decision, in each and every one of the following particulars, respectively: (1) Allowing $500, or any sum, for H. & M.; (2) allowing $343.91, or any sum, to said administrator for commissions; (3) allowing said item of $50, alleged to have been paid to B.," etc. *Held*, that such specifications of error were sufficient, under Code Civ. Proc. § 648. Estate of Page, 57 Cal. 238, distinguished.

3. On the settlement of the account of an administrator, the court need not make findings of fact, though such findings are not waived, under Code Civ. Proc. §§ 590, 633.

4. Where a second administrator resigns, and is succeeded by a new administrator, and the first administrator has been paid commissions in a sum nearly equal to the amount allowable by Code Civ. Proc. § 1618, on the entire estate, such second administrator is not entitled to any allowance for commissions until the final settlement of the estate.

5. On the settlement of an administrator's account, it appeared that he engaged in litigation on behalf of the estate against deceased's former partners, and employed expert accountants to examine the books of the partnership for the purposes of the litigation, and he claimed credit of $673.30 for the services of such experts. As a witness, he stated that he had no explanation to give of a receipt signed by him, and produced by the legatees, acknowledging the receipt from them of $240 towards payment of expenses on behalf of the legatees "in experting the books of" such firm. *Held*, that $240 should be deducted from the amount claimed to have been paid.

6. It is error to allow an administrator $50 to pay a doctor for attendance one day, as a witness, on a motion for a receiver in an action instituted by such administrator, the amount fixed by the statute being $2 per day.

7. The appellate court will not disturb an allowance of attorney's fees for services rendered an administrator, where the claim is that the services were of no value, and the evidence on such question is conflicting.

8. Where, on settlement of the accounts of an administrator, an allowance is made for services of attorneys, rendered the administrator, it is error to direct payment to be made to such attorneys, who are strangers to the proceeding, but the allowance should be simply to the administrator.

9. Where, on the settlement of the accounts of an administrator, he is charged with misfeasance by the legatees, and the court finds the charge false, it is proper to allow him a credit of $100 to pay for assistance of counsel in defending him against such charge.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Judicial settlement of the accounts of J. W. Goodwin, administrator with the will annexed of John Levinson, deceased. From an order allowing the account, with the exception of one item, Fannie Levinson and others, legatees, appeal. Modified and affirmed.

Horace W. Philbrook, for appellants. Morrison, Stratton & Foerster, Barclay Henley, and J. W. Goodwin, for respondent.

PER CURIAM. Appeal by certain legatees named in the will of John Levinson, deceased, from an order settling the account of J. W. Goodwin, administrator with the will annexed of the estate of said deceased. The administrator was charged with misconduct in the discharge of his trust, and was cited to show cause why his letters should not be revoked. Thereupon on February 14, 1893, he filed the account in question, and tendered his resignation of his office of administrator. The order appealed from declared the charges against respondent to be without foundation, allowed his account as presented,—with the exception of a single item,—and directed that upon the production of a receipt for the balance of funds of the estate in his hands, ascertained to be the sum of $4,729.94, from one Ira P. Rankin, who was appointed special administrator to succeed him, the respondent be discharged from further liability.

1. The legatees filed their exceptions to the account March 3, 1893. A hearing was had upon the objections thus made, and on September 12, 1893, the court orally announced its decision, stating the terms of the order

to be drawn allowing the account. Such order was signed by the judge and filed with the clerk September 16, 1893, and was entered in the minute book of the court October 6th, following. The appeal was taken December 4, 1893. Respondent insists that the order is a judgment (Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639), that the appeal was not taken "within sixty days after the rendition of the judgment" (Code Civ. Proc. § 939), and hence that the evidence upon which the decision rests cannot be reviewed. But this question has been made the subject of investigation by the court in Estate of Rose, 80 Cal. 166, 22 Pac. 86; and, on the authority of that case, we consider that the evidence here is open for examination.

2. Respondent further contends that the specifications of insufficiency of the evidence to justify the decision, appearing in appellant's bill of exceptions, are not stated so as to answer the requirements of section 648, Code Civ. Proc. The specifications supposed to be faulty are set out in this manner: "The evidence is insufficient to justify the decision in each and every one of the following particulars, respectively: (1) Allowing $500, or any sum, for Henley & MacSherry; (2) allowing $343.91, or any sum to said administrator for commissions; (3) allowing said item of $50, alleged to have been paid to Dr. C. F. Buckley," etc. We think the specifications are sufficient. The account is itself a bill of items, and, when the respondent was informed by the specifications of the several items which appellants deemed to be unsupported by the evidence, he certainly was advised of the particulars wherein he should take note whether the evidence, if any, sustaining the account appeared in the bill of exceptions when proposed; and this we understand to be a main object of the requirement of such specifications by the statute (Code Civ. Proc. § 648). The case differs obviously from Estate of Page, 57 Cal. 238. There no attempt was made to specify any deficiency of evidence.

3. Findings of fact were not waived, and the court made none. Appellants claim that for this reason the order should be reversed. The manner in which the account of an executor or administrator is usually made up, and the manner in which objections thereto are usually presented (and this case shows no exception), do not at all conduce to the development of issues such as arise upon the pleadings in a civil action, and to which findings are required to be responsive. Code Civ. Proc. §§ 590, 633. And it has been said here obiter, but, we think, correctly, that "in such a proceeding it is not incumbent upon the court to make and file express findings." Miller v. Lux, 100 Cal. 613, 35 Pac. 345, 639.

4. The court allowed to the respondent the sum of $343.91 as commissions. It appears that he was preceded in the administration of the estate by one S. W. Raveley, named executor in the will of the deceased. Raveley had been, on the settlement of his account, credited with the sum of $15,441.98, of which $700 was for his own commissions; he paid over to Mr. Goodwin, his successor, the respondent here, the balance in his hands belonging to the estate, amounting to $6,254.91; respondent received from other quarters $223.34; making the total funds of the estate coming to his hands $6,478.25, and the total value of the estate accounted for $21,920.23. On this sum the commissions allowable under section 1618, Code Civ. Proc., amount to $997.60, while the sum of $1,043.91 has actually been allowed, and the administration is yet unclosed. It is suggested by counsel that the presumption should be indulged that the allowance made to respondent included something for extraordinary services, under section 1618, Code Civ. Proc. But his account makes no claim for such services, and it is expressly stated in the order that he "is entitled to $343.91 as commissions." The presumption does not arise. Estate of Moore, 96 Cal. 526, 527, 31 Pac. 584. Under the circumstances disclosed by the record, nothing can be allowed respondent for commissions until the final settlement of the estate. See Estate of Barton, 55 Cal. 87, and cases there cited.

5. Respondent engaged in litigation on behalf of the estate against William J. and Benjamin Newman, former partners of decedent in the firm of Newman & Levinson, and employed certain expert accountants to examine the books of the partnership for the purposes of such litigation. He claimed credit for $673.30 paid for the services of said experts. The payments to them, as shown by the account, were made in sums ranging from $25 to $80, beginning in January, 1892, and continuing at intervals for nearly a year following. Testimony was given that at first the money to pay said experts was furnished by the legatees. On cross-examination of the administrator as a witness at the hearing, contestants produced a paper writing signed by him, dated March 2, 1892, and acknowledging the receipt from one of them of $240 towards payment of expenses on behalf of the legatees "in experting the books of Newman & Levinson." Being asked to explain the receipt, the witness said he had no explanation to give. He also said that he had given no credit in his account for said $240. The court allowed the full sum claimed for compensation of experts. We think the administrator mistook, and that the circumstances were such as to require him to explain that the money had by him as evidenced by the receipt was used to pay for services different from, or in additon to, those specified in his account, or for other reason was not chargeable to him, and that failing so to do his credits should have been reduced by said sum of $240. The allowance of the further sum of $433.30, paid to said accountants, was a

matter committed to the sound discretion of the court. There is no proof that such discretion was abused. See Estate of Moore, 72 Cal. 336, 13 Pac. 880.

6. The following credit item appearing in the account was allowed: "Dr. C. F. Buckley, services, $50.00." The administrator testified that payment thereof was made to Dr. Buckley for attendance as a witness on a motion for a receiver in a certain action instituted by the administrator; that he attended one day. The statute fixes the fees of witnesses at $2 per day. Why the further sum of $48 was paid, does not appear in the record. Its allowance was therefore erroneous.

7. The order appealed from directs that the sum of $500 be paid out of the estate to the law firm of Henley & MacSherry "for services rendered the estate and the administrator in the management of the estate." The services referred to were rendered in the conduct of the respondent's suit against the Newmans. The claim is stated in the account as among the "bills outstanding," no sum being named, but at the hearing said attorneys presented a statement claiming an allowance of $1,000 for their services. The principal contest in the court below seems to have concerned the allowance of this item. Appellants make two points in this connection: (1) That the services were of no value; and (2) that an order directing payment to counsel, who are strangers to the proceeding is void. As to the first, it suffices to say that the evidence was conflicting. While it pretty clearly appears that there was a wide divergence of opinion between Messrs. Henley & MacSherry, and counsel associated with them, as to the policy to be pursued in the later stages of the trial of that cause, and that they (Henley & MacSherry) then entertained small hope of ultimate success, and so were insistent (as was the administrator) on a proposed compromise, which, if effected, would have given the estate little, if anything, more than the expenses of the action, yet it does not appear but that the course they recommended comported with the proper discharge of professional obligation. In the light of the event, it seems that it would have been most to the interest of the estate: and, without signifying approval of all the methods employed by them and by the administrator in the effort to bring about such compromise, it ought to be said that the evidence does not substantiate appellants' charge that they and the administrator "became traitors to the interests of the decedent's estate, and treacherously exerted themselves to bring about a judgment for the defendants." There was error, however, in the direction that the payment be made to the attorneys. Like other necessary expenses incurred in course of administration, the fees of counsel are to be allowed out of the estate to the executor or administrator. Such is the reading of the statute (Code Civ. Proc. § 1616), and the effect of the decisions of this court. In re Ogier's Estate, 101 Cal. 385, 35 Pac. 900; Henry v. Superior Court, 93 Cal. 569, 29 Pac. 230; In re Blythe's Estate, 103 Cal. 350, 37 Pac. 392; Pennie v. Roach, 94 Cal. 515, 29 Pac. 956, and 30 Pac. 106; Sharon v. Sharon, 75 Cal. 38, 16 Pac. 345.

8. Since the court found that the charges of misfeasance against the respondent were false, it properly allowed him credit for the item of $100 paid for assistance of counsel in defending himself against the same. It would be otherwise if the charges were sustained. Woerner, Adm'n, § 516.

The cause is remanded, with instructions to the superior court to modify the order appealed from in these particulars, viz.: (1) Striking out therefrom all allowance for commissions, with leave to respondent to move for an allowance of his reasonable proportion of commissions upon the final settlement of the estate. (2) Allowing to respondent $500 for services of his attorneys, Henley & MacSherry, and striking out the allowance to said attorneys. (3) Allowing for services of experts $433.30, instead of $673.30. (4) Allowing for payment of Dr. Buckley $2, instead of $50. And as thus modified the order will stand affirmed.

(108 Cal. 463)

In re GARRITY'S ESTATE.

Appeal of BUCKLEY. (No. 15,732.)

(Supreme Court of California. Aug. 6, 1895.)

EXECUTORS—ALLOWANCE TO WIDOW—PETITION—SETTLEMENT — SUPPLEMENTAL INVENTORY OF PERSONALTY — APPRAISEMENT—WHEN NECESSARY—LIFE TENANT — POSSESSION OF PERSONAL ESTATE.

1. Under Code Civ. Proc. § 1466, which confers on the court power to make reasonable allowance out of the estate for the maintenance of the family, the court may make such allowance without first setting apart a homestead, as authorized by section 1465, and determining that it is insufficient for the widow's support. 38 Pac. 628, affirmed.

2. The son of the widow may petition for the allowance to her, though he is also the executor. 38 Pac. 628, affirmed.

3. Where the executor disposes of certain personal property without including it in the inventory, in accordance with the expressed wish of the decedent, and, on final settlement, makes a supplemental inventory of such property, the court may determine its value, and it need not be appraised as other property of the estate. 38 Pac. 628, affirmed.

4. Where testator gives "all" his property to his wife to hold and to "enjoy" for life, and to others the residue "remaining upon the termination of the life estate," the wife is entitled to the possession of the personal estate without security, in the absence of adverse showing by the remainder-men. 38 Pac. 628, affirmed.

In bank.

On rehearing. For decision in department, see 38 Pac. 628.

PER CURIAM. After a full consideration of this cause in bank, we are satisfied with the conclusion reached in department, and with the opinion of Mr. Justice HARRISON therein delivered. 38 Pac. 628. In accordance with said opinion, the superior court is directed to modify the decree of distribution by striking therefrom the following proviso: "Provided, that the sum of one hundred dollars of said distribution shall have been heretofore received by Thomas Garrity, and that the sum of fifteen dollars has been received by James Garrity;" and, as so modified, the decree is affirmed. The orders for a family allowance and settling the account are also affirmed; and the costs of this appeal are to be borne by appellant.

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108 Cal. 484

In re LI PO TAI'S ESTATE.

LI TAI WING v. FREESE. (No. 15,746.)

(Supreme Court of California. Aug. 7, 1895.)

ADMINISTRATOR WITH WILL ANNEXED—RIGHT TO REMOVE—EXECUTOR—COMPETENCY—RES JUDICATA.

1. Code Civ. Proc. § 1383, providing that when letters of administration have been granted to any other than the wife, child, etc., of the intestate, any one of them may obtain the revocation of the letters, and become entitled to the administration, applies to a case where deceased left a will, and an administrator with the will annexed has been appointed, and may be availed of though the person applying for the revocation was designated by the will as executor; section 1354, providing that where the person designated in a will is absent from the state, or a minor, letters of administration with the will annexed shall be granted, which, in the discretion of the court, may be revoked on return of the absent executor, or arrival of the minor at the age of majority, having application only where the petitioner has no other right to administer, except that he was designated by deceased. 39 Pac. 30, reversed.

2. A person is not incompetent to serve as an executor, on the ground of want of understanding (Code Civ. Proc. § 1350), merely because he cannot speak English, and is not instructed as to the constitution of the state.

3. Denial of application under Code Civ. Proc. § 1354, for removal of an administrator with the will annexed, and appointment in place of him, is not an adjudication of want of understanding of petitioner; no reason being assigned for the denial, and there being various other grounds on which the application could be denied.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Petition by Li Tai Wing for the removal of A. C. Freese, public administrator, as administrator with the will annexed of Li Po Tai, and that letters of administration with the will annexed be issued to petitioner. From an order denying the application, petitioner appeals. Reversed.

Alexander D. Keyes and Philip Teare, for appellant. J. D. Sullivan, W. M. Willett, and R. H. Countryman, for respondent.

BEATTY, C. J. On the 28th of February, A. D. 1894, appellant, Li Tai Wing, filed a petition in the probate court of the city and county of San Francisco, in which, with other allegations, he stated: That Li Po Tai died in said city and county March 20, 1893, testate. That by his will he nominated petitioner and his mother executor and executrix of the will. That at the time of the death of Li Po Tai, and when the will was probated, and letters testamentary were issued to his mother, petitioner was a minor, and was absent from the state of California. That his mother, Lee See, was appointed executrix April 11, 1893, and duly qualified. That afterwards, on the 27th day of October, 1893, said Lee See was removed from office, and her said letters revoked; and afterwards, on the 15th day of November, 1893, A. C. Freese, public administrator, was appointed administrator with the will annexed, to take charge of the estate, and said Freese duly qualified, and is still acting as such administrator. That said Freese was not the husband or wife, child, father, mother, brother, or sister of said Li Po Tai, deceased. Petitioner is the eldest son of said Li Po Tai; is over the age of 21 years, and a resident of the city and county of San Francisco. Wherefore, he asked that the letters of administration issued to A. C. Freese be revoked, and letters of administration with the will annexed be issued to petitioner. Freese was duly cited to appear and answer. He filed no answer, but did appear, and was allowed to contest the right of the petitioner. Petitioner bases his claims upon the language of section 1383, Code Civ. Proc., and succeeding sections. He contends that under these provisions his right to the relief asked is absolute, provided only that he be found to possess the statutory competency.

The first question to be considered is this: Has section 1383 any application where the decedent has left a will? By its terms, it might seem to have been intended to apply only in cases of intestacy; but in Estate of Pacheco, 23 Cal. 476, it was applied to a case in which, like the present, there was a will, and in which the other material facts were substantially the same. It is true that the question of its applicability, although argued by counsel, was not expressly adjudicated, but the decision rests upon the tacit assumption by the court that the right to administration in the case provided for is unaffected by the fact that there is a will. In itself, this decision may not be of much weight as an authority; but it was made many years ago, and has never been overruled or questioned. Meantime the legislature has revised the statute, and re-enacted this particular section in its old form, and, we are bound to suppose, with the intention that it should be construed now as it was construed before the revision. In my opinion, there is no reason for changing its construction. If it be said that the decision in the Pacheco Case disregarded the terms of the law, it may be answered that the court was fully justified by the whole tenor of the statute, and the manifest policy of the legislature in respect to the choice of administrators, in departing from a literal construction of this particular section. By the old probate act, as by the corresponding sections of the Code, the legislature had prescribed the order in which the relatives and creditors of an intestate and other persons should be entitled to administer, and had made the same order of preference applicable to cases in which executors named in a will failed to qualify or ceased to act. These various provisions are found in sections 1350, 1365, 1425, and 1426, Code Civ. Proc. The policy of the law is clear. In the absence of any designation of an executor by the decedent, certain persons, in a certain order, have the right to administer. When executors have been appointed by the decedent, if they cannot act, or will not act, or are not allowed to act, then the same persons, in the same order, are entitled to letters of administration with the will annexed. Failing the choice of the decedent, the law enforces its choice. And so of the case where letters of administration have been granted to some person other than the husband or wife or child of the decedent,—it makes no difference whether there was a will or not; if one of the persons preferred by the law asks that the administrator (with or without the will annexed) be removed, and himself appointed, his request should be granted, if he is legally competent to discharge the trust. It is argued that this conclusion does not follow, and that section 1383 does not apply in cases of testacy, because section 1354[1] is specially applicable to such cases, and confers upon the court a discretionary power to remove or retain the administrator with the will annexed, as it may deem proper. But I do not think section 1354 applies where the petition for the removal of the administrator with the will annexed is based upon a right to administer conferred upon the petitioner by the statute. If the petitioner has no other right to administer, except such as flows from his designation by the decedent, then section 1354 applies, and the granting or refusal of the petition rests in the sound discretion of the court. But, when the petition is based upon the statutory right to administer, then section 1383 applies; and, if the petitioner is not incompetent by reason of some statutory disqualification, the court has no discretion to deny his petition.

But, although the objection that section 1383 does not apply is the point principally relied on by respondent to support the order of the superior court denying the petition of Li Tai Wing, it does not appear that this was the ground of the decision. The superior court found that Li Tai Wing was not competent, and that he had been previously adjudged incompetent, to discharge the trust, and upon these grounds denied his petition. The question is whether the evidence sustains these findings. In my opinion, it does not. The only evidence of incompetency was directed to the point that the petitioner had not sufficient understanding (Code Civ. Proc. § 1350), and it only proved that he could not speak the English language, and was not instructed as to the constitution of the state. These facts do not show lack of understanding, and the other evidence showed that the petitioner was a man of intelligence and education. Nor was there any prior adjudication of want of understanding. The petitioner had made an application under section 1354, which had simply been denied without any reason assigned, and without any finding of fact. The denial of the former petition does not imply a finding of incompetency, because there are various other grounds upon which it might have been denied. Code Civ. Proc. § 1911. The order appealed from is reversed.

We concur: VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.

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108 Cal. 490

SAN BERNARDINO INV. CO. v. MERRILL.

(No. 19,439.)

(Supreme Court of California. Aug. 7, 1895.)

CORPORATIONS—ASSESSMENT OF STOCK—ENFORCEMENT OF ASSESSMENT.

1. Civ. Code, § 331, provides that "a corporation, * * * after one-fourth of its capital stock has been subscribed, may * * * levy and collect assessments" thereon. *Held* that, in an action to collect an assessment on certain shares of stock, a complaint that does not show one-fourth of the capital stock to have been subscribed is demurrable as failing to show a cause of action.

2. In the absence of any provision therefor, a corporation cannot levy an assessment on its capital stock until after the whole amount has been subscribed.

3. The term "waiver" implies the abandonment of a right which can be enforced, or of a privilege which can be exercised, and there can be no waiver unless at the time the right or privilege waived is in existence.

4. Civ. Code, § 339, relating to the levy and collection of assessments on corporate stock, and the sale thereof for delinquency, provides that "the first publication of all delinquent sales must be at least fifteen days prior to the day of sale." Section 349 provides that "on the day specified for declaring the stock delinquent or at any time subsequent thereto the board of directors may elect to waive further proceedings * * * and proceed by action to recover the amount of the assessment." *Held* that, where the directors fixed May 7th for the sale of delinquent stock, they could not on April 25th elect to waive further proceedings therein, and proceed by action for the recovery thereof, no notice of delinquent sales having been published up to that time.

Department 1. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

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[1] Code Civ. Proc. § 1354, provides that: "Where a person absent from the state, or a minor, is named executor—if there is another executor who accepts the trust and qualifies—the latter may have letters testamentary and administer the estate until the return of the absentee or the majority of the minor, who may then be admitted as joint executor. If there is no other executor, letters of administration with the will annexed must be granted; but the court may, in its discretion, revoke them on the return of the absent executor or the arrival of the minor at the age of majority."

Action by the San Bernardino Investment Company against Samuel Merrill to recover an assessment levied on certain stock. Plaintiff had judgment, and defendant appeals. Reversed.

Goodcell & Leonard and John W. Craig, for appellant. Rolfe & Rolfe, for respondent.

HARRISON, J. The plaintiff made an order March 11, 1892, by which it levied an assessment of $1.50 per share upon its capital stock, payable on or before the 18th of April, and providing that any stock upon which such assessment should remain unpaid on that day should be delinquent and sold at public auction May 7, 1892. Under the directions of the secretary, this notice was published in a newspaper of general circulation in the county of San Bernardino once a week for four successive weeks, commencing March 18, 1892, and on the same day a copy thereof was sent by him by mail to each stockholder. On April 25th the board of directors of the plaintiff passed a resolution by which it elected to waive further proceedings for the sale of the stock on account of any delinquency in paying the assessment, and to proceed by action to recover the amount thereof. The defendant was the owner of 1,025 shares of the capital stock of the plaintiff, standing in his name upon its books, and, the assessment upon this stock not having been paid, the plaintiff brought this action and recovered judgment for the amount of the assessment.

1. The defendant demurred to the complaint upon the ground that it does not state a cause of action against him. The complaint alleges that the amount of the capital stock of the plaintiff is $500,000, divided into $5,000 shares of the par value of $100 each, and that during all the time mentioned in the complaint the defendant was the owner of 1,025 shares of such capital stock. There is no allegation of the amount of its capital stock that had been subscribed or that had been issued, or any allegation that any of its capital stock, other than that of the defendant, had been subscribed or issued. The rule is well established that, in the absence of any provision to the contrary, a corporation cannot levy an assessment upon its capital stock until after the whole amount thereof has been subscribed. Ang. & A. Corp. § 146; Bridge Co. v. Cummings, 3 Kan. 55; Livesey v. Hotel Co., 5 Neb. 50; Railroad Co. v. Gould, 2 Gray, 277; Railroad Co. v. Barker, 32 N. H. 363. This rule has been modified in this state by section 331, Civ. Code, which provides: "The directors of any corporation formed or existing under the laws of this state, after one-fourth of its capital stock has been subscribed, may for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form and to the extent provided herein." Unless, therefore, one-fourth of its capital stock had been subscribed, the directors had no authority to levy the assessment upon which this action is brought. This was a condition precedent to the exercise of the power given by the statute, and, in order that the complaint should show a right of recovery in the plaintiff, it was necessary to allege the existence of the condition under which the power might be exercised. See Boone, Code Pl. § 203. The demurrer to the complaint should, therefore, have been sustained.

2. The plaintiff seeks to recover the amount of the assessment, not by virtue of any contract of subscription on the part of the defendant, but solely by virtue of the obligation against him which is created by the statute, and hence a strict observance of the statutory mode and provision is essential to its recovery. Section 334, Civ. Code, provides: "Every order levying an assessment must specify the amount thereof, when, to whom, and where payable; fix a day subsequent to the full term of publication of the assessment notice on which the unpaid assessments shall be delinquent, not less than thirty nor more than sixty days from the time of making the order levying the assessment; and a day for the sale of delinquent stock, not less than fifteen nor more than sixty days from the day the stock is declared delinquent." Section 337 provides that, if any portion of the assessment mentioned in the notice remains unpaid on the day specified therein for declaring the stock delinquent, the secretary must, unless otherwise ordered by the board of directors, cause to be published a notice specifying each certificate of stock upon which the assessment is delinquent, and that as many shares thereof as may be necessary to pay the delinquent assessment, with costs and expenses of sale, will be sold on the day fixed for the sale in the order levying the assessment; and section 339 declares that "the first publication of all delinquent sales must be at least fifteen days prior to the day of sale." Section 349 provides: "On the day specified for declaring the stock delinquent, or at any time subsequent thereto, and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter for the collection of delinquent assessments, or any part or portion thereof, and may elect to proceed by action to recover the amount of the assessment, and the costs and expenses already incurred, or any part or portion thereof."

The term "waiver" or "to waive" implies the abandonment of a right which can be enforced, or of a privilege which can be exercised; and there can be no waiver unless at the time of its exercise the right or privilege waived is in existence. There can be no waiver of a right that has been lost. "Waiver is a voluntary act, and implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded or insisted upon" (per Cooley, J., in Warren v. Crane, 50 Mich. 301, 15 N. W. 465). Bouvier defines waiver as "the relinquishment or refusal to accept of a right." See, also, Stewart v. Crosby, 50 Me. 134; Shaw v. Spencer, 100 Mass. 395; Dawson v. Shillock, 29 Minn. 191, 12 N. W. 526; Bish. Cont. § 792. If the relinquishment of some right is the consideration upon which another right is to be created, there is no consideration for the creation of such other right unless there is an existing right to be relinquished. Under a statute conferring a special remedy for enforcing a right, and providing that the party may have a different remedy upon condition that he will surrender his right to the first, such surrender must be made while he has the right to enforce the original remedy. The party cannot by his neglect or inaction suffer the special remedy to elapse, and then claim the right to resort to the other. A right of election between two remedies, which is conferred upon the condition of relinquishing one of the remedies by some positive act, must be exercised while both of the remedies are open. Unless there is a remedy to relinquish, there is no place for an election. To exercise an election of remedies implies the right to resort to either, and that both exist at the time of the election. In the present case the board of directors, in the order levying the assessment, fixed April 18th as the day on which the assessment would be delinquent, and May 7th as the day on which the sale for delinquent assessments would be made. As the secretary was not "otherwise ordered by the board of directors," it was his duty, if the board had intended to sell the stock of the defendant in order to recover the delinquent assessment thereon, to publish the notice of such sale at least 15 days prior to May 7th; that is, its first publication must have been made not later than April 22d. The directors did not make the election provided for by section 349 "on the day specified for declaring the stock delinquent," nor until after the time had elapsed within which they could take any proceedings for the sale of the stock. By the failure to make publication of the delinquent sale "at least fifteen days prior to the day they had fixed for such sale," they lost all jurisdiction to sell the stock for the delinquent assessment, unless they should begin anew all previous proceedings and publication subsequent to the levying of the assessment as authorized by section 346. As, therefore, on the 25th of April the board of directors had lost jurisdiction to take any further proceedings for the collection of the delinquent assessment, under the chapter providing for the sale of the stock, there were no "further proceedings" which it could waive, and the condition under which the statute authorized it to elect to proceed by action to collect the same did not exist. It follows that the plaintiff had no cause of action against the defendant. The judgment and order are reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

5 Cal. Unrep. 113

RAFFERTY v. HIGH et al. (No. 19,469.)

(Supreme Court of California. Aug. 8, 1895.)

MORTGAGES—COUNSEL FEES.

A mortgage expressly stating that it is given "as security for the payment of" the principal sum of the note, "with interest thereon according to the terms of the note," does not secure counsel fees provided by the note in case of suit being brought against the maker.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Mrs. E. C. Rafferty against Annie M. High and others. Judgment for plaintiff. Defendants appeal. Modified.

M. A. Luce, for appellants. E. W. Britt, for respondent.

VANCLIEF, C. Action to foreclose two mortgages on the same lot of land, each to secure a distinct promissory note. The rate of interest on each note was 15 per cent. per annum from date of note until payment, payable and compounded semiannually, and each note contained the following: "And I further agree that, in the event of suit being brought against me, then there shall be added to any judgment against me rendered in said suit, as counsel fees, an additional sum of ten per centum * * * upon the amount of the principal and interest hereof accrued at the time of the entry of such judgment." Each mortgage was expressly given "as security for the payment of" the principal sum of the note, "with interest thereon according to the terms of the note," and a copy of the note secured was set out in each mortgage. But neither mortgage expressly purported to secure the payment of counsel fees in any event. The trial court allowed plaintiff counsel fees amounting to $178.91, and held that the payment of them was secured by the mortgages, and ordered that they be paid from the proceeds of the foreclosure sale. Counsel for appellants contends that the court erred in holding that counsel fees were secured by the mortgages, and whether or not they were so secured is the only question presented on this appeal. Upon this question I think the case of Clemens v. Luce, 101 Cal. 432, 35 Pac. 1032, is clearly in point for appellants. In that case the note secured by mortgage provided for the payment of counsel fees in the same language and form as in this case; and the mortgages in that case stated that they were given "as security for the payment to said mortgagee of the sum of $16,000, with interest thereon according to the terms of a certain promissory note, of date September 22, 1891,"—setting out a copy of the note,—but said nothing about securing counsel fees. In that case this court said: "As to what these mortgages were given to secure, was a matter of pure contract between the parties. They could have been given to secure the principal of the note alone, or the interest alone, or both principal and interest, as was actually done, or they could have been given to secure future advances, and attorney's fees in case of foreclosure. It follows that security for an attorney's fee is not provided for in either mortgage, and consequently such fee cannot be made a lien upon the land, and the judgment of the court in that regard is erroneous." This decision has been affirmed in at least three unreported cases. See list of unreported cases in 101 Cal. xvii. Counsel for respondent cite the case of Ogborn v. Eliason, 77 Ind. 393; but in that case it does not appear that the mortgage purported to secure only the principal and interest of the note, as in the case at bar. For aught that appears in the report of that case, the mortgage may have expressly purported to secure payment of the note according to its terms, without specifying merely the principal and interest, and omitting counsel fees, as in this case. I think the court erred in deciding that the payment of counsel fees was secured by the mortgages, and that the judgment should be modified by subtracting from the total amount adjudged to be secured by the mortgages the sum allowed for attorney's fees, to wit, $178.91; and, thus modified, the judgment should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is modified according to that opinion, and, as so modified, is affirmed. Costs of the appeal to be taxed to the respondent.

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5 Cal. Unrep. 115

SAVINGS BANK OF SAN DIEGO COUNTY v. FISHER et al. (No. 19,557.)

(Supreme Court of California. Aug. 26, 1895.)

MISJOINDER OF CAUSES OF ACTION — HARMLESS ERROR—NOTES—WAIVER OF DEMAND AND NOTICE OF NONPAYMENT.

1. Error, if any, in overruling a demurrer to a complaint on the ground that it united with a cause of action for foreclosure of mortgage a cause of action on a guaranty, is harmless, the court having found that the guaranty was without consideration.

2. An indorser of a note signed the following provision thereon: "I hereby guaranty the payment of the within note, * * * and waive presentation, demand, notice of nonpayment and protest." *Held* that, as demand and notice of nonpayment need not be given a guarantor, the waiver was by the party as indorser.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the Savings Bank of San Diego County against John C. Fisher and others. Judgment for plaintiff. Defendants Mary C. Morse and husband appeal. Affirmed.

M. A. Luce, for appellants. McNealy & Whitehead, for respondent.

HAYNES, C. The defendant John C. Fisher on April 11, 1891, made and delivered to the defendant Mary C. Morse his promissory note payable one year after date, and on the same day executed to her a mortgage to secure the same. On July 17, 1891, said Mary C. Morse indorsed said note in blank to the plaintiff, and assigned to it said mortgage. This action was brought against Fisher and the appellants Mary C. Morse and her husband, E. W. Morse, to foreclose said mortgage, and to fix the liability of Mary C. Morse, as indorser and guarantor, in case the mortgaged property should prove insufficient to satisfy the judgment. Findings were filed, and a decree entered foreclosing the mortgage, and directing that if, upon the sale of the mortgaged property, the proceeds should be insufficient to satisfy the amount found due the plaintiff, a deficiency judgment should be docketed against Fisher and said Mary C. Morse. Said Mary C. Morse and her husband appeal from the judgment and an order denying a new trial.

The complaint alleged that at the time Mary C. Morse indorsed said note and assigned said mortgage to the plaintiff she guarantied the payment of the note, and waived demand and notice, by signing the following words stamped upon the back of the note, to wit: "For value received, I hereby guaranty the payment of the within note, principal, interest, and attorney's fee, and waive presentation, demand, notice of nonpayment, and protest." The defendants Mary C. and E. W. Morse demurred to the complaint upon several grounds, of which the following only need be noticed: (1) That several causes of action have been improperly united, in this: that an action for the foreclosure of a mortgage against Fisher has been united with an action against Mary C. Morse as guarantor; (2) that these separate causes of action have been united, but are not separately stated and numbered. The second alleged defect was also attacked by motion to require these causes of action to be separately stated.

The court, however, found that the guaranty was made after the note had been indorsed and delivered, and that it was without consideration. It is, therefore, not necessary to discuss or decide whether a cause of action against Mary C. Morse upon the guaranty could be joined with a cause of action against Fisher upon the note; for, if it be conceded that the court erred in not sustaining the demurrer upon that ground, she was not injured, the court having found that she was not liable as guarantor. She was properly joined as a defendant as an indorser, so that the joinder as a party was proper, independently of any question of liability upon the guaranty.

The question arising upon the denial of the motion may be similarly disposed of. Counsel for appellants have not pointed out any possible theory upon which the judgment would have been more favorable to them if the court had ruled differently upon either the demurrer or the motion.

The defendants Mary C. Morse and E. W. Morse answered the complaint, and alleged: (1) That said guaranty was not made or signed at the time the note was indorsed and delivered, but long afterwards, and that it was without consideration; (2) that plaintiff is and was a banking corporation, and had not complied with the act of April 1, 1876, requiring it to publish and file for record in the recorder's office a sworn statement of the amount of its capital, the value of its assets, etc.; (3) that plaintiff had delayed bringing the action to foreclose, that the mortgaged property had greatly depreciated, and Fisher had become insolvent, whereby, etc. Plaintiff's demurrer to the first defense was overruled, and was sustained to the second and third defenses. The only question arising upon the demurrer to the second defense is whether said act of April, 1876, requiring banking corporations to publish and record said statements, was repealed by the act approved March 9, 1893. St. 1893, p. 112. That the former act was repealed by the last-mentioned act was expressly decided in Savings Bank of San Diego v. Burns, 104 Cal. 473, 38 Pac. 102, and that question need not be further considered. As to the third defense, it is not contended by appellants here that it stated facts constituting a defense. The demurrer to the second and third defenses was properly sustained.

The only remaining question is one presented by the motion for new trial, viz. whether the defendant Mary C. Morse waived presentation, demand, and notice of nonpayment of said note. Appellants contend that she did not, that she is not liable for any deficiency, and that the judgment against her should be reversed. There is no conflict of evidence. The undisputed facts are that on July 17, 1891, Mrs. Morse transferred said note to the plaintiff by writing her name thereon, without other words; that about a month afterwards, and before said note became due, the bank stamped upon the back of the note the words: "For value received, I hereby guaranty the payment of the within note, principal, interest, and attorney's fee, and waive presentation, demand, notice of nonpayment, and protest;" and Mrs. Morse signed her name thereto. No demand and notice of nonpayment is required to be given to a guarantor. His liability attaches immediately upon the default of the principal, without demand or notice. Civ. Code, § 2807. Neither party, therefore, could have intended the waiver to aid the guaranty; but banks are not in the habit of releasing any ground of liability, and therefore desired to hold her as indorser without the necessity of a formal demand and notice of nonpayment, while she, if she were willing to guaranty payment, could reasonably have no objection to fixing her liability as indorser by making the waiver. But, however that may be, as the waiver could not relate to or affect the guaranty, and could only have effect or operation upon her liability as an indorser, the court correctly found that she waived demand and notice of nonpayment, and was liable upon her indorsement. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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108 Cal. 569

WITMER BROS. CO. v. WEID. (No. 19,531.)

(Supreme Court of California. Aug. 27, 1895.)

CONTRACTS — CONDITIONS PRECEDENT — DELAY IN COMPLETION—WAIVER—MISTAKE—DAMAGES—PLEADING.

1. M., in consideration of the agreement of defendant, agreed to build a certain street railroad, for which defendant agreed to pay M. a certain amount, in notes of defendant, one-half, by a two-months note, when the grading was done and the iron was on the ground, the balance, by a four-months note, on completion of the road; that the road should be constructed, weather permitting, within four months; that the notes should be deposited with B. in trust till the conditions of the contract were performed by M., and the certificate of the engineer that the conditions had been performed should be served on said trustee, and on delivery to him of said certificate he should deliver to M. the two-months note and the four-months note, respectively. The notes were deposited with B., with instructions to deliver the two-months note to M. on the certificate of the engineer that the grading was done and the iron on the ground, and the four-months note on his certificate that the road was completed. *Held*, that the completion of the road within four months was not a condition precedent to the right of M. to a delivery to him of the notes.

2. A condition precedent to the delivery of defendant's notes, that certain work be done at certain time, is waived by defendant's thereafter directing that the notes be delivered.

3. Evidence of mistake of defendant in directing delivery by a trustee of defendant's notes, or of fraud in their delivery, is not admissible under an answer merely denying that they were ever delivered by defendant, and alleging that they were delivered by the trustee before certain work was completed, in contravention of a certain contract.

4. M. agreed to construct a street railroad to defendant's property within a certain time, and defendant, in consideration of "the advantages to be derived" by him "from the extension and operation of said railroad," agreed to give M. a certain amount therefor, evidenced by his notes. *Held*, that defendant, by giving his notes to M.

after the construction of the road, was precluded from claiming a partial failure of consideration, or damages by reason of the road not being completed within the time specified; the giving of the notes being a conclusive settlement of all obligations of both parties arising from the contract.

5. An answer alleging that, if a street railroad had been completed as provided by the contract of plaintiff's assignor, defendant would have been able to sell his property for a greater price than it was "then worth without said railroad," or "is now worth with said railroad," and that defendant could, before making the contract for construction of the road, have sold his land at a greater price than he could when the road was completed, or at any time since, does not show any damages from delay in the construction of the road, it not being alleged that the decline in price was after the time the road should have been completed, or that delay in constructing the road caused the decline, or that defendant would have sold his land at any price had the road been completed within the contract period.

Commissioners' decision, Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by the Witmer Bros. Co., a corporation, against Ivar A. Weid. Judgment for plaintiff. Defendant appeals. Affirmed.

H. G. Weyse, for appellant. P. W. Dooner, for respondent.

VANCLIEF, C. Action on two promissory notes made by defendant to James McLoughlin, each for $500, with interest after maturity at rate of 1 per cent. per month, and assigned by McLoughlin to plaintiff. The judgment was in favor of plaintiff for the full amount of principal and interest of both notes. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

The notes were made to secure payment of defendant's subscription of $1,000, to be paid to McLoughlin in consideration of the construction of a proposed street railroad on a specified route passing through defendant's land. The following is a copy of the subscription contract: "This agreement, entered into this 27th day of December, 1887, by and between H. H. Wilcox, Frederick J. Moll, Henry Claussen, Mrs. H. Lee Noble, Manuel Andrada, Martin Labaig, Laurent Etchopero, Levi H. Dunham, Nicholas Cochems, N. L. Shaffer, M. Sanders, T. B. Rapp, Claudio Lopez, Wm. H. Avery, I. W. Lord, W. D. Wilson, Linwood Salter, S. C. Sloan, Ivar A. Weid, H. M. Russell, parties of the first part, and James McLoughlin, party of the second part, witnesseth: That whereas, it is desirable that the steam dummy railroad now running from the terminus of the Second Street Railroad, at the corner of Diamond street and Belmont avenue, westerly by various streets and ways to the southwest corner of section 12, T. 1 S., R. 14 W., S. B. M., be extended north three-fourths of a mile and west one and one-fourth miles, to the west line of east half of N. E. ¼ of section 10, T. 1 S., R. 14 W., S. B. M., the parties of the first part, in consideration of the advantages to be derived by them from the extension and operation of said railroad, agree to pay to James McLoughlin, party of the second part, the several sums set opposite our names, on the following terms and conditions, to wit: Ivar A. Weid, $1,000. [The names and sums of the other nineteen are here omitted.] That the said amounts subscribed shall be payable as follows: One-half, represented by two-months notes, when grading is done and the iron is on the ground; the balance, represented by four-months notes, on the completion of the said road, on the first day of its operation. That the dummy railroad shall be extended from its present terminus to the west line of east ½ of N. E. ¼ of section 10, T. 1 S., R. 14 W., S. B. M., by the route above designated, within four months, weather permitting. That the said dummy railroad shall be well and substantially built, and shall be operated by steam power, and shall have a speed and carrying capacity equal to all requirements of the section; that the fare upon this road shall not exceed fifteen cents for residents along the line of the road as a commutation rate: provided, always, that the right of way be secured to James McLoughlin, on demand of James McLoughlin, for said extension absolutely, and for further extension of his road, by the first parties, and each of them, over and by any route that the said McLoughlin shall adopt for the construction thereof, to the westerly line of Wilcox's land, or the northerly line of Weid's land. That the said amounts shall be evidenced by the promissory notes of the above subscribers executed to the said James McLoughlin, each subscriber executing two such notes, each reading one-half the amount of his subscription; the one payable two months after date thereof and the other four after date thereof, and each bearing interest at the rate of one per cent. per month after maturity. That said notes, when so executed, shall be deposited with Geo. H. Bonebrake, at the Los Angeles National Bank, to be held in trust until the conditions in this contract specified shall be performed by the said McLoughlin, and the certificate of Geo. E. Pillsbury, constructing engineer of said road, that said conditions have been performed, shall be served upon said trustee, and upon the delivery to him of said certificate, viz. 1st, that the grading is done and the rails on the ground; and, 2nd, that the road is completed and in running order,—he shall deliver to said James McLoughlin the two-months notes and the four-months notes, respectively, at the times of such respective presentations. In consideration of the foregoing agreement of the parties of the first part, and the guaranty of I. A. Weid, O. G. Weyse, and H. H. Wilcox, hereinafter contained, said McLoughlin promises and agrees to build and equip said railroad as hereinafter specified. And said subscribers, H. H.

Wilcox, O. G. Weyse and Ivar A. Weid, in consideration of the promises aforesaid, do hereby guaranty to pay to said McLoughlin when said railroad shall be completed, evidenced as aforesaid, the further sum of $1,200.00, thereby making a total subscription of $10,000.00, and said guaranty to be apportioned as follows: H. H. Wilcox, $600; O. G. Weyse & I. A. Weid, jointly and severally, $600. The said H. H. Wilcox further agrees to and hereby guaranties the subscriptions and obligations of Ivar A. Weid aforesaid. [Signed] James McLoughlin. H. H. Wilcox. N. Cochems. Ivar A. Weid."

The findings of fact bearing on the points made by appellant are as follows: "(1) That the promissory notes in suit were both deposited in escrow with George H. Bonebrake by the defendant, Ivar A. Weid, on the 24th day of January, 1888, with only the written instructions by the defendant to said Bonebrake, of said date, as follows, viz.: 'The above notes, due in two months from date of same, to be delivered to said James McLoughlin upon the certificate of Geo. E. Pillsbury that the grading for the West End Dummy R. R. is finished to Wilcox avenue in Hollywood, and that the iron for the same is on the ground; and the four-months note to be delivered to said McLoughlin upon the certificate of said Pillsbury that the road is finished and cars running to Wilcox avenue in Hollywood.' (2) That on the 7th day of May, 1888, the defendant notified said Bonebrake not to deliver the said notes, or either of them, to said McLoughlin, and thereafter, on or about the 10th day of May, 1888, said defendant departed from the state of California, and visited the continent of Europe, and remained absent from the state of California continuously until about the first day of April, 1891. (3) That on the 7th day of June, 1888, the said McLoughlin had finished the grading of the roadway for the said dummy railroad, and had the necessary iron and rails deposited on the ground, and thereupon on said day procured the certificate of Geo. E. Pillsbury, the said civil engineer, to all the said facts, and presented the same to said Bonebrake, and thereupon on said day demanded of him the delivery of the said two-months note in suit; but the said Bonebrake failed and refused to deliver the same at said time, by reason of the notification not to do so as aforesaid. That, thereafter, on the 14th day of August, 1888, the said James McLoughlin had completed said railroad, and put the same into operation, and had cars running thereon throughout, and on the said day procured the certificate of said George E. Pillsbury, engineer, to all the said facts, and on said day presented said certificate to said Geo. H. Bonebrake, and demanded of him the delivery of said four-months note in suit; but the said Bonebrake failed and refused to deliver the said note at said time, by reason of the notification by him received from said defendant not to do so, as aforesaid. (4) That on the 8th day of November, 1888, the defendant, Ivar A. Weid, acting by and through John Milner, his attorney in fact, thereunto fully authorized by a valid existing general power of attorney, theretofore duly executed by Ivar A. Weid, the defendant, and duly recorded,—which power duly authorized his said attorney, as the act and deed of him, the said Ivar A. Weid, 'to sign, seal, execute, deliver, and acknowledge such deeds, leases, and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt,' 'and such other instruments in writing of whatsoever kind and nature, as may be necessary or proper in the premises, * * * hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue of these presents,'—instructed said Bonebrake, trustee, in writing, to deliver the notes in suit to said McLoughlin, and on the day next succeeding, to wit, the 9th day of November, 1888, in obedience to said instruction, the said Bonebrake did accordingly deliver the said notes to the said James McLoughlin."

It will be observed that the road was not completed within four months after the date of the contract, as provided therein, nor until the 8th of August, 1888. As to the cause of this delay, the court found: (1) That the contract was not fully executed by all the parties of the first part until January 24, 1888, when the notes were deposited with Bonebrake; (2) that the parties of the first part failed to procure the right of way for said road, as provided in the contract; and (3) that the chief cause of the delay was that the rails and other materials for the road, while being transported by railroad, were delayed by a washout of the track; that these delays were unavoidable and without fault on the part of McLoughlin; and, furthermore, that the defendant suffered no injury or damage by reason of the delay.

1. Appellant contends that defendant's notes were never properly delivered, because defendant, on May 7, 1888, two days before his departure for Europe, notified Bonebrake that he had rescinded the subscription contract, on the ground that the terms thereof had not been complied with by McLoughlin. Conceding that the notes should be read and construed in the light of the subscription contract, which, by the way, had not been deposited with, or seen by, Bonebrake, it will hardly be contended that defendant could have rescinded that contract by mere notice to Bonebrake that he had rescinded it, without any notice of such rescission, or of his intention to rescind, to McLoughlin. It is not pretended that defendant ever notified McLoughlin of his intention to rescind, or of any objection to the delay of the work, until after the road had been completed, and after both notes had been delivered by Bonebrake pursuant to the written order of defendant's

agent, Milner. Nor does it appear that McLoughlin had any knowledge of defendant's notice to Bonebrake that he had rescinded the contract until June 7, 1888, when the work had been so far advanced as to entitle McLoughlin to delivery of the two-months note, and even then only by inference from the facts that Bonebrake then refused to deliver the two-months note, and probably then informed plaintiff of his reason for the refusal; for there is no express testimony that Bonebrake ever informed McLoughlin of defendant's notice of rescission. Nor did the defendant pretend that his notice to Bonebrake effected a rescission, or was more than mere notice to Bonebrake of a rescission already effected, as it purported to be. When and by what means had the alleged rescission been effected? To this inquiry there is no response in the record.

Another alleged reason why the notes were not properly delivered is that the time within which the road was to be completed is of the essence of the contract, and, therefore, that the completion of the road within that time was a condition precedent to the right of McLoughlin to a delivery to him of the notes. But nothing of this is expressed in the contract, nor do I think it is implied. The only conditions upon which payment of the subscriptions were to be made were: "One-half, represented by two-months notes, when the grading is done and the iron is on the ground; the balance, represented by four-months notes, on the completion of the road, on the first day of its operation." It was surely and necessarily intended that the two-months notes were to be delivered before the road was completed. Then, again, the written instructions to Bonebrake as to the conditions upon which he should deliver the notes, agreed upon by the parties and deposited with the notes, correspond with the conditions named in the contract, as follows: "The above notes [list of all the notes], due in two months from date of same, to be delivered to James McLoughlin upon the certificate of Geo. E. Pillsbury that the grading for the road is finished to Wilcox avenue in Hollywood, and that the iron for same is on the ground; and the four-months notes to be delivered to said McLoughlin upon certificate of said Pillsbury that the road is finished and cars running to Wilcox avenue in Hollywood." The subscription contract was not deposited with Bonebrake, nor did he know its contents until after delivery of all the notes in strict obedience to the above instructions and to the following written order indorsed on said instructions: "L. A., Cal., Nov. 8, 1888. Geo. H. Bonebrake: Deliver to Jas. McLoughlin the two notes given by Ivar Weid for $500 each. Ivar A. Weid, by John Milner, His Attorney in Fact."

These conditions precedent, expressly enumerated as such in the contract and in the instructions to Bonebrake, exclude all others which are not expressly made such; and since the provision in the subscription contract that the road "shall be extended from its present terminus to the west line of east half of northeast quarter of section 10, * * * by the route above designated, within four months, weather permitting," is not expressly made a condition precedent, nor declared to be of the essence of the contract, it should not be so construed. The case of McLaughlin v. Clausen, 85 Cal. 322, 24 Pac. 636, cited by appellant, is not in point; for, though that action was upon one of the notes made pursuant to the subscription contract in question here, this court said: "It does not present the mere question whether the stipulation that the road should be completed and running within a certain time was of the essence of the contract;" and this question was not considered in that case, though it was there held that "the completion of the road was, by the terms of the contract, made an absolute condition precedent, and until such completion the note could not be delivered or take effect." In that case the question thus decided arose upon a general demurrer to the answer, in which it was alleged that the road was not completed when the note was delivered.

But even if it be conceded in this case that time was essential, and that completion of the road within the time mentioned was a condition precedent to the delivery of the notes, yet the defendant was at liberty to waive the condition; and I think he did waive it by his written order on Bonebrake to deliver the notes given by his duly-authorized agent, Milner, as found by the court. No doubt that Milner was authorized to order the notes to be delivered, and that the construction of his written power of attorney from defendant by the court was correct in this respect. The only matter urged against the legitimate effect of this order by Milner is his testimony that at the time he gave the order he "was not aware of the fact that Mr. Weid had given written instructions to Major Bonebrake not to deliver those notes. When Mr. Weid left for Europe he gave no special instructions in regard to those notes, but did give me special instructions in regard to the managing of his ranch, and so on. He mentioned, in a general way, that he had given some notes to Mr. McLoughlin in connection with the building of this road, without any further instructions about them." This shows no material mistake of either the agent or principal. The agent did not exceed his authority, and did only what his principal was plainly obligated to do by his contract; besides, under the pleadings, the testimony of Milner was wholly immaterial and irrelevant. The answer simply denies that the notes were ever delivered by defendant to plaintiff, and alleges that they were delivered by Bonebrake before the road was completed, "in contravention of the terms of said contract." There is, in the answer, no averment of mistake or fraud.

2. The only other point made by appellant is that there was a failure or partial failure of consideration for the notes; and counsel for appellant says the question of failure of consideration "resolves itself into this: Was the stipulation in the contract as to time a material one?" We have seen that the time mentioned in the contract within which the road was to be completed was not a condition precedent to the delivery of the notes, and that the notes were voluntarily and properly delivered after the road was completed. Under these circumstances, I think the delivery of the notes precluded a plea of failure or partial failure of the consideration expressed in the contract, to wit, "the advantages to be derived by them [parties of the first part] from the extension and operation of said railroad." As it is admitted that the road was completed on August 8, 1888, the only possible failure of the consideration was the failure to operate the road from April 27th until August 8, 1888; and such failure occurred, and must have been known to all parties interested, before the notes were delivered. In the absence of fraud and mistake, the delivery of the notes completed a conclusive settlement of all obligations of both parties arising from the subscription contract. After such settlement that contract was satisfied, and was no longer executory by either party. The delay of 3½ months in completing the road, known to defendant at the time of the settlement, must have been considered of no consequence injurious to the defendant, or excusable, as found by the court. Furthermore, there is no foundation in the answer for a counterclaim, or a recoupment of damages on account of the delay, as to which the whole substance of the answer is as follows: If the road had been completed as in the contract provided, the defendant would have been able to sell his property "at greatly enhanced price over what it was then worth without said railroad, and over what it is now worth with said railroad"; and "defendant could, during the month of December, 1887, and before signing said contract and notes, have sold his said land at a greater price than he could at the time of the alleged completion of said road, or at any time since." It thus appears that there was a decline in the market value of plaintiff's land between the written date of the contract and the completion of the road; but whether such decline occurred during the four months within which the road was to have been completed, or later, is not stated. Nor is it alleged that the delay in constructing the road caused any decline in the market price of defendant's land, nor that plaintiff would have sold his land at any price, even if the road had been completed within the contract period. That the court properly excluded proof of these averments in the answer is too obvious to admit of question. Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659.

The findings of fact by the court are fully justified by the evidence. I think the order and judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are affirmed.

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108 Cal. 549

SAN DIEGO WATER CO. v. SAN DIEGO FLUME CO. (No. 19,446.)

(Supreme Court of California. Aug. 26, 1895.)

SPECIFIC PERFORMANCE — PLEADING — PARTIES— CONTRACTS OF CORPORATIONS—MONOPOLIES—PARTNERSHIP.

1. A complaint asking the specific performance of a contract and damage for its nonperformance on the same facts sets up a single cause of action.

2. When two water companies contract with each other to unite in furnishing a city water, and each appoints a trustee to manage its business, such trustees are not necessary parties to an action by one company against the other to enforce the contract.

3. A corporation owning water pipes without a city contracted with one owning those within it to deliver water for the city at the city limits, and made it its agent for the sale of water within the city, sales subject to its approval. Two trustees named in the contract, one appointed by each corporation, were to have general charge of distribution of the water, but were authorized to perform only such duties as a board of directors could perform by an agent, except that they had a limited power to determine what should be charged for operating expenses. *Held*, that the contract was not ultra vires as taking the management of the corporation from their respective board of directors and conferring it on two trustees, each a stranger to the corporation appointing the other.

4. Under Const. art. 14, § 1, water supplies of cities were put under control of the state, and the rate to be charged under control of the governing body of each city. *Held*, that a contract between a corporation owning a water supply, and pipes to conduct it to the limits of a city, and a corporation owning a system of distributing pipes in the city, under which water is to be supplied to the city, is not void as creating a monopoly.

5. Under the contract, the proceeds of sales, after deducting operating expenses, including necessary extension of pipes, were to be divided between the companies. Two trustees named in the contract, one appointed by each corporation, were given general charge under the contract. *Held*, that no partnership was created.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the San Diego Water Company against the San Diego Flume Company for specific performance of a contract, and damages for its breach. From a judgment for defendant, plaintiff appeals. Reversed.

Works & Works, for appellant. Luce & McDonald, for respondent.

HAYNES, C. Defendant's demurrer to the complaint was sustained, and, the plaintiff declining to amend, judgment of dismissal was entered, from which judgment it appeals. The only questions to be considered therefore, are those presented by the demurrer.

The complaint alleges, in substance, that both the parties to this action are corporations organized and existing under the laws of this state for the purpose of distributing, selling, and furnishing water to consumers in the county and city of San Diego; that the plaintiff is the owner of a complete distributing plant for furnishing water to the city of San Diego and its inhabitants; that the defendant is the owner of water rights, reservoirs, and a supply of water outside of said city, from which the water is conducted by flumes and pipes to the city boundary, where, during all the times mentioned in the complaint, they were and are connected with the water mains and pipes of the plaintiff; that the defendant was not and is not the owner of any water pipes within the city, and was unable to distribute or furnish its water to the city or its inhabitants. Under these circumstances, the parties to this action executed two written agreements, both bearing date November 6, 1890, which are referred to as Exhibits A and B, respectively, but which constitute one contract. By the first, the flume company appoints the water company its sole agent for the exclusive sale of its water within the corporate limits of the city, as then or thereafter established, excepting the peninsula of San Diego; but all sales made by the water company "shall be subject to the approval of the party of the first part [the flume company], and no sales shall be made without the consent of the party of the first part." It was further provided that said appointment should continue and be in force during the continuance of the other contract of the same date, namely, 20 years. The other contract—Exhibit B—is very long, but for the purpose of disposing of the questions made upon this appeal may be greatly condensed. By this agreement E. S. Babcock and J. W. Sefton, the former the president of the plaintiff corporation, and the latter the president of the defendant, were appointed trustees, to whom were given the control of the properties of these corporations, respectively, "so far as the same may be confined to the corporate limits of the city of San Diego," to operate and control the same for the use and benefit of the respective parties thereto. These trustees were selected and named, one by each corporation, and each was to hold said office of trustee at the pleasure of the party naming him, who should also appoint his successor, and the compensation of each should be fixed and paid by the party appointing him; that "the use, operation, and control of these properties by the said trustees shall be for the purpose of furnishing the water supply to the city of San Diego and its inhabitants, the profits arising therefrom to be subject to the control and use of the parties hereto, as hereinafter mentioned; said parties hereto agreeing to combine their joint endeavor for the advancement of their respective interests under this trust, subject to the conditions as hereinafter mentioned." The water company agreed to furnish its entire plant, and the flume company agreed to deliver at the city limits a sufficient quantity of good water for the supply of the city and its inhabitants, to be used by the trustees for that exclusive purpose. The trustees were to keep three separate accounts, one designated as the "operating account," another as "first-division account," and the third, as "second-division account." The second and third accounts were for the purpose of distributing the profits between the respective corporations. The agreement stated, in a general way, what should be charged to operating expenses, and except as provided, and excluding certain specified matters, the trustees were empowered to determine what should constitute a proper charge to that account. It was also provided that the flume company might use the water company's system of pipes for conducting water to parties outside the city limits, the compensation therefor to be fixed by the trustees.

The complaint further alleged that the parties thereto entered upon the performance of said agreement, that the plaintiff in all things carried out and performed the same on its part, that plaintiff and defendant and their said trustees failed to agree as to the proper basis of division of the accounts between them, and especially as to the amount to be expended for the extension of plaintiff's plant, and have been unable to agree upon a settlement of their said accounts; alleged plaintiff's willingness to settle and adjust the same, but that defendant made said differences an excuse for not furnishing the water required by the contract, and had wholly failed since May 2, 1892, to comply with said contract, though plaintiff had demanded in writing such performance; alleged that upon a true and just accounting there was due to it from defendant the sum of about $50,000, but that if the court should find otherwise, and that it was indebted to the defendant, it thereby offered to pay the same; that, by the defendant's failure to comply with its said contract, plaintiff had been damaged in the sum of $100,000; that, acting under said contract, plaintiff contracted with the city of San Diego to supply it with water for the term of 20 years at a reasonable profit, but that defendant, after furnishing water for said purpose for about a year, failed and refused to longer furnish the same, whereby plaintiff sustained special damage in the sum of $100,000.

The prayer is for an accounting, for damages, and for a specific performance of the contract, and for general relief.

The demurrer was upon several grounds, viz.: (1) For want of facts sufficient to constitute a cause of action; (2) that two alleged causes of action for damages are joined with an alleged cause of action for specific performance, without separately stating said several causes of action; (3) for defect of parties, in that Babcock and Sefton, the trustees, are not made parties; and (4) that the complaint is uncertain, in that several causes of action are joined without being separately stated and numbered.

The second and fourth grounds of demurrer go to the joinder of several causes of action without being separately stated. Different causes of action are not stated, however. Both legal and equitable relief is sought, but the right to such relief is based upon the same facts. Pom. Rem. § 452. Nor is the third ground of demurrer well taken. The trustees were simply the agents or instruments of the parties to the contract, and had no interest in the controversy in any legal sense.

Whether the complaint states facts sufficient to constitute a cause of action is the principal question in the case. Respondent contends "that enough appears upon the face of the complaint to show that said contracts were void, because beyond the powers of the respective corporations, and against the public policy of the state." The questions here presented were discussed by counsel in another action between the same parties, but that case went off upon another point, and no opinion was expressed upon them. San Diego Water Co. v. San Diego Flume Co., 100 Cal. 43, 34 Pac. 656.

It is contended that the contract in question was ultra vires, because under it the management of the affairs of the two corporations were taken from their respective boards of directors and transferred to two trustees, each of whom is a stranger to the corporation appointing the other. This statement of the effect of the contract is too broad. When analyzed, the powers of the trustees are very limited. By that part of the contract called "Exhibit A," the plaintiff, as a corporation, was appointed the agent of the defendant corporation for the sale of water within the city of San Diego; but all sales were subject to the approval of the defendant, and no sales could be made without its consent. The trustees were not given any power or authority over the sale of the water. They were given the general charge of operating the works of the plaintiff in distributing the water furnished by the defendant, and of keeping the accounts of receipts and expenses, with a limited power of determining what should be charged to the account of operating expenses; and, with that exception, their whole powers and duties were executory, and such as could not be discharged by any board of directors otherwise than through an agent. Nor is it material whether these agents were or were not connected with either corporation. They derived their authority from the agreement, and, as they were named in the agreement, each corporation acted upon and consented to the appointment of both. It is not contended that two corporations may not enter into contracts with each other. Their power to do so depends, however, upon the character of the contract, examined in the light of their charters and of public policy. So far as the subject-matter of the contract is concerned, it relates to the sale and distribution of water, and to that extent, at least, it relates to the very purpose of the organization of each of these corporations, and is therefore presumably within their power. It is contended, however, in support of the demurrer, "that, under the power conferred by subdivisions five and eight of section 354 of the Civil Code, the defendant, by its board of directors, was only authorized to appoint such agents and enter into such contracts as were essential to the transaction of its ordinary affairs; and that any attempt to make the plaintiff its exclusive agent for the sale of water was illegal and beyond the powers of the corporation." The statement that plaintiff is made "the exclusive agent" of the defendant for the sale of water is too broad. Such agency is confined to the corporate limits of the city of San Diego, within which the plaintiff alone had the means of distributing water to consumers. The agency, however, while exclusive, was not unlimited or unrestricted; but all sales of water were to be subject to the approval of the defendant, and no sale could be made without its consent. It is not suggested that the plaintiff corporation could not legally become an agent as to matters consistent with or in furtherance of the objects of its organization, nor that the defendant, within similar limitations, could not appoint an agent; but the real question involved lies back of and beyond these objections, which go only to the instrumentalities used to carry out the ultimate purpose of the parties in making the contract in question, viz. that the contract is against public policy, and therefore void.

It is urged that "both corporations were formed for the purpose, among other things, of furnishing water to the city of San Diego and its inhabitants, and are, therefore, quasi public corporations"; and that "the agreement is contrary to public policy, for the reason that it is a combination between the parties for the purpose of creating a monopoly for the sale of water to the city of San Diego and its inhabitants." That the contract is consistent with the purpose of the organization of each of these corporations, viz. "to furnish the city of San Diego and its inhabitants with water," is too clear for discussion. The question is therefore narrowed down to this: Does the agreement create a monopoly, or in any manner injuriously affect the interests of the city or its inhabitants? "Monopoly" signifies the sole power of dealing in a particular thing, or doing a particular thing, either generally or in a particular place. A monopoly is usually, though not necessarily, harmful or injurious to public interests, though, as that term is generally used, injury to the public is implied, and competition is therefore regarded as favorable to the public interest. But there is a competition which tends to monopoly by driving out all but the stronger competitor, when prices are again increased so as not only to yield a profit upon the original investment, but to recoup the losses incurred in breaking down competitors; or, where the competitors are of equal strength and tenacity of purpose, it may result in the destruction of the public service by the collapse of all of them. At and before the date of the contract in question, the plaintiff was the owner of a pumping plant, and of a system of mains and pipes for the distribution of water to the city of San Diego and its inhabitants, and was engaged in supplying them with water. The defendant was the owner of a reservoir supplied with water, together with flumes and pipes by which the water was conveyed to the borders of the city; but it owned no distributing plant by which it could dispose of its water within the city. To enable it to do so, it must either purchase plaintiff's distributing plant, or construct a distributing system of mains and pipes of its own, or sell its water within the city by or through the plaintiff, under some agreement for that purpose. It is not suggested that one distributing plant is not sufficient for all the wants of the city and its inhabitants, and certainly we cannot assume that it is not. Some agreement of the character here in question which would effectuate the evident intention of the parties would appear to be to the best interest of both corporations; and if the city and its inhabitants can be properly served through one distributing system, at reasonable rates, it is obviously to its best interest that its streets should not be subjected to the burden of laying and keeping in repair an additional system of mains and pipes. So far as the parties to this contract are concerned, the restraint is only partial. It is confined to the city of San Diego, or rather to that part of it which did not include the peninsula; and this, we think, was upon a sufficient consideration, and not an unreasonable restriction as between the parties. See Mitchel v. Reynolds, 1 Smith, Lead. Cas. (8th Ed.) 417. Nor does it injuriously affect the city or its inhabitants. Our constitution provides that "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law"; and it further provides that the rate or compensation to be collected for the use of water supplied to any city or town or its inhabitants shall be fixed annually by the governing body of the city and county, or city, or town, and any person or corporation collecting water rates "otherwise than as so established" shall forfeit the franchises and waterworks of such person or corporation to the city, etc. Const. art. 14, § 1. In Spring Valley Water Works v. City of San Francisco, 82 Cal. 286, 22 Pac. 910, 1046, it was held that, when the constitution provides for the fixing of rates or compensation for the use of water, it means reasonable rates and just compensation; that the power of regulating rates is not a power of confiscation, or to take the property of the water company without just compensation.

Under the constitution, and the construction thus given its provisions, we fail to perceive how the agreement in question can create a monopoly, or in any manner increase the rate or compensation to be paid by the city or its inhabitants for the water supplied. Indeed, it is evident that water can be supplied more cheaply through one distributing plant than through two; and the governing body of the city, in whom is vested the power to fix the water rates, is bound to take that fact into consideration, as well as all other facts which will enable it to fix "reasonable rates" and award a "just compensation." In Mor. Priv. Corp. § 1129, it is said that the same rule which applies to traffic arrangements between competing railroads applies also to telegraph, water, and gas companies; and, in relation to traffic arrangements between competing roads, it is said, at section 1131: "It is certainly not true that all agreements or combinations restricting competition are illegal at common law. * * * Even if there were such a rule as has been claimed, applicable to competition in trade, the principle and policy of the rule would not be applicable to traffic arrangements designed merely to prevent ruinous competition and 'wars' among railroad companies. The main objection which has been urged against combinations restraining competition in trade, namely, that such combinations tend to produce monopolies and cause extortion, has no application to combinations among railroad companies; for railroad companies are prohibited by law, irrespective of any combination, to charge more than reasonable rates. * * * Public policy clearly does not demand that railroad companies operating competing lines shall engage in strife causing their financial ruin." With even greater force may it be said in this case that public policy does not condemn nor prohibit an arrangement intended to prevent a competition between these corporations which would inevitably result in the financial ruin of one or both of them, and which could not in any event benefit the city or its inhabitants.

The contention that the agreement in question creates a partnership between these corporations is without force. It does not appear that it covers all of the business of either party, though the whole of the business of each relates to the sale of water. In a partnership, each partner has authority to represent all the partners, and to bind them by his acts so far as they relate to the partnership business. Here the agency is not of that character, but is expressly limited. It simply provides a mode of determining the compensation the defendant shall receive for the water furnished by it to the plaintiff,—an arrangement made necessary by the fact that neither of the parties, nor both combined, could determine the rate at which the water could be sold to consumers, nor accurately fix the cost of distribution, nor the quantity of water required.

The judgment should be reversed, with directions to overrule the demurrer to the complaint.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with directions to overrule the demurrer to the complaint.

immediate delivery, and followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller, disputable only by making it appear, on the part of the person claiming under such sale, that the same was made in good faith, for a sufficient consideration, without intent to defraud such creditors." The court gave the instruction as asked, but added thereto the following: "This presumption is subject to the same rule as the former. It may be overcome by any evidence that satisfies your minds to the contrary." It is claimed that it was error to so modify the instruction requested. The objection is that by the instruction as given the jury were at liberty to find that the presumption of fraud arising from a want of delivery could be overcome by any evidence which to them seemed satisfactory, while the statute provides that such presumption is disputable only by showing "that the sale was made in good faith for a sufficient consideration, without intent to defraud such creditors." But it seems to us that, when the entire instruction is considered, it is not properly subject to the objection urged. By it the jury are first told that the presumption of fraud is disputable only by making certain things appear, and then that it may be overcome by any evidence "which satisfies your minds to the contrary"; that is, that any evidence which satisfied the minds of the jury that the sale was made in good faith, for a sufficient consideration, and without intent to defraud creditors, was enough. It was only evidence of such facts which, under a rule of law as laid down by the court, could be "to the contrary"; and hence, by reference to what preceded, the language used is, in effect, that evidence satisfying the minds of the jury that the sale was made in good faith, for a valuable consideration, and without intent to defraud creditors, was sufficient to overcome the presumption of fraud arising from the want of a change of possession. But, whether this is a proper construction or not, the error was harmless, because the court instructed the jury, at the request of the defendant, that if, at the time of the seizure by the defendant under the writ, the husband of plaintiff was in possession of the horses, or exercising acts of ownership over them, and the sheriff had no notice of plaintiff's claim, the attachment was valid; and, as the jury found for plaintiff, they must necessarily, under this instruction, have found that the property was taken from the possession of plaintiff, and not her husband, and therefore the question as to the presumption of fraud declared by the statute was immaterial. The retention by the vendor of the possession of personal property capable of immediate delivery raises only a presumption of fraud, but this presumption continues no longer than the property remains in the possession of the vendor; and if, as the jury found, the possession of the horses in dispute had been delivered to, and they were under the supervision and control of, the plaintiff, at the time the defendant attached them, there was no room for the application of the rule referred to. It was only important in view of defendant's contention that there never had been a change of possession; and that question having been submitted to the jury, and they having found against the defendant, any error committed by the court in instructing on the assumption that the possession remained in the husband was harmless. This view disposes of all the other assignments of error, and sustains the judgment of the court below.

The case seems to have been submitted to the jury on the theory that, if the property was in the possession of the plaintiff's husband at the time it was attached, she could not recover, whether she had purchased it in good faith or not. This was certainly as favorable to the defendant as he could reasonably ask, and, under the verdict rendered, any error committed by the court in instructing the jury in reference to the presumption of fraud arising from the want of delivery was immaterial. It follows that the judgment of the court below must be affirmed.

In re WONG HANE. (31 Cr.)

(Supreme Court of California. Sept. 4, 1895.)

CITY ORDINANCE—POSSESSION OF LOTTERY TICKET.

An ordinance making it "unlawful for any person to have in his possession, unless it be shown that such possession is innocent, any lottery ticket," is unconstitutional, in that it places on one accused of its violation the burden of showing the innocence of his possession.

In bank.

Application of Wong Hane for a writ of habeas corpus. Granted.

M. G. Norton, for petitioner. W. E. Dunn, for respondent.

HARRISON, J. The petitioner is held in confinement by the chief of police of the city of Los Angeles, under a warrant of arrest issued by the police judge of that city, upon a complaint charging him with the violation of a city ordinance, in that he did "willfully and unlawfully have in his possession—such possession being neither innocent nor for a lawful purpose—a certain tool, device, and paper used, and intended to be used, in and for the contriving, setting up, preparing, and drawing a certain lottery." The ordinance under which the complaint is made is as follows:

"The mayor and council of the city of Los Angeles do ordain as follows:

"Section 1. It shall be unlawful for any person to have in his possession, unless it be shown that such possession is innocent or for a lawful purpose, any lottery ticket; or any ticket, certificate, paper or instrument, purporting or representing, or understood to be or to represent, any ticket, chance, share or interest in or dependent upon the event of any lottery; or any tool, instrument, stamp or device, used or intended to be used in or for contriving, preparing, making, writing, printing, stamping, or getting ready for sale or distribution any lottery ticket or tickets.

"Section 2. Any person who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or be imprisoned in the city jail for a term not exceeding six months, or by both such fine and imprisonment."

The effect of this ordinance is to make proof of the mere possession of a lottery ticket a misdemeanor, and to place upon the defendant the burden of showing that his possession was lawful or innocent. The mere possession of a lottery ticket does not, however, of necessity, involve the possessor in a crime. The ticket may be in possession of the court, or of one of its officers, to be used as evidence upon the trial of one charged with selling it. It may be in the possession of one who purchased it in a country which recognizes the right to traffic in lottery tickets, and who is merely passing through the city. The Penal Code of this state does not make the purchase of a lottery ticket an offense; the provisions of that Code being directed against the selling of such tickets. By the very terms of the ordinance under consideration, it is assumed that the possession of the ticket may be lawful or innocent, and that, in such case, the possessor is not guilty of a violation of the ordinance. The ordinance, however, throws upon the defendant the burden of proving his innocence; and by its terms, unless he shows that his possession is lawful or innocent, his mere possession of the ticket renders him liable to punishment. If there are any circumstances under which the possession of a lottery ticket may be lawful or innocent, a defendant who is charged with the offense of having such ticket in his possession is entitled to the presumption of innocence, and cannot be compelled to establish his innocence by affirmative proof. To the extent that the defendant is required to establish his innocence, the provisions of the ordinance violate his constitutional rights.

It is not sufficient to say that the prosecution may disregard this clause of the ordinance, and itself make proof of the criminal intent of the defendant, or show that his possession was not innocent, or for a lawful purpose. The ordinance is to be tested by its own terms. It has declared that the offense does not exist "unless it be shown that such possession is innocent, or for a lawful purpose." Instead of enacting that the possession with a criminal purpose shall constitute the offense, the city council has industriously provided that the offense is established unless the possession is shown to be with an innocent purpose. This is a qualification attached to the definition of the offense, and is, of necessity, to be established by the defendant, since, if it were shown by the prosecution, it would establish the innocence of the defendant, and, therefore, that no offense had been committed. Nor can this clause in the ordinance be disregarded as being unconstitutional, and effect be given to the first part alone. The provisions of the ordinance are to be considered as a whole, and it is not to be assumed that the city council would have adopted the first clause without enacting the condition thereto. The connection of the two clauses by the conjunction "unless" shows that they are to be taken together, and that the first clause does not, by itself, express the legislative will of the council. It is well established that a statute may be in part constitutional, and in part unconstitutional, and, if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected; but, as was said in Poindexter v. Greenhow, 114 U. S. 305, 5 Sup. Ct. 903, 962: "These are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact." The same court also said in Spraigue v. Thompson, 118 U. S. 94, 6 Sup. Ct. 988, where it was sought to apply the rule to certain illegal exceptions in a statute of the state of Georgia: "The insuperable difficulty with the application of that principle of construction to the present instance is that, by rejecting the exceptions intended by the legislature of Georgia, the statute is made to enact what confessedly the legislature never meant. It forces upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted, in view of the illegality of the exceptions." See, also, Cooley, Const. Lim. pp. 209-212; Warren v. Charlestown, 2 Gray, 84.

As we can consider the ordinance only in the form in which it has been enacted, we must hold that it did not authorize the arrest of the petitioner. The petitioner is, therefore, discharged.

We concur: GAROUTTE, J.; McFARLAND, J.; HENSHAW, J.; VAN FLEET, J.; TEMPLE, J.

(5 Cal. Unrep. 119)

WRIGHT v. WRIGHT. (No. 19,511.)

(Supreme Court of California. Aug. 28, 1895.)

HUSBAND AND WIFE—COMMUNITY PROPERTY—TRIAL—FINDINGS.

1. Where property purchased with community funds is conveyed to the wife by direction of the husband, and with the intent that it shall become separate property, that conveyance will operate as a gift from him to her.

2. Where a complaint alleges the making of deeds to certain property in the wife's name, and that the property was paid for with community funds, and is community property, and the answer admits the making of the deeds, but alleges that the property was paid for with the wife's separate funds, and is her separate and individual property, there is no reversible error in a finding that the deeds were so executed by the instruction of the husband, for the purpose of vesting title in the wife, as her separate and individual property, and not as belonging to the community.

3. In an action by a husband to have set aside conveyances of certain realty to his wife, and to have the property declared community property, the complaint also alleging desertion of him by the defendant, judgment will not be reversed for want of a finding on that particular issue, the court having found that the property was the wife's separate estate.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; J. S. Noyes, Judge.

Action by M. V. B. Wright against Margaret D. Wright, his wife, to have set aside a certain conveyance of gift from him to her, and to have the property covered thereby declared community property. There was judgment for defendant, from which plaintiff appeals. Affirmed.

Carver & Preston and D. P. Hatch, for appellant. Oscar P. Taylor (John D. Bicknell, of counsel), for respondent.

BELCHER, C. Plaintiff and defendant intermarried in the state of Ohio in 1859, and have ever since been, and now are, husband and wife. In 1873 they came to this state to live, and settled at Riverside. In November, 1878, Hattie L. Traver conveyed to defendant, by a quitclaim deed, 20 acres of land, situate in what is now the county of Riverside; and in May, 1883, she again conveyed to defendant the same land, by a bargain and sale deed. On the 21st day of May, 1885, plaintiff executed to defendant a deed of the same land, which, after referring to the last-named deed, recites that: "Whereas, the conveyance thereof appears on the face of said deed to be community property; and whereas, the consideration paid therefor was from the separate estate of said Margaret Wright; and whereas, I am desirous of placing the title to said property in my wife, Margaret Wright, as her separate property: Now, therefore, in consideration of the premises, I hereby give and grant to Margaret Wright," etc. Subsequently, in 1888, defendant purchased two lots of land in the town of Riverside, and 30 shares of the capital stock of the Riverside Canal Company, taking the title thereto in her own name. Plaintiff and defendant lived and cohabited together in Riverside until January, 1886, when plaintiff left defendant and went to Los Angeles, where he has ever since resided separate and apart from defendant. In May, 1893, plaintiff commenced this action, alleging that all the before-mentioned property was purchased and paid for with community funds, and is the community property of himself and wife; that the deed of May 21, 1885, was obtained by fraudulent misrepresentations on the part of defendant, and that plaintiff did not know the contents of the deed when he signed it, and never discovered the contents or nature and import thereof until January, 1892; that plaintiff never intended to give or grant any part of said land to his wife, but that since obtaining the deed she has deserted him, and has refused, and still refuses, to live with him as his wife, and has during all said time claimed to own all the said property as her own separate estate,—and praying that by the judgment and decree of the court the said deed of May 21, 1885, be declared null and void, and be set aside and canceled, and all the property described, both real and personal, be adjudged to be the community property of plaintiff and defendant, and be equitably divided between them. The defendant answered, setting up the purchase by herself of all the property involved in the action, and the payment therefor with money derived from her own separate earnings, and alleged to be her separate funds and estate; denying that plaintiff executed the deed of May 21, 1885, without knowing the contents and import thereof, and under fraudulent misrepresentations, and alleging that he "voluntarily, of his own free will and accord, executed the aforesaid writing, with the intention and for the purpose of thereby releasing, giving, granting, and conveying to defendant, as and for her separate and individual property and estate, any and all right, claim, and interest which said plaintiff then had, or might thereafter acquire either in law or equity, of, in, and to the aforesaid land, and every part thereof, and that plaintiff, at the time of executing said writing, knew well the full contents and import thereof"; denying that defendant has, for a long time past, or during any time, or at all, deserted the plaintiff, or refused to live with him as his wife, and alleging on the contrary, that plaintiff has, for more than 10 years last past, willfully deserted and abandoned defendant, and has lived separate and apart from her, and during all said time has willfully failed, neglected, and refused to provide for her the common necessaries of life.

The court below found that Hattie L. Traver executed to defendant the two deeds, as before stated, and that the entire consideration for the conveyances, and the entire purchase price of said land, was paid by defendant from and out of her own separate property and estate, and that no part of said consideration was community property. The court further found, among other things, as follows:

(5) "That the plaintiff directed said Hattie L. Traver to so execute said deeds to the defendant in the name of the defendant, and directed said Hattie L. Traver to so convey said lands to the defendant, with the intention and for the purpose of thereby vesting the title to all said property in the defendant, as and for her separate and individual property and estate, and not as community property." (6) "That said deeds were so executed and said land was so conveyed to the defendant, and in the name of the defendant, with the full knowledge of the plaintiff, and that the plaintiff consented to, acquiesced in, and approved of the manner and form of such execution and conveyance, with the intention and for the purpose of thereby conveying to the defendant as a gift, and vesting in her as a gift, from himself, any and all right and interest which the plaintiff claimed to have in said property." (7) "That on May 21, 1885, the plaintiff executed and delivered to the defendant a deed of gift, conveying to the defendant all the right and interest which the plaintiff claimed in the above-described property; that the plaintiff, at the time of executing said deed of gift, well knew and understood the full contents, import, and meaning thereof; and that he executed the same voluntarily, and of his own free will and accord, and without any accident or mistake on his part, and without any fraud, deception, or undue influence on the part of the defendant, and with the intention of thereby giving and granting to the defendant, as and for her separate and individual property and estate, any and all right and interest which said plaintiff then claimed to have in said property." (10) "That all the property, real and personal, mentioned and described in the pleadings herein, and in these findings, is the sole and separate property and estate of the defendant, and that no part thereof is, or ever was, community property, and that the plaintiff has not now, and never did have, any interest therein." In accordance with the findings, judgment was entered that the plaintiff take nothing by his action, from which judgment he has appealed, and has brought the case here on the judgment roll, including a bill of exception.

Counsel for appellant earnestly contend that the earnings of defendant, with which the Riverside land was paid for, are clearly shown by the affirmative averments of the answer to have been community funds, and, therefore, that the said land became and was community property. This question has been very elaborately argued by counsel, but we do not deem it necessary to state or review the points made; for, conceding the argument to be sound, still, if the findings above quoted can be sustained, it is a matter of no consequence whether the original purchase money was separate or community property, as the judgment, in either event, must be affirmed. Under our statute, all property acquired by husband or wife after marriage, except that acquired by gift, bequest, devise, or descent, is community property. And prior to the amendment to section 164 of the Civil Code, in 1889, all property conveyed to the wife was presumed to be community property. This presumption, however, could be met and overcome by extrinsic evidence showing that the property was acquired by her in one of the excepted ways above specified in the statute. And where property purchased with community funds was conveyed to the wife by direction of the husband, and with the intent that it should become her separate property, it has many times been held that the conveyance operated as a gift from him to her. Peck v. Brummagim, 31 Cal. 441; Woods v. Whitney, 42 Cal. 358; Higgins v. Higgins, 46 Cal. 259; Read v. Rahm, 65 Cal. 343, 4 Pac. 111; Jackson v. Torrence, 83 Cal. 521, 23 Pac. 695. In the case last cited it is said: "There is no evidence that he [the husband] was indebted to any one at the time, and if he was free from debt he had the right to give her [his wife] the property, and could make the gift effectual by simply directing the conveyance to be made to her." So, also, it has been held that when a husband himself conveys property to his wife, whether it be his separate property or community property, the conveyance operates to vest the title in the wife, as her separate estate. Burkett v. Burkett, 78 Cal. 310, 20 Pac. 715; Taylor v. Opperman, 79 Cal. 468, 21 Pac. 869; Oaks v. Oaks, 94 Cal. 66, 29 Pac. 330; In re Lamb's Estate, 95 Cal. 397, 30 Pac. 568.

But, admitting that such is the law, still it is insisted that finding 5 is outside of the issues raised by the pleadings, and that each of the findings quoted is contrary to, and not supported by, the evidence. The complaint alleges the making of the deeds by Mrs. Traver to defendant, and that the property was paid for with community funds, and is now the community property of plaintiff and defendant. The answer admits the making of the deeds, and alleges that the property was paid for with defendant's separate funds, and is now her separate and individual property. The real issue, then, was as to whether the property purchased became community or separate property; and, to determine that issue, much evidence was introduced, without objection, on both sides. Of course, the general rule is that new matter must be specially pleaded, but that rule seems hardly broad enough to apply to this case, and put the finding complained of outside of the issues raised. But, however this may be, if that and the other findings are justified by the evidence, the judgment cannot be reversed on this ground.

The evidence was in many respects conflicting, but that was a matter for solution by the trial court. The plaintiff testified, "It is my recollection that I directed Mrs. Traver to make the deed to my wife." Defendant testified: "At the time of the Traver conveyance, plaintiff said it was my money paid for the land, and if he had the deed in his own name he could not take up a government claim; it was my money paid for it, and I ought to have it. He so stated both before and after the deeds were made. After that, Mr. Wright always spoke of the property as being 'Mamma's property,' 'Mamma's ranch,' and said it was my money paid for it." C. W. Craven testified: "I live in Riverside. Have known plaintiff and defendant since 1880. Am their neighbor. Early in my acquaintance, I heard plaintiff, on several occasions, state, in substance, that no one should look to him for anything about the ranch; that he had no right—no part—in the property; that it was Mrs. Wright's property; and that he was to be held for no obligations. * * * Since 1885 I have heard him say the property was his wife's, and he was to be held for nothing financially." Plaintiff testified that, when Mr. Conway brought him the deed of May 21st for its execution, Conway "said that Mrs. Wright could get a loan of sixteen hundred dollars from Mr. McFarland, but that Mr. McFarland refused to loan the money unless I would sign away my community rights." S. J. Hinckley testified that in June, 1885, plaintiff told him "that Mr. Conway came to Colton, where he was teaching school, and had a paper, and got him to sign it; that he knew he was signing his rights away, but he didn't care." O. T. Dyer testified, in substance, that early in May, 1885, he was negotiating a loan for Mrs. Wright upon the property in question, and had a conversation with plaintiff about his joining in the execution of the mortgage; that plaintiff said he had no interest in the property, and would not join in the mortgage, or put his name on the note, but that he would deed the land to his wife, and she might do what she had a mind to with it; all he asked was to be let alone. John E. Wright, the son of plaintiff and defendant, testified that between 1887 and 1889 he had a conversation with his father about home matters. "I said to him, 'How did you come to sign that paper that mother said you signed, giving your property right away?' He said, 'Well, she owned the property, and she was not in very good health, and it seemed to worry her that she did not have the entire control, and I just signed it to please her.' * * * He further stated that his wife owned the property any way, and that he didn't see as his signing the paper made any difference." Without discussing the matter further, it seems to us that the evidence above recited is quite sufficient to support and justify the findings as to each of the deeds under which defendant claims title.

It is further urged that the judgment should be reversed because the court failed to find upon the issue of desertion, and upon the allegations found in paragraphs 10 to 17 of the answer. We do not think the judgment can be disturbed on this ground. The court having found that plaintiff directed Mrs. Traver to convey the property to defendant, with the intention and for the purpose of thereby vesting the title thereto in the defendant, as her separate estate, and having further found that the deed of May 21, 1885, was a valid and operative deed of gift, it is wholly immaterial whether the property was paid for with separate or community funds, and equally immaterial whether the plaintiff or defendant had been guilty of desertion. "There should be findings on all the material issues in the case, but a judgment will not be reversed for want of a finding on a particular issue, where it is apparent that the failure to find on that issue is in no way prejudicial to the appellant." Murphy v. Bennett, 68 Cal. 528, 9 Pac. 738. The judgment should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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108 Cal. 597

PEOPLE v. CHIN HANE et al. (No. 21,161.)

(Supreme Court of California. Sept. 2, 1895.)

HOMICIDE—EVIDENCE—WITNESS—IMPEACHMENT—DEPOSITION.

1. For the purpose of showing motive for a murder, evidence that deceased was on the bail bond of one who was charged with assault with intent to murder defendant is admissible.

2. On an issue as to whether certain shots were fired from inside or outside of a building, the testimony of a witness, who was near the scene, that the shots sounded as though fired from inside, and that they sounded like a drum, is not objectionable as the expression of his opinion.

3. The state, after showing diligent effort to find an absent witness, offered the deposition of the witness, taken on the preliminary hearing. On cross examination, defendant produced a photograph of the absent witness, and offered it to the jury for inspection. *Held*, that the exclusion of the photograph was proper.

4. On a trial for murder, evidence that, while defendants were in jail, they threatened to kill a person who was sent to identify them, is admissible against them.

5. A witness testified that, when he went to the jail to identify defendants, they threatened to kill him. He also testified, under objection, that he identified defendants before the coroner's jury; but nothing was shown as to defendants' conduct or threats at that time. *Held*, that the latter part of the evidence should have been stricken out on motion, but, as no motion was made to that effect, defendants could not complain.

6. It was proper to admit testimony of a conversation had in the presence of a defendant Chinaman, where he was sufficiently acquainted with the English language to understand it.

7. A witness for the state testified that she identified defendants at the coroner's office. The defense afterwards proposed to show by another witness that the witness first pointed out another person as the guilty party. *Held*, that it was not the proper method of impeachment, as the state's witness should have been first examined with reference to that point.

8. On a trial for murder committed in an affray, defendants introduced evidence showing that a certain witness for the state was an active friend of deceased during the fight, and was arrested, shortly after the murder, for carrying concealed weapons, and had such weapons on his person at the time. *Held*, that it was proper for the state to show in rebuttal that the

charge against said witness was subsequently dismissed.

9. Where a witness for the defense, in a trial for murder committed in an affray, testified, in response to a question, that he did not know that the police had found a trunk containing armor in his room, the question was harmless.

10. On an issue as to where and how certain bullets struck a building, in a murder trial, it was not error to confine defendants' witness to a description of the bullet marks, without stating in which direction they went in, though the latter testimony would be admissible if called for by definite questions.

11. The discretion of the court, exercised in refusing to permit a witness to illustrate on a door of the court room how certain bullets struck a building, will not be reviewed, except for abuse.

12. On a trial for murder, evidence that the wife of deceased, who was a witness for the state, was an inmate of a house of prostitution, was not admissible to affect her veracity.

13. Though it was not proper to ask a witness for the defense, in a trial for the murder of a Chinaman, as to whether he was not "known as king of the highbinders," no reversible error was shown, where objection to the question was sustained, and the examination stopped there.

14. In order to impeach the credibility of a witness, he may be asked if he was ever convicted of a felony, and, under Code Civ. Proc. § 2051, the name of the particular felony may be mentioned.

15. On a trial for murder, the state, over defendants' objection that it was not cross-examination, elicited testimony from defendant that he never had any trouble with deceased, or with any one related to him. *Held*, that, as the evidence was favorable to the defense, it was harmless error to admit it.

16. Where defendant asserted that he was a doctor, it was proper, in rebuttal, to permit a witness to testify that he knew defendant for many years, but never heard of him as a doctor.

17. Const. art. 1, § 13, provides for the taking, in the presence of defendant and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide, when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. *Held*, on a trial for murder, that it was not error to admit the deposition of an absent witness, taken on the preliminary examination. People v. Oiler, 4 Pac. 1066, 66 Cal. 101, followed.

In bank. Appeal from superior court, Sacramento county.

Chin Hane and Hoey Yen Sing were convicted of murder, and appeal. Affirmed.

A. L. Hart and Johnson & Johnson, for appellants. Frank D. Ryan, Charles T. Jones, John T. Carey, and Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. The defendants were charged by the district attorney of Sacramento county, upon information, with the crime of murder. They were tried jointly and convicted, and, under the verdict of the jury, the court sentenced Chin Hane to be hanged, and Hoey Yen Sing to be imprisoned for life. This is an appeal from such judgment, and from the order denying a motion for a new trial. The killing occurred at about the hour of 10 p. m., in a building upon I street, in the city of Sacramento, at the inception or during the progress of an affray, carried on, very probably, by two rival Chinese societies, several Chinamen being killed at the time, and others wounded, as the result of the discharge of many firearms. The principal witnesses upon both sides of the case were Chinese, and, as is the universal rule in this class of cases, the evidence upon the main questions involved was directly conflicting. There is no complaint made upon the law given to the jury by the trial court, and the grounds for appeal consist of 23 specific, numbered specifications of errors of law committed by the trial court, largely in the admission and rejection of evidence. Many of these specifications are exceedingly technical, and demand no extended consideration. Others of more importance we will proceed to notice.

1. The party killed in the present case was one Lee Gong, and the prosecution, for the purpose of showing motive upon the part of the defendant Hoey Yen Sing, offered evidence, under objection, to the effect that the deceased was upon the bond of one Fong Ah Sheung, who had been charged with an assault to murder the said defendant Sing. The objection is based upon the ground that there was no evidence that the defendant Sing knew that the deceased had gone upon the bond. The objection, we think, goes to the weight of the evidence, rather than to its competency, We think it fairly inferable, from all the facts and circumstances, that he was possessed of such information, but, if he had no knowledge of the fact, then the evidence was entirely harmless, and no injury to him could have possibly resulted from its admission. The committing magistrate testified that Sheung was found not guilty of the charge of assault with a deadly weapon upon the day that Lee Gong was killed. It is now argued that this evidence tended to show the commission of another crime by the defendant Sing. We think no such inference logically follows from the evidence. From all that appears by the record, Sheung, the defendant in that case, may have established an alibi, or some other defense equally inconsistent with guilt upon the part of this defendant Sing.

2. The prosecution claimed that the shots which killed the deceased were fired from inside the house. The defense insisted that they were fired in the open air. One Hill was near the scene of the affray at the time, and heard the shots. He was allowed to testify, under objection, that the shots sounded as though fired inside the building. He further testified that it sounded like it was a drum, or something deep. It did not sound like it was in the air. It is claimed that this evidence called for the opinion of the witness, and, for that reason, was not admissible. In the strict sense, the evidence given was not the opinion of the witness, any more than it was his opinion that the sounds were made by a drum. The evidence was simply a statement as to the nature of the impressions of sound left upon the ear, and, we think, clearly admissible. See Robinson v. Fire Co., 103 Cal. 1, 36 Pac. 955. As an additional reason for holding this assignment of error unsound, it may be sug-

gested that the witness, without objection, had previously testified to the same effect. This fact would make the error harmless, if error had been committed.

3. The prosecution desired to introduce the deposition of one Lee Sam, taken at the preliminary examination, and, preliminary thereto, placed a witness upon the stand, who testified to his efforts in trying to find the witness. Upon cross-examination the defense produced a photograph of the absent witness, and offered it to the jury for inspection. An objection was sustained to the course of counsel, and, we think, properly so. We know of no authority for such a practice. The evidence of the witness Lee Lick, and also that of Fay, bearing upon this question, in no way was prejudicial to the defendants' rights, even conceding it to have been erroneously admitted.

4. It appears that, while the defendants were under arrest and in jail for the killing, one Lee Sam came to the jail and identified them. When identified, they each told Lee Sam, in the presence of the other, that they would kill him. This evidence was offered, under objection. We deem it admissible. Threats made by a defendant against a witness whom he expects to testify against him, with the evident purpose of intimidating the witness, are proper evidence. The fact that the defendants were in custody at this time is wholly immaterial. The question was further asked the witness: "Did you identify the defendants before the coroner's jury?" He answered, under objection, that he did. Nothing was shown as to the conduct of the defendants when so identified, and it would seem that the answer of the witness should have been stricken out, upon motion, for this reason; but no motion to that effect was made. See People v. Mallon, 103 Cal. 513, 37 Pac. 512.

5. Chief of Police Rogers testified, under objection, to a conversation occurring between Lee Sam, himself, and the defendant Chin Hane. The court admitted the evidence, upon the ground that the defendant Chin Hane was sufficiently acquainted with the English language to understand all that was said, and did understand it. We see no error in this ruling.

6. Ah Wah testified, when upon the witness stand, that she identified the defendants at the coroner's office as the men who killed the deceased. The defense proposed to show by another witness, who was present at the time of the identification, that Ah Wah first pointed out another Chinaman as the guilty party; but, upon objection, the evidence was rejected. We do not think the witness could be impeached in this manner. Ah Wah should have been recalled, and asked with reference to the matter, and, upon her denial of it, the foundation would then have been laid for her impeachment by this witness' testimony.

7. Lee Sam was an active friend of the deceased upon the night of the killing. A police officer testified that, subsequent to the killing, he arrested Lee Sam for carrying concealed weapons, and found upon him two large pistols. The prosecution then asked the officer if he swore to a complaint, or prosecuted Lee Sam for carrying the weapons; an objection to the question was overruled, and the officer said he did not know whether or not he swore to a complaint, but that the charge was subsequently dismissed. It is not at all clear that the evidence of the police officer in the first instance was material to the case at bar, but, if material, we think clearly the opposing side had the right to explain it. It may further be suggested that the defendants were not prejudiced by the action of the court in admitting the evidence.

8. It was not error for the court to exclude evidence of self-serving declarations made by defendant Chin Hane in San Francisco, immediately prior to his departure for Sacramento. We see nothing in the conduct of the district attorney, in his examination of the witness as to his past criminal record, demanding a reversal of the judgment. The witness Cheong, in reply to a question by the people, under objection, testified that he did not know of the police officer finding a trunk in his room with armor in it. The answer of the witness thus renders the question harmless, and defendants were not prejudiced.

9. The witness Lowell, after testifying that he made an examination of the deceased's building after the killing, stated that he found several bullet marks upon the outside of the building. He then continued: "There was a bullet hole in the door jamb of Lee Gong's, also. That was six or seven feet high. Some, also, on the brick wall, on the outside, on the edge of the brick wall. It seems to me as if that, on the south side of the door, there was a big chunk taken out of the brick. I am not positive. There is quite a large corner knocked off of a brick there." The record further discloses as follows: "Mr. Hart: Q. Which way did it go; diagonally south, or straight in? Mr. Jones objected: That calls for the opinion of the witness. And the objection was sustained. Mr. Hart: Q. Which way did the mark go; directly south, or straight in? Mr. Jones objected that the question is improper. The mark is still there. At this point there was an argument among counsel, and at the conclusion Mr. Hart said: 'The court stated that I didn't know half the time what I was doing. I want that remark taken down, and take an exception.' The Judge: You contradicted the court. I said that you asked the question, and that it was indefinite. * * * The Judge: Q. Did you state that you could describe the piece which you said was knocked off the brick? You say there was a piece of brick chipped off? A. It is quite a large piece,—two or three inches long. I did not see it knocked off. I know, though, that it was knocked off. It was a three-cornered piece. It had been struck by some missile, and knocked off the corner. It was about seven feet from the sidewalk, I should judge. There were several bullet marks on the walls of Lee Gong's, and on the side of the store

there is a bullet hole in the edge of the door. Mr. Hart: Q. Now, take this door here, and tell where the bullet struck, and in which direction. Mr. Jones objected, as irrelevant, incompetent, and immaterial. They have no right to put a witness on the stand to show where a bullet struck. He can describe the marks. Objection sustained. Defendants duly excepted." This excerpt from the record contains three questions by defendants' counsel to which the court sustained objections. There appears to have been some little friction between counsel and the court at this particular time,—an event not without precedent in the past. And we may be allowed to suggest that we think that counsel for defense could well have been more explicit in framing the questions asked, and that the court could well have been more liberal in its treatment of these questions as asked. It is a very common practice to illustrate upon the wall, or upon a door in a court room, before the eyes of the jury, the location of a bullet mark, and we think it may well have been done here. But such matters are largely in the discretion of the trial court, and, in the absence of an abuse of such discretion, we cannot interfere. The prosecution offered to allow the witness to describe the bullet marks, and we think the defendants must be satisfied with such offer. If the question addressed to the witness, "Which way did it go; diagonally south, or straight in?" referred to the course of the bullet, or bullet mark in the wood or brick wall (which is far from plain, when we consider the context), then the objection that the question called for the opinion of the witness is not at all tenable; for he was simply asked to state something that he saw. It would be a statement based upon actual inspection, and, as far as we can see, entirely unobjectionable. But, beyond all this, the jury viewed these premises, and were particularly instructed to view these various bullet marks; and, taking all these matters into consideration, no grounds for a new trial of the case are shown.

10. The witness Ah Wah testified that she was the wife of the deceased. She further testified as to her manner of life, habits, etc. The defense attempted to prove that she had been an inmate of a house of prostitution. The evidence was inadmissible. Such matters were entirely collateral, and her veracity could not be impeached in that way. The defendant Chin Hane, upon his direct examination, claimed to be a doctor. On cross-examination he was asked if he was not known in San Francisco as king of the highbinders. Under objection, the question was not answered. Even conceding the question improper, the investigation in this direction here stopped, and nothing occurred of sufficient importance to reverse the judgment. In order to impeach the credibility of a witness, including a defendant when he testifies, the witness may be asked if he has ever been convicted of a felony. The details and circumstances comprising the offense should not be gone into. But in view of the statute (section 2051, Code Civ. Proc.), which allows the proof of the fact to be made either by the evidence of the witness himself, or by the record of conviction, it would appear that not only the fact of the conviction could be shown, but the name of the particular felony of which the witness had been convicted. Beyond this the examination should not go.

11. Under objection of the defense, the defendant Chin Hane, upon cross-examination, in answer to interrogatories, testified that he had never had any trouble with Jesse Jim (the party who discovered him to the officers after the killing), nor Ah Wah (deceased's wife), nor the Lee family (to which the deceased belonged), nor the Chee Kong Tong. Under the facts forming the history of this case, we are inclined to think that this character of evidence would have been admissible, coming from the defense, as tending to show an absence of motive to do the killing. Objection was made to its introduction by the defense, upon the ground that it was not cross-examination; and, especially in view of the fact that the witness testifying was the defendant, we think it should have been excluded, if the court's attention had been called to that fact. But, as we view this whole line of evidence, it was rather favorable to the defendant than otherwise, and no prejudicial error was committed.

12. In rebuttal, the witness Cox, having known the defendant Chin Hane for many years in San Francisco, testified that he had never heard of him as a doctor. The motion to strike out this evidence was properly denied. While, in its nature, light, its weight was a question for the jury. The evidence of Clark, in rebuttal, as to the identification by Ah Wah, was properly admitted. It is contended that the deposition of an absent witness, taken at the preliminary examination, in a case of homicide, cannot be used at the trial, for the reason that such a proceeding is violative of section 13, art. 1, of the constitution of the state. That provision of the constitution has been construed contrary to the appellants' contention in the case of People v. Oiler, 66 Cal. 101, 4 Pac. 1066.

For the foregoing reasons, the judgments and orders appealed from are affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; HARRISON, J.; HENSHAW, J.

5 Cal. Unrep. 129

In re CARRIGER'S ESTATE. (S. F. 155.)

(Supreme Court of California. Aug. 29, 1895.)

REVIEW ON APPEAL—PRESUMPTIONS.

On appeal by an administrator from an order directing him to pay the widow of decedent a certain amount per month, as a family allowance, it will be presumed, in the absence of the evidence before the court below, that the condition of the estate was such as to authorize the allowance of the sum fixed in the order.

Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

In the matter of the estate of William W. Carriger, deceased. Appeal by Soloman Carriger, special administrator of said estate, from an order directing him to pay to the widow of said deceased a certain amount per month, as a family allowance. Affirmed.

Barclay Henley and Cary Howard, for appellant. Campbell & Campbell and Aylett R. Cotton, for respondent.

PER CURIAM. The special administrator of the estate of the deceased has appealed from an order of the superior court directing him to pay to the widow of the deceased the sum of $50 per month, as a family allowance. The order was made after a citation to the appellant, and a hearing thereon before the court; but the appeal is presented here without any bill of exceptions or other showing of the matters which were considered by the court in making its order.

Section 1464, Code Civ. Proc., authorizes the court to make a reasonable provision for the support of the family "until letters are granted and the inventory is returned"; and by section 1466 the court is authorized to make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, "during the progress of the settlement of the estate." The only limitation upon the action of the court in this regard is that, in case the estate is insolvent, the allowance must not be continued longer than one year after granting letters testamentary or of administration. There is no intimation in the return of the special administrator that the estate is insolvent, and, by section 1467, the family allowance must be paid in preference to all other charges, except funeral charges and expenses of administration. Although the appellant, in his return to the petition, states that the funeral charges have not been paid, he does not give the amount of these charges, nor does it appear from the record what is the amount of the decedent's estate. The fact that the administrator has not in his hands sufficient money to pay the family allowance does not deprive the court of the power to fix the amount to be paid. If there is other estate which can be subjected to this payment, the court can make a proper order therefor. In the absence of the evidence which was before the court at the hearing, we must assume that it was fully shown that the condition of the estate was such as to authorize the allowance of the sum fixed in the order. The order is affirmed.

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108 Cal. 608

HERWICK et al. v. LANGFORD. (No. 19,565.)

(Supreme Court of California. Sept. 3, 1895.)

CONTEST OF WILL—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

1. On an issue as to whether a will was procured by undue influence of testator's wife, it appeared that testator frequently went alone to the office of the attorney who drew the will, and who had no acquaintance with testator's wife; that he conversed freely and intelligently respecting the provisions of the will; that about three years afterwards he confirmed the will, in a codicil thereto, at which time he also appeared to be mentally sound; that testator's wife, in his presence, and about a year after the will was executed, gave directions in respect to the work on their residence; that testator was always anxious to please his wife, and was more jovial when away from her; that five years afterwards a difference of opinion as to certain domestic affairs was settled in accordance with his wife's views; that the testator dealt largely in real estate, and conducted all his negotiations alone. Evidence as to testamentary intent was given by the contestants themselves, who were children of the testator by a former wife, to the effect that the testator, at various times after the execution of the will, said he intended to divide his property between them. *Held* insufficient to show undue influence.

2. On a contest of a will, it was improper for contestants, who were children of a divorced wife, to testify that they objected to testator's marriage to proponent, but that he told them that proponent insisted on the marriage on account of their previous illicit relations, and that, after the marriage, testator was not as jovial as before.

3. The mere fact that testator's wife urged on him the propriety of leaving his property to her, though he had children by a former wife, does not constitute undue influence.

4. The presumption of undue influence is not raised merely by proof of interest and opportunity to influence the testator.

5. The fact that a will seems unnatural is not sufficient reason to deny its admission to probate, if it is shown to be the spontaneous act of a competent testator.

Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Maria M. Langford propounded for probate the will of Charles E. Langford, deceased. The probate of the will was contested by Mary J. Herwick and others. From a judgment denying probate to the said will, the proponent, Maria M. Langford, appeals. Reversed.

A. R. Metcalfe and Anderson & Anderson, for appellant. R. A. Ling, H. H. Appel, and H. T. Gordon, for respondents.

McFARLAND, J. This is an appeal by Maria M. Langford, widow of Charles E. Langford, deceased, and proponent in the lower court of his last will, from a judgment denying probate of said will, and from an order denying her motion for a new trial. The probate of the will was contested by children of the decedent by a former wife, upon the grounds that he was mentally incompetent to make a will, and that it was procured to be made by the fraud, and also by the undue influence, of appellant. In answer to interrogatories propounded to the jury, they found that at the time of the execution of the will, and also at the time of the execution of a certain codicil, the decedent was of sound and disposing mind and memory, but that it was procured by the fraud, and also by the undue influence, of the appellant. The finding of fraud may be dismissed with the remark that there is no evidence to support it. The alleged fraud was that the appellant falsely and fraudulently represented to the decedent that the contestants cared nothing for him, had no love for him, and only wanted his money. There is nothing in the evidence to support these averments. As to the finding of undue influence, the contentions of appellant are that there is no evidence sufficient to justify it, and that the court committed material and reversible errors in rulings upon the admissibility of evidence on that issue, and we think that both contentions must be sustained.

The decedent and appellant were married in Fulton, Ill., in 1873. They resided there several years and then removed to Pasadena, Cal., where they resided until his death, and where the will was made. There can be no pretense that there is evidence of any direct influence exercised by appellant, or any other person, over the decedent, at the very time of the execution of the will, and affecting the testamentary act, or constituting part of the res gestæ. To all appearances, and as far as the circumstances in proof show, he was acting with perfect freedom, and following his own uncontrolled wishes. The will was executed on November 29, 1887. Two or three weeks prior to that date he went to the law office of Winslow & Hester, at Pasadena, and after some conversation with Mr. Winslow, who was in very bad health, the latter introduced him to Mr. Frank J. Polley, who was a young lawyer then in the employ of Winslow & Hester, with the request that he (Polley) should draw a will for the deceased. The appellant had no acquaintance with Polley, Winslow, or Hester. Polley never saw her until the trial of this cause, which was over six years afterwards. After Winslow had turned over to Polley the business of the preparation of the will, the decedent visited the office several times, and had conversations about the matter with Polley. He always went to the office alone. Mr. Polley testified: "At such visits we conversed about the will. Our conversations were almost entirely in relation to the will, and related to the different provisions. Each provision in the will was requested by Mr. Langford. * * * At the time Mr. Langford executed the will, I do not think he was acting under any threat, menace, misrepresentation, nor fraud, nor undue influence, that I know of. Positively, he was not, so far as I am concerned. At that time Mr. Langford's mind was, I think, unusually clear. I had numerous conversations with him during the time I was drawing the will. He understood perfectly what he was doing." The will was completed and executed on November 29th, and was witnessed by Polley and Mr. Hester, who had been most of the time in the city of Los Angeles, attending to legal business there, but was at home on that day. The deceased took the will away with him, and it was found in his box at the bank a few days after his death. Both the subscribing witnesses testified at the trial. About three years afterwards—on January 29, 1890—he made a codicil to the will. In the original will he left no property to his daughter Mabel, but left "her future welfare in the hands of my said wife, in whom I have full confidence that the dictates of a mother's love," etc.; and the codicil merely provided that, should his wife die before his death, the property devised to her should go to Mabel. This codicil was also drawn by Mr. Polley, who at that time was doing business, as a lawyer, for himself. He testified: "Mr. Langford came into the office, and asked me to draw a codicil. He stated his wishes in reference to it. * * * At the time Mr. Langford was not acting under fraud, menace, threats, or undue influence, so far as I know." He also testified that: "At the time he went over his financial affairs with me, talked about different matters, and said that now he thought he had his affairs in good shape. We had quite a long talk about his property, and his business relations with parties during the boom." He also testified that deceased read over the codicil, and that his mind was sound and strong. The codicil was witnessed by Polley and by a Mr. Wetherby, who was doing business in the house in which Polley had his law office, and who was called in by Polley to witness the execution of the codicil. Wetherby was a witness at the trial.

So far, therefore, as we are to be governed by the facts and circumstances directly attendant upon the execution of the will and codicil, and forming part of the res gestæ, we are inevitably forced to the conclusion that the testator acted with a perfectly free volition. This is not the case where a man makes a will upon his deathbed, surrounded by those who turn out to be his devisees. Nor is it a case where a weak person, at the time of the execution of his will, is teased and tormented by the importunities of relatives, who do not allow him to be out of their sight, or to have any opportunity for quiet thought or independent advice. In the case at bar the testator, as found by the jury, was of sound mind; when he concluded to make a will, he went entirely alone to his attorneys, with whom he had various conversations; and he had ample opportunity to fully and freely think out what he wanted to do, and to change any conclusion which he might have arrived at, if he so desired. There is not a single suspicious circumstance immediately connected with the execution of the will or the codicil. What, then, are the other facts in proof which present the alleged basis for upsetting this will? The contention of respondents, when thoroughly sifted, seems to be about this: That there is evidence to the point that appellant had a general influence over the deceased, which ought to be classified as "undue," and that, therefore, although when he made his will, under the circumstances above stated, he was apparently free to act as he pleased, yet it must be inferred that this general influence of appellant accompanied him, subverting his volition, and coercing him to act against his real wishes. To maintain such a strained and difficult theory would require evidence very different from that presented in the record. As to the evidence relied on, of occurrences which took place at any point of time reasonably near the time of the execution of the will, they are substantially these: The witness McCarty testified that in 1888—about a year after the execution of the will, and two years before the date of the codicil—he worked on a dwelling house that decedent was building. A Mr. McKenzie was foreman of the work. And the substance of McCarty's testimony is in these words: "I saw Mr. and Mrs. Langford there, and Mrs. Langford gave some instructions in reference to the work. Mr. Langford did not give any, as I know of." There is no significance whatever in this testimony. The wife had a perfect right to have a voice in the matter of the family residence. There is also the testimony of the witness Irish, who worked for the deceased during a period between 1889 and 1892, and was discharged. This was long after the execution of the will, but included the date of the execution of the codicil. His testimony was directed principally to an attempt at showing that the deceased was not of a strong mind. As to the question of "influence," he stated that Mr. Langford gave him his instructions, but that "sometimes he would tell me that Mrs. Langford wanted this done; that she wanted it done this way, or she wanted it done that way. Different times while I was there, why, he would say that Maria—he most always called her Maria to me—wanted the lawn mowed, or the flowers fixed, or the driveway fixed, or something of that kind." He was asked by respondents if, from his observations, the deceased "appeared to you to be in fear of his wife," and his answer was as follows: "Well, I could not answer that. He always seemed to want to —didn't never— He always seemed he didn't want to displease her in anything,—in no way displease her. I do not remember of any instance of him expressing himself in reference to pleasing or displeasing her. It may come to my memory. I know that Mrs. Langford went East." He was then asked directly if he noticed "any change in Mr. Langford's conduct while she was East," and he answered, "Yes"; that he seemed to be more jovial and friendly. He also testified that, when Mrs. Langford was about to return home, deceased told him that he must "clean up"; that "you know, when Maria gets home, everything will have to be renovated"; and that "it's a case 'when the cat's away the mice will play.'" He also testified that when he was discharged the deceased "stated that he would have to let him go on account of Mrs. Langford's account."

The foregoing is about all the evidence as to any occurrences which took place near the time of the execution of the will or codicil, apart from certain alleged declarations by the deceased of testamentary intent, which will be noticed hereafter. There was, however, the testimony of the witness Reinke, who was a hired man of deceased for a period commencing in 1892. This was five or six years after the execution of the will, and about two years after the execution of the codicil. The facts to which he testified were that, while he was working for deceased, there was a difference of opinion between Mr. and Mrs. Langford as to whether some orchard land should be plowed at a certain time, whether some beans and corn should be planted at a certain place, whether a fresh milch cow should be bought for family use, whether a horse to be used about the place should be bought, and another one sold, and that it turned out that these things were done in accordance with the expressed opinion and desire of Mrs. Langford. In answer to a direct leading question of respondents' counsel, "Did he appear to be afraid of her?" the witness answered, "Yes, sir." One Rowland also testified that he was a veterinarian, and that when he was doctoring a sick horse of deceased, while Reinke was with him, the deceased told him, although he was an entire stranger, that he did not want Maria to know about it, because she might think that the horse was not sick enough to be doctored, and that he had more peace when he let her have her way. The testimony of the two witnesses last named, about trivial domestic affairs, if near enough to the time of the execution of the will to be admissible at all, is entirely too paltry to have any important bearing upon the real question at issue, particularly when contrasted with the testimony of at least 20 witnesses, consisting of men engaged in various kinds of business at Pasadena, who were brought into close contact with the deceased, and of various ladies intimate in his family. The testimony of these several witnesses covers a period which commenced a short time before the execution of the will, and extended to the date of the death of the deceased. It shows that his business was large, and quite varied; that, among other things, he owned, sold, and leased many different pieces of real property, and dealt largely with real-estate agents and purchasers of land; that he managed his business wisely, and made shrewd bargains; that he did all his business himself; his wife never being present; and that when men went to his house on business they saw him alone; and that, if she happened to be present at the beginning of the interview, she left the room. It was testified by ladies intimate in the family, by the pastor of his church, by his family physician, and by others having excellent opportunities of observation, that the relations between deceased and the appellant were as pleasant and cordial as those usually existing between husband and wife, with no evidence whatever that the deceased was either afraid, or under any unusual influence, of the appellant.

There is some evidence of declarations of the decedent about his testamentary intent, consisting mainly of the testimony of the contestants themselves, and much of it too remote from the time of the execution of the will to be of any consequence, or even admissible. The son, and contestant, Charles E. Langford, said that he received in Minnesota a letter from the deceased, written at Pasadena, which was written, "as near as I can remember, a month or six weeks before Christmas, 1887." This letter had been destroyed, but was written in response to one sent by the witness to the deceased, asking for money. He says, from memory, that the letter contained the phrase "Please find inclosed fifty dollars, to help you out of your difficulty," and also a statement of certain moneys which the deceased had expended for Charles, amounting to a little over $1,200. The witness then proceeds: "He said he wanted me to know my exact indebtedness to him, as he calculated to make a will before long, and to deduct all that each of us children had drawn out of the property. He calculated to divide his property among his children equally, and deduct what they had drawn out of it." He also produced a letter written to him by the deceased in September, 1890. The writer says that he incloses $110, "as requested, to help you out." Some advice is then given Charles about getting into scrapes, and the only clause in the letter in point as to testamentary intent is the following, "I will depend on your honor, and, if you don't deal honorable, I will make it all right in my will." On October 18, 1888, about a year after the execution of the will, the deceased wrote a letter to his son-in-law Longshore, which contained the following: "Yours received, and contents noted. The amount of your note is due me the 1st of December next would be $265; note $200, September the 1st, '85, three years and three months' interest at ten per cent. more. I think you ought to pay this now, or the first of December. It will be for your advantage, for I shall remember my children in my will according to their worth and honor in dealing with me." The balance of the letter is about other things. John S. Herwick, son-in-law of the deceased, testified that in 1888, the year after the execution of the will, the deceased told him, in substance, that he had always told his children that his property should be theirs, and that he intended to stick to his word, and that, if they didn't get it, not to blame him. The witness Reinke (the hired man hereinbefore noticed) testified that when he worked for deceased, which was in 1892 or 1893, he said to decedent, "Well, I suppose your children are just as rich as you are," and that the deceased answered: "'No, they are not. Some of them are poor, but they ain't so very poor,' he says, 'probably I don't know anything,—didn't hear anything for several years of them that they are poor, but after I am dead,' he says, 'they can have it all.'" The foregoing is about all the evidence of declarations of testamentary intent, within any reasonable time of the execution of the will or codicil, which we can find in the transcript,—all, for instance, since the settlement of the deceased in California. Some of the contestants testified to other statements made so long before the execution of the will as to be either beyond the range of legitimate evidence, or too remote to have any appreciable value. If we consider the above stated declarations of the deceased (supposing them to have been fully proved) in the light of the other facts of the case, it is apparent that they did not express his real intentions. He is made to speak of dividing his property equally among his children in a will to be made, when he had already made a will which he never changed (as to the contestants), in which he had given them only a certain part of his property. Three years afterwards he solemnly republished that will,—at the time he made the codicil. We need not inquire whether the alleged declarations were made to hasten the payments of debts owing to deceased by some of the contestants, or to appease children of a former wife, who were bitterly opposed to his second marriage, or what other motive moved him to make them. The language of Justice Temple in the McDevitt will contest (95 Cal. 17, 30 Pac. 101), is peculiarly applicable here: "Whether, by this statement, the decedent intended to deceive the witness, or at the time intended to execute a new will, is alike immaterial; for such declarations have no weight, unless introduced in connection with evidence tending to prove undue influence, mental incompetency, or fraud at the time of the testamentary act." And the case at bar is much stronger in this respect in favor of appellant, than was the McDevitt Case. In the case at bar the jury found affirmatively on the issue of mental capacity, while in the McDevitt Case the only issue propounded to the jury was that of undue influence; and, as we have before stated, there was no evidence here of fraud. In the McDevitt Case the court, speaking of such declarations, further say, "In fact, in a case like this, where the testator was, beyond question, of sound mind, they were entitled to no weight at all, in the absence of proof of influence as to the very testamentary act"; and further: "Under such circumstances, this evidence, and all other of like character, is entitled to no weight." Waterman v. Whitney, 11 N. Y. 157. And the "circumstances" in that case did not bring it within the rule stated with so much absoluteness as do the circumstances here bring the case at bar within that rule.

The opinion in the McDevitt Case, and the citations therein made, afford full authority upon this point. In that case the verdict was against the validity of the will, and the judgment and order denying a new trial were reversed, and it would be inconsistent with the decision of this court in that case to affirm the judgment in the case at bar. Numerous authorities upon the subject may be found in the notes to In re Hess' Will, 31 Am. St. Rep. p. 665 (Minn.) 51 N. W. 614.

There was a good deal of evidence introduced over the objections of appellant which, in our opinion, was improperly admitted. The decedent was married to the appellant in the year 1873, and before that time had been divorced from a former wife, who was the mother of the contestants; and contestants were allowed to testify to declarations which, they say, the decedent made to them before, at the time of, and shortly after the marriage. For instance, some of the contestants, when they heard of the intended marriage, endeavored to persuade the decedent against it. They suggested that he give appellant money, to buy her off; and they were allowed to testify that decedent told them, in substance, that he could not avoid it, that appellant insisted on the marriage, and even that there had been illicit relations between him and appellant. There was also testimony admitted that shortly after the marriage he was not as jovial, and was apparently not as happy, as before the marriage. There was also testimony tending to show that appellant had done some dressmaking in decedent's family before the marriage, with the view, we suppose, of showing that she made some efforts to captivate the affections of the decedent. All this was 17 years before the execution of the will, and 20 years before the codicil in which he reaffirmed the will. It was too remote in time to be admissible for any purpose, and that it was prejudicial to appellant is beyond question. There was also some testimony as to declarations and occurrences at a somewhat later period, but before decedent's removal from Illinois to California; and, if admissible at all, they are entitled to no weight, in the absence of evidence, either direct or circumstantial, that undue influence was brought to bear upon the very testamentary act. And such evidence must "do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator." In re McDevitt, supra.

It is sought to distinguish the case at bar from the McDevitt Case because in the case at bar there was the relation of husband and wife, and the position seems to be taken that such relation raises the presumption of undue influence. But there is no such presumption. "There is no legal presumption against the validity of any provision which a husband may make in a wife's favor, for she may justly influence the making of her husband's will, for her own benefit or that of others, so long as she does not act fraudulently, or extort benefits from her husband when he is not in condition to exercise his faculties as a free agent. Latham v. Udell, 38 Mich. 238. Accordingly, the circumstance that the testator's wife urged upon him the propriety of leaving his property to her does not constitute undue influence, to vitiate the will. Hughes v. Murtha, 32 N. J. Eq. 288. And the mere fact that the will of the husband is changed to gratify the wishes of the wife does not raise a presumption of undue influence on her part. Rankin v. Rankin, 61 Mo. 295. Where a husband had made two wills, dividing his property between his wife and sister, and a few days subsequent to the making of the second will, and after several days of his last illness, he made another will, revoking his former wills, without apparent reason, and leaving all his property to his wife, this, in the absence of any other evidence of undue influence, will not raise the presumption of such influence, so as to require the submission of that question to a jury. In re Nelson's Will, 39 Minn. 204, 39 N. W. 143"; Notes to Richmond's Appeal (Conn.) 21 Am. St. Rep. 98, 22 Atl. 82. In Mason v. Williams, 53 Hun, 394, 6 N. Y. Supp. 479, it was held that "the fact that the wife of a testator had both opportunity and motive, and that the will makes provision for her beyond what the law would have given her, creates no presumption of undue influence. Nor does the additional fact that the will was executed six weeks after the testator had drawn a radically different will, in accordance with a draft submitted to him by his father." The presumption of undue influence is not raised by proof of interest and opportunity alone. Turnure v. Turnure, 35 N. J. Eq. 437. See other cases to same point cited in 21 Am. St. Rep. 98 et seq. In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made.

It is contended also that the case at bar differs from the McDevitt Case because here the will was unnatural. The consideration of the question whether or not a will is "unnatural"—by which is meant, we suppose, different from what it might be expected to have been—is of no importance, except in a case where there is some evidence immediately tending to show mental incapacity, fraud, or undue influence, in which event it might serve to help out a weak case. But there is no evidence in the case at bar that could be thus helped out. A will cannot be upset because, in the opinion of a jury or court, it is unnatural. In the opinion of the McDevitt Case it is said: "Although I do not think it of special interest here, it is well to remember that one has the right to make an unjust will, an unreasonable will, or even a cruel will. Generally, such questions turn our thoughts, as they are often intended to, from the only question at issue, which always is, only, is the will the spontaneous act of a competent testator? Of course, juries lean against wills which to them seem unequal or unjust. But the right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners, and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper." See, also, Latham v. Udell, 38 Mich. 238. And, indeed,—if it were important to consider it,—we do not see how the will in the case at bar can be considered unnatural, in such extreme sense as to be remarkable. At the time of the execution of the will the contestants—children of the first wife—were all grown up, middle-aged people, with families of their own. He had seen but little of them after his marriage, and in a few years afterwards he had moved away from them to California. They had strenuously opposed the marriage, and had said unkind things of his wife; and, as was very natural, there was not much social intercourse between the families afterwards. Of course, the contestants blame the appellant for this; but although several of them visited her, and were entertained, at least, politely, there is no evidence that they ever invited her to visit them, except that on one occasion one of them said to her and the decedent, "Of course, you will come and see us soon." They had appealed to him a number of times for financial aid, and he had helped them, and he was displeased and angry because some of them followed him to California. One of the daughters, in stating the contents of a lost letter received from decedent, said: "He began by saying that he was sorry we had come here, as he had advised us not to come, and that it looked like we had come on purpose for him to help us; that we could—now that we had come we could—we could hoe our own row, he would mind his; he had enough of his own business to attend to. I think that was about all." Of course, the contestants attribute this to the influence of the appellant, and they testify to statements which they say the decedent made to them tending to support that view. Nevertheless, the fact was that they came to California against his protests, and thereby greatly displeased him. He and the appellant had one child, Mabel, who was only 14 years old at the time of decedent's death, and quite a young child at the time of the execution of the will. Therefore, under all the circumstances, it is not at all surprising that his affections bound him closely to his wife and Mabel, and that he left them property, the income of which would support them. By his will he gave to each of the contestants $1,000, and left the balance of his property, which was of the value of about $50,000, to his wife, and, in the event of her death, to Mabel. The income of that amount of property would give the wife and daughter not more than a modest support; and, under all the circumstances, the disposition which he made of his property cannot be justly characterized as unusual or unnatural. At all events, being of sound mind and memory, it was for him to dispose of his property as he chose.

It is proper to notice particularly that the averment that appellant would not permit contestants to see the decedent is entirely unsupported by the evidence. Not only did he go about daily, attending to his business, entirely alone, but the appellant at one time visited the East for two months, the decedent remaining at home, and upon two occasions the decedent visited the East by himself.

Looking through the transcript in this case, we see no evidence at all sufficient to warrant a jury in annulling the solemn acts by which the decedent executed his will, and republished it in the codicil. If the law is to be changed, and the right of disposing of one's property by will, the policy of which has been sanctioned by the wisdom and experience of many generations of men, is to be taken away, that result must be effected by the legislative department of the government. As the law now stands, that right cannot be frittered away, after the death of the testator, according to the tastes and notions of others. It is quite likely that in the case at bar the provisions of the will did not meet with the approval of the jurors, but their approval was not necessary. The judgment and order denying a new trial are reversed.

We concur: TEMPLE, J.; HENSHAW, J.

108 Cal. 688

LONES et al. v. LONES. (Sac. No. 3.)

(Supreme Court of California. Sept. 5, 1895.)

WILLS—REVOCATION AND REVIVAL.

Under Civ. Code, § 1297, the mere execution of a subsequent revocatory will ends the first will, and such first will is not revived by the revocation of the last will unless it is revived by the terms of such revocation.

Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Proceeding by John H. Lones and others against William B. Lones in his own right and as administrator with the will annexed of the estate of H. A. Lones, deceased, to contest such will, in which there was a judgment for contestants. From an order refusing a new trial, defendant appeals. Affirmed.

Frank T. Nilon, for appellant. Thos. S. Ford and Smith & Riley, for respondents.

TEMPLE, J. This is a contest of a will, in which the contestants recovered a judgment. The appeal is from an order refusing a new trial. The deceased made a will in 1856, and another in 1884, which in terms revoked the will of 1856; and another in 1885, which in terms revoked all former wills. He died in 1893, and the will of 1856 was duly admitted to probate, but within the year the plaintiffs, who are heirs of the decedent, inaugurated this contest. The fact of the execution of the subsequent wills, and that they in terms revoked former wills, was established beyond question. The defendant, William B. Lones, however, who was executor and the sole beneficiary of the will of 1856, contends that in the cancellation of the will of 1885 the testator revived the will of 1856. The court found against this contention, and the statement does not contain an iota of testimony tending even in a remote degree to prove that at the time of the revocation or cancellation of the will of 1885 the testator intended to revive any former will. The testimony does not show when or how that will was canceled, and, of course, there could be no evidence tending to prove that "by the terms of such revocation" the former will was revived. But by no act or manifestation of intent in writing or otherwise, not executed with the formalities with which a will should be executed, would the will of 1856 have been revived upon the cancellation of the will of 1885. The will of 1885 did not revoke the will of 1856, but that of 1884, and only the will of 1884 could have been revived by the revocation of the will of 1885. That the revocation of a revocatory will revives the will revoked by the last will is upon one of two grounds: either that the revocation, being itself revoked, leaves the will which had been annulled by the revocation then unrevoked, or that a will is ambulatory, and has no operation until the death of the testator and its probate; and, if the revocatory will is itself revoked, and therefore cannot be probated, it never had any operation, and therefore the first never was revoked. Whichever view is taken, the revocation of the will of 1885 could not have revived a will which had not been revoked by its execution. But all such speculations are ended by section 1297, Civ. Code. The mere execution of a subsequent revocatory will ends the first will, and such will is not revived by the revocation of the last will unless it is revived by the terms of such revocation. What sort of a revocation it must be which can by its terms revive a prior will is shown by the first subdivision of section 1292, Id. The order is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(108 Cal. 627)

In re WALKERLY'S ESTATE. (No. 15,592.)

(Supreme Court of California. Sept. 3, 1895.)

Bequests — Conditions as to Time of Payment — Perpetuities — Assigning Homestead — Wills—Construction—Estoppel — Parol Evidence.

1. A direct bequest to a person, conditioned, however, that the principal thereof should not be paid till distribution of the residue by trustees, which was not to be till after the death of such person, is a present gift vesting immediately, and is independent of the trust, except as to the time of payment, which, being repugnant to the gift, as impossible on its face, is void.

2. A devise of the residue of an estate to trustees to hold and manage for a fixed period, and then sell, and distribute among certain persons or their heirs, is void as creating a perpetuity; Civ. Code, § 715, providing that the absolute power of alienation shall not be suspended by any condition or limitation longer than during the continuance of lives in being at the creation of the limitation or condition, and section 716 declaring void every future interest which, by any possibility, may suspend such power of alienation for a longer period, and declaring that it is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.

3. Even though the future interest of the beneficiary be vested like a remainder, and be thus alienable, it is not such an interest as will by transfer carry an absolute interest in possession.

4. The provision in a devise in trust that the trustee shall sell the property, and distribute it among certain persons or their heirs only after the lapse of 25 years, cannot be rejected as a condition void because repugnant to the interest conveyed.

5. Even if the rule against perpetuities did not apply to personal property, the doctrine of equitable conversion could not be invoked, so that land devised in trust to be sold only after a fixed period should be treated as already sold and converted into personalty.

6. The word "heirs," in Code Civ. Proc. § 1468, declaring that, if the property assigned as a homestead be selected from the separate property of deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of deceased, subject to such order, cannot be construed to mean "heirs or devisees."

7. Though a devise in trust allows the trustees to sell the property at any time, still, it being provided that the trustees shall hold and invest the proceeds till distribution, which is not to be made till a definite time, a perpetuity is created; Civ. Code, § 771, declaring that the suspension of all power to alienate the subject of a trust other than power to exchange it for other property, to be held on the same trust, or to sell it, and reinvest the proceeds, to be held on the same trust, is a suspension of the power of alienation, within the inhibition of section 715.

8. The inhibition of Civ. Code, § 715, against suspension of the absolute power of alienation, applies to personal as well as real property, the section being in that part of the Code dealing with the modifications of ownership and restraints on alienation of "property in general."

9. Though a legatee, by taking under a will, is estopped to deny its validity as a will, she may insist on a due interpretation of its provisions disconnected with the bequest, though they create a trust void as against the statute as to perpetuities.

10. A court whose duty it is, on distribution of a testator's estate, to give effect to his legal devises and bequests, cannot, even with the consent of the parties, declare valid trusts which are opposed to the express provision of the statute against perpetuities.

11. Where the provisions of a will are plain and unambiguous, parol evidence is not admissible on the question of testator's intent.

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

In the matter of the estate of William Walkerly, deceased. From the decree of distribution, testator's widow and minor child appeal. Reversed.

Rodgers & Paterson, for appellants. Frederick E. Whitney, H. C. Firebaugh, B. B. Newman, Fox, Kellogg & Gray, H. W. Hutton, and F. D. Brandon, for respondents.

HENSHAW, J. William Walkerly died testate upon September 16, 1887, leaving as heirs at law his widow, Blanche M. Walkerly, and a posthumous child, born February 14, 1888. This appeal is by the widow and the minor child from the decree of distribution rendered in the matter of his estate.

Upon June 2, 1887, Walkerly executed his will containing the following provisions: "First. I declare that my entire estate is my separate property, having been acquired by me prior to my marriage. Second. I direct my executors hereinafter named to pay all my just debts and funeral expenses without unnecessary delay. Third. I give, bequeath, and devise to my dear wife, Blanche M. Walkerly, all my household furniture, books, pictures, jewelry, and plate, to her sole use and benefit forever. I also give and bequeath to her during her widowhood the free use and enjoyment of my residence consisting of block number 121, with dwelling, stable, etc., thereon, situated in the city of Oakland. Upon the death or second marriage of my said wife, my trustees herein named are hereby directed to take possession and control of said dwelling and premises, and to manage and administer the same in the same manner and for the same purposes as they are directed in this will to manage and administer other property herein bequeathed and devised to them. Fourth. I hereby give and bequeath unto my dear wife, Blanche M. Walkerly, an annuity of two thousand four hundred ($2,400) dollars during her life, payable quarter-yearly, in gold coin of the United States, and I do hereby make the said annuity a charge and burden upon that certain piece of real estate situate on the northwest corner of Post and Stockton streets, in the city and county of San Francisco, known as the Walkerly Block or Building; and I do request my trustees hereinafter named to see that this annuity or allowance for the support and maintenance of my wife is promptly paid as herein directed. Fifth. I give and bequeath unto my grandnephew, Andrew Rumgay, the sum of two thousand dollars. Sixth. I do hereby give, bequeath, and devise unto Martin Bacon, Frank Barker, and Columbus Bartlett all the rest and residue of my estate of every description and wheresoever situated, in trust, for the folowing uses and purposes, to wit: (1) To take the possession, charge, and management of the property, and collect the rents, issues, and profits thereof. (2) Out of the income or rents and profits to pay quarter-yearly the annuity or allowance hereinbefore made to my wife, Blanche M. Walkerly, for her support and maintenance. (3) To pay to my sister, Mary Windley, the sum of five hundred dollars per annum, during her life, payable semiannually. Should my sister die before her husband, then, and in such case, the annuity left shall not cease and determine, but shall go on, and shall be paid to Stephen Windley during his lifetime. (4) To annually distribute the residue of the rents and profits of the trust estate, after deducting the sum of $2,400 to be paid to my wife, and the $500 to be paid to my sister, Mary, or her husband, and the taxes, insurance, and expenses, and charges of administration, equally among my nephews and nieces. Upon the death of any nephew or niece, his or her share shall go and be divided equally between his or her children, share and share alike. (5) To sell and convey all the trust property and estate at the expiration of twenty-five years from the date of my death, and to distribute the proceeds equally among my nephews and nieces or their heirs, the descendants or heirs of any deceased nephew or niece taking collectively the share which their father or mother would take were he or she living. Provided, that no final sale or distribution of the trust estate be made during the lifetime of my wife, Blanche M. Walkerly, but only after the expiration of twenty-five years from date of my death, and after her death. Upon the distribution of the proceeds of the sale of the trust estate among the parties entitled, then this trust shall cease and determine. Should any one or more of my said trustees die or resign, the remaining trustees or trustee must immediately appoint some suitable person to fill the vacancy, so as to keep the number of trustees at three. Seventh. I hereby nominate and appoint my nephews Martin Bacon and Frank Barker and my friend Columbus Bartlett the executors of this my last will and testament, without bonds, with full power and authority to sell any part of my estate, real or personal, whenever, in their judgment, or that of a majority of them, it is necessary or advisable to do so, excepting my residence in the city of Oakland, and the Walkerly Building in San Francisco. In the event that the proceeds of the sales of my other property shall not prove sufficient to pay my debts, expenses of administration, etc., then, in such case, but not otherwise, I hereby authorize my executors to negotiate, execute, and place a mortgage on the Walkerly Building, for the purpose of raising sufficient funds to pay the residue of my debts, etc. It is my will that the Walkerly Block be transferred and delivered over to my trustees hereinbefore named so soon as can be conveniently done after my death, to be managed by them in pursuance of the trust hereinbefore created, and that my residence be not sold while occupied by my widow. Should she marry again, then my trustees are directed to take possession of the same, and manage it for the benefit and as part of the trust estate, with power to sell the same whenever in their judgment it is best to do so."

Upon September 7, 1887, he republished said will with the following codicil thereto: "I, William Walkerly, of the city of Oakland, Alameda county, California, do make, publish, and declare this as and for a codicil to my last will and testament. That is to say, being informed by my wife, Blanche Walkerly, that she is pregnant with a child by me, I desire to make provision for such child, should it be born alive, and to make a more liberal and different provision for my said wife than I have made in my will to which this is a codicil. First. I hereby revoke the gifts, bequests, and devises made in my said will to and for the benefit of my wife, Blanche Walkerly, and in lieu thereof I do hereby give and bequeath to her the sum of one hundred thousand dollars ($100,000), to be paid to her when the Walkerly Block shall be sold, as described and provided for in my will, and in the meantime to be a lien, mortgage, and burthen upon said Walkerly Block, bearing interest at the rate of five per cent. per annum. Said interest to be paid to her semiannually by my trustees, Martin Bacon and Columbus Bartlett. Second. I give, bequeath, and devise unto my child, which shall be born unto me lawfully, begotten upon the body of my wife, Blanche Walkerly, the sum of one hundred thousand dollars ($100,000), to be paid when the Walkerly Block shall be sold as described and provided for in my will, and in the meantime to be a lien, mortgage, and burthen on said Walkerly Block, bearing interest at the rate of five per cent. per annum. And my trustees, Martin Bacon and Columbus Bartlett, are hereby directed to pay the interest on this bequest semiannually to the guardian of such child. Third. I hereby nominate and appoint my nephew Martin Bacon the guardian of the estate of any child which shall lawfully be born to me, without bonds."

Upon the hearing of the petition for distribution the court, first making certain findings of fact, hereinafter considered, rendered its decree, which itself contained a recital of the findings of fact above adverted to, and which, after further specifically setting forth the proceedings in probate showing that the estate was ready for distribution, and that the widow had remarried, and was the wife of William F. Burbank, made distribution as follows: "It is hereby ordered, adjudged, and decreed that the residue of said estate of William Walkerly, deceased, hereinafter particularly described, and now remaining in the hands of said executors, and any other property now known or which may hereafter be discovered which may belong to said estate, or in which the said deceased may have any interest, be, and the same is hereby, distributed unto Martin Bacon, Frank Barker, and Henry Davis Hawks, in trust, for the following purposes and uses, to wit: First. To take the possession, charge, and management thereof, and to collect the rents, issues, and profits thereof. Second. Out of the income or rents or profits of said trust estate to pay semiannually $2,500 to Blanche Walkerly-Burbank, formerly Blanche M. Walkerly, and $2,500 to William Martin Walkerly, a minor, and to distribute annually the residue of the rents and profits of said trust estate, after the aforesaid payments and expenses of the trust property have been paid, equally among the nephews and nieces of said William Walkerly, deceased; and upon the death of any nephew or niece his or her share to be divided equally between his or her child or children, share and share alike. Third. To sell and convey all the trust property and estate as soon as practicable, and convert the same into money, and distribute the same as follows: (1) Out of the proceeds obtained from the sale of the Walkerly Block in San Francisco, hereinafter mentioned, $100,000 to Blanche Walkerly-Burbank, with interest thereon from the 27th day of November, 1893, at the rate of five per cent. per annum, payable semiannually. (2) Out of the proceeds obtained from the sale of the Walkerly Block in San Francisco, $100,000 to said William Martin Walkerly, a minor, with interest thereon from the 27th day of November, 1893, and after deducting therefrom said sum $2,000 paid as attorney's fees to Arthur Rodgers, the attorney of said minor, appointed heretofore by this court, and interest as stated in the decree. (3) The remainder of the proceeds of the sale of said Walkerly Block in San Francisco, and all other property of said estate, to be equally divided among the following named persons. * * *" The nephews and nieces and the children of deceased nephews and nieces are then named, and their respective shares allotted to them. The residue so distributed to the trustees comprised the Walkerly Block, block 121 in Oakland, which had been set apart to Blanche Walkerly and the child as a homestead during her widowhood, and personal property, consisting of moneys to the amount of $4,615, and certain stocks, judgments, and claims of considerable amount, but small actual value.

The first proposition urged by appellants against the decree may be thus stated: The decree declares trusts other and different from those set up by testator in his will. The trusts sought to be established by testator in his will are void. The trust declared by the decree, read by itself and apart from the will, whose provisions it is supposed to formulate, is legal, and requires no independent consideration. But does it fairly interpret and represent the trusts sought to be created by the will? This vital point must first receive attention Omitting from present consideration the language of the codicil, Walkerly bequeathed and devised the residue of his estate to the trustees named upon certain defined trusts: (1) To pay an annuity of $2,400 to his widow during her life, making the annuity a charge upon the Walkerly Block; (2) to pay an annuity of $500 a year to his sister during her life, and upon her death to her husband during his life; (3) annually to distribute the remainder of the net income and profits of the estate to testator's nephews and nieces, and upon the death of any nephew or niece to distribute his or her share among the children of such decedent. The trusts so declared belong to those classes of express trusts which, as to real property, are alone permitted to be created by our statutes. Civ. Code, § 857, subds. 2, 3. So far, then, as concerns their objects and purposes, up to this point they contravene no law, and are undoubtedly legal. But there is still to be considered the life of the trust,—the event upon the happening of which, or the time upon the arrival of which, the testator has declared it shall cease and determine. These provisions are found in sections 5 and 7 of the will above quoted. At the expiration of 25 years from the date of testator's death the trustees are required to sell all the trust property, and to divide the proceeds among the then living nephews and nieces or their heirs, the "descendants or heirs" of a deceased nephew or niece taking collectively the share of the ancestor. That there may be no room for construction of his meaning as to when the sale shall be made, the testator further declares in the same connection that "no final sale or distribution of the trust estate shall be made during the lifetime of my wife, Blanche M. Walkerly, but only after the expiration of twenty-five years from date of my death, and after her death." This language is certain, precise, and free from doubt. The testator had left as a legacy to his wife an annuity of $2,400, the payment of which was made a charge upon the most valuable portion of his estate, the Walkerly Block. His special purpose was to preserve this property unaliened and inalienable for at least 25 years; for a longer period if his wife should live longer, but, if she should die sooner, still for 25 years. This purpose is made manifest not only from the clauses of the trust already discussed, but, in addition, by the exemption of this property from the operation of the power of sale conferred in the seventh paragraph of the will. To the grant of power to sell, therein made, is expressly attached a reservation excepting this property.

Turning now to the codicil, which is to be construed with the main instrument, it will be seen that the testator's declared purpose therein is to make a more liberal provision for his widow and for the child with which he has been informed she is pregnant. This he does by revoking the annuity, and giving her a present legacy of $100,000, with payment only deferred. It is to be paid "when the Walkerly Block shall be sold as described and provided for in my will," and in the meantime to be a charge upon that property. There is here not only no modification of the original time of the sale of this land and the extinguishment of the trust, but the provisions of the will in this regard are referred to with particularity as fixing the time of payment. The circumstance that the time of payment thus fixed must be after the death of the widow, and that, therefore, the legacy could not be paid to her, cannot affect or modify the terms of trust. The legacy is put wholly without, and made entirely independent of, the trust, except as to the date of payment. It is a present gift, vesting immediately, and, if the condition deferring the time of its payment is repugnant to it as being impossible upon its face, the condition would be void. Hone's Ex'rs v. Van Schaick, 20 Wend. 568; Oxley v. Lane, 35 N. Y. 350. In passing may be pointed out the radical and important distinction between the present gift to the wife and child each of $100,000 to be paid when the Walkerly Block is sold, and the future interests of the nephews and nieces, to whom nothing was directly given. All of the residue was devised to the trustees, who were to sell as provided, and upon sale to distribute the proceeds to the nephews and nieces who should be then alive, and the "descendants or heirs" of those who might be dead. The legacy to the child presents no features meriting special attention. No other conclusion, therefore, can be reached than that the general purpose of the testator as to all his property, clearly expressed by his will, was that it should be held by the trustees for 25 years before distribution, and that his special purpose as to that particular property called the "Walkerly Block" was that in no event should it be sold or aliened before the expiration of 25 years from his death.

But the trust estate consisted (1) of the Walkerly Block; (2) of the homestead, block 121, in Oakland; and (3) of personal property; and, as the terms and conditions of the trusts are not uniform as to these, a separate and more particular consideration of them and of the law bearing upon them becomes necessary. We proceed to consider:

1. The trust declared upon the Walkerly Block. This property comprises by far the greater portion in value of the testator's estate. It was devised to the trustees upon the trusts indicated, namely, to manage the property, and apply the proceeds for the use of the persons designated, and at the expiration of 25 years, or, if the widow should at that time be alive, then upon her death, to sell the property, and distribute the proceeds among the then living nephews and nieces and the "descendants or heirs" of those who might be dead. The purposes indicated come within the purview of subdivisions 1 and 3 of section 857 of the Civil Code. The fatal defect in the trust is that it provides for an absolute period of years for its determination, during which period the power of alienation is suspended. Section 715, Civ. Code: "The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition." Section 716, Id.: "Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed." Section 749, Id.: "The delivery of the grant, where a limitation, condition or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition or interest, within the meaning of this part of the Code." Section 771, Id.: "The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and re-invest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section 715." It would seem as though all need of discussion were foreclosed as to the trust under consideration by the plain terms of the Code above set forth, yet, because of the great value of the property involved, and the serious consequences which must follow to the interests of respondents, it would perhaps be unjust to leave this consideration without further amplification. We will therefore discuss, so far as we have been able to follow them, the propositions made by respondents in support of this trust. A perpetuity is any limitation or condition which may (not which will or must) take away or suspend the absolute power of alienation for a period

beyond the continuance of lives in being. The absolute power of alienation is equivalent to the power of conveying an absolute fee. Chapl. Suspen. § 64. The law against the suspension of the power of alienation applies to every kind of conveyance and devise. It applies to all trusts, whether created by will or deed, whether providing for remainders or executory devises, or, as here, merely restraining the power of alienation for a fixed period of years, and then providing for sale with gift over. In short, it "covers the entire field of estates, interests, rights, and possibilities." Id. § 2. Says Perry: "A perpetuity will no more be tolerated when it is covered by a trust than when it displays itself undisguised in the settlement of a legal estate." Perry, Trusts, § 382. And section 771, Civ. Code, is but an enactment of this rule. Every express trust, valid in its creation, vests the whole estate in the trustees. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust. Section 863, Id. If this trust be not valid in its creation, the trustees would take no estate, but neither would the beneficiaries whose rights are dependent upon the validity of the trust. If it be valid, then the "whole estate" vests in the trustees. The "whole estate," as has been pointed out (Embury v. Sheldon, 68 N. Y. 227), means the whole of such an estate as is necessary to the performance of the trust. In the one under consideration it embraces the whole legal and equitable estate which the testator enjoyed, since no less would be sufficient to enable the trustees to carry out the purposes: first, to apply the income for 25 years (Civ. Code, § 857, subd. 3); and, second, at the expiration of that time to sell the property, and dispose of the proceeds (Id. subd. 1). The beneficiaries herein, then, take no estate as such, their interest being the right to the enforcement of the trust.

But, if we understand the position of respondents, it is contended that the nephews and nieces take a future estate, which future estate is vested and is alienable, and that, therefore, it is a valid estate, since only those future interests are void which by possibility may unduly suspend the power of alienation. Following this argument, and for this purpose treating the interest of the beneficiaries as a future interest or estate within the contemplation of the Code (Civ. Code, § 716), it may be first suggested that all expectant estates, whether vested in interest or contingent with a vested right, or entirely contingent, pass by succession, will, and transfer, like present estates and interests (Id. § 699). But the fact that such interests may pass does not relieve from the operation of the rule, unless there are persons in being who, by combining and conveying all their distinct interests created by the original grant or devise, can pass an absolute interest in possession. Conceding that the future interest of the beneficiaries is vested in the sense in which remainders are spoken of as vesting, and that the interest would thus be alienable, it still is not such an interest as would by transfer carry an absolute interest in possession. As is pointed out by the court in Vanderpoel v. Loew, 112 N. Y. 167, 19 N. E. 481, the vesting of an estate involves absolute alienability only so far as that particular estate is concerned. The fact that a given remainder is vested renders it absolutely alienable, so far as it is itself concerned; but the absolute fee may at the same time be inalienable. Therefore, to convey this absolute interest in possession, the beneficiaries would be compelled to unite with their conveyance that of the trustees in whom the fee is vested. But the trustees cannot convey until the expiration of 25 years. An attempt by them to convey before that time would contravene the trust, and be a void act (Civ. Code, § 870), and so even by this method of progression our path leads to that barrier of perpetuity which cannot be surmounted. So, even though the beneficiary should be a remainder-man under such a trust as this, he still could not alienate the land within the trust period so as to avoid the statute. Such a trust cannot be terminated or destroyed during the period fixed for the existence, even by the consent and joint act of all the trustees and beneficiaries. Douglas v. Cruger, 80 N. Y. 15; Penfield v. Tower, 1 N. D. 216, 46 N. W. 413. Hence the question whether the interest of the beneficiaries is contingent or vested is here of no possible moment. The absolute alienability required by section 715 of the Civil Code does not imply vesting, and it affords no escape from the operation of the rule because the interest which the beneficiaries take may be relieved from uncertainty as to persons or event. When so relieved, the interest may be said to be vested. But it is not such a vesting, nor yet such an interest, as removes the bar of the statute, since all of the interests and estates, contingent and vested, cannot convey the fee so long as the terms of the trust from which alone their interests are derived stand in the way. The perpetuity here does not result from too remote limitations, or the failure of future estates to vest, but it arises by the direct act of the testator in forbidding his trustees to alienate for a period not tolerated by the law.

Nor is the 25 years a "condition" which may be rejected as void, because repugnant to the interest conveyed. It is a limitation, a restraint upon alienation, forming an integral part of the trust. To the constitution of every valid express trust it is essential that there should be a trustee, an estate conveyed to him, a beneficiary, a legal purpose, and a legal term. While equity will in certain instances make good the absence of the first requisite, if the second or third be lacking, or the fourth or fifth be illegal, the trust itself must fail. Of the express trusts permitted by the statute there are two great classes, one of which does and the other does not involve a suspension of the power of alienation. Under the first class are included all those whose very purpose and essence it is that the land shall not be alienated by the trustee during the trust term, and where, consequently, a sale by him would be in direct contravention of the trust. In the case of such express trusts as occasion the suspension of the absolute power of alienation, the term of duration is the vital subject of inquiry. Chapl. Suspen. 146, 148. Trusts such as those under consideration in their very nature operate to suspend the power of alienation. That power must be suspended in the one case while the trustee is distributing the rents and profits, and in the other case it is suspended by the express duty imposed upon the trustee to sell only at the expiration of a fixed period. The law has seen fit to insist that the measure of the period of suspension shall be lives in being, and it will not countenance the suspension for any fixed period or term of years for the sufficient reason that during the time of such a limitation, however short, the person capable of conveying the absolute interest might die,—a possibility not to be endured. So it happens that whenever a testator, through temerity or ignorance, violates the plain mandate of the statute, as in this case, and creates a trust by which the absolute power of alienation is sought to be suspended for a term of years, he must pay the penalty of his rashness or folly in the destruction of his cherished design. Such, though grievous, have always been the necessary and logical decisions of the courts, and the books abound in cases which, while monuments to the learning of the judges, are equally monuments to the persistency of testators, or to the recklessness of their advisers. Thus it is, as is said by the vice chancellor in Field v. Field, 4 Sandf. Ch. 528, that "the statute restricts the suspension of alienation and ownership to lives and lives only. It does not admit of a suspense for a term of years, however short nor one dependent in part upon life and in part upon a fixed period of time." The rule has been applied in New York alone to terms of varying length of from 21 years to 3, from the leading case of Hone's Ex'rs v. Van Schaick, 20 Wend. 564, through a long and unvarying series of judicial determination (Bolles. Power Alien. note to section 78, where cases are collated), while in other states the authorities are as uniform, if not so numerous. Mandlebaum v. McDonell, 29 Mich. 78; Farrand v. Petit, 84 Mich. 671, 48 N. W. 156; DeWolf v. Lawson, 61 Wis. 473, 21 N. W. 615; Penfield v. Tower, 1 N. D. 216, 46 N. W. 413.

Nor can the doctrine of equitable conversion be invoked to aid this trust. If we understand the argument of counsel upon this point, they urge that under that doctrine the land should be treated as now sold and converted into personal property, and that such a trust in personal property would be valid, and that, therefore, this trust must be upheld. This would not only be a surprising application of the doctrine, but would be a novel and startling method of evading the law against perpetuities by invoking an equitable fiction. The rule of equitable conversion merely amounts to this: that where there is a mandate to sell at a future time, equity, upon the principle of regarding that done which ought to be done, will for certain purposes, and in aid of justice, consider the conversion as effected at the time when the sale ought to take place, whether the land be then really sold or not. But whenever the direction is for a future sale, up to the time fixed the land is governed by the law of real estate. Savage v. Burnham, 17 N. Y. 561; Vincent v. Newhouse, 83 N. Y. 505; Underwood v. Curtis, 127 N. Y. 533, 28 N. E. 585; DeWolf v. Lawson, 61 Wis. 469, 21 N. W. 615. Whether a trust of personalty for a fixed term would be valid is a matter of consideration hereinafter.

The intestacy of the testator as to the Walkerly Block is the harsh result which must follow this void trust, and the property will descend to his heirs. It is true that such was not the testator's intent, but a testator must do more than merely evince an intention to disinherit before the heirs' right of succession can be cut off. He must make a valid disposition of his property. Habergham v. Vincent, 2 Ves. Jr. 204; Hawley v. James, 16 Wend. 150; Haynes v. Sherman, 117 N. Y. 433, 22 N. E. 938.

2. The trust as to block 121. The first objection presented by the appellants to the disposition of this land made in the decree is that it has been removed from administration, and no longer forms a part of the residue of the estate or of the trust property. The argument in support of the contention is based upon the following facts: Upon application the court set apart block 121 as a homestead to the widow and minor child "during her widowhood." This life estate was terminated by her marriage to William F. Burbank, whose wife she now is. Section 1468, Code Civ. Proc., declares that if the property assigned as a homestead be selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order. The claim of the widow, therefore, is that the title to block 121, notwithstanding the testamentary disposition made of the property to the trustees, vested in herself and child, by virtue of this section, eo instanti, when the court made the homestead order, and that consequently her subsequent marriage, while it terminated the homestead right, had no effect upon the title to the property which had vested in her as an heir of her husband. Against this respondents urge that the word

"heirs" was not used in the section to exclude devisees, and that it should be construed as broad enough to include them. The right of testamentary disposition is itself only a right given by statute, and may be restrained, modified, or abrogated entirely. But still it is unquestionably the general policy of our law to allow full power of testamentary disposition, saving as that power may be abridged by specific enactments. The Code provisions making disposition of the homestead and of estates in value less than $1,500 are instances of the limitations put by the legislature upon the free power of testamentary disposition, and from the lack of uniformity and harmony in their terms these homestead provisions have presented questions of much doubt and vexation to the courts. The present question is one of that kind. Did the legislature mean by section 1468 to do more than declare the ordinary rule of succession and descent in cases of intestacy, but subject always to the right of testamentary disposition; or did it mean that, as to separate property, upon which the homestead character had been impressed by order of court, any devise would be void, and the property must descend to the heirs? The latter view places a limitation upon a testator's power, and removes from the disposition of a will any property which may chance to be selected and set apart to the widow and children, and may thus defeat by a curious uncertainty the object of a testator's worthy bounty. It may do more than that, as in this case. The widow, to whom a homestead of the estimated value of $30,000 had been set aside "during her widowhood,"—the time in contemplation of a beneficent law during which she may be dependent and is entitled to maintenance from the estate of her deceased husband,—by marrying again, while thus cutting off any further right of homestead or maintenance, is enabled to obtain a perfect and untrammeled fee in the property which her husband had devised to others, and which, in the general contemplation of the law, was to be set aside to her use only during the limited period of her widowhood and dependency. But nevertheless such an interpretation is borne out by the language of the statute. Upon the other hand, the former view is certainly more in accord with the apparent policy of the law; but the language of the section before and after amendment to its present form stands in the way of its adoption. Where a homestead has been selected from the separate property of a husband during his life, and without his consent, it goes, upon his death, to his "heirs and devisees," subject to the power of the court to assign the same for a limited period, under section 1265 of the Civil Code; while by section 1474 of the Code of Civil Procedure the same property vests in "the heirs," subject to the same power of limited assignment in the court. It is not easy to see, as this court has before said, why the rule of devise or descent as to a homestead upon separate property declared during life should differ from that which obtains in case it be set apart after death, and it is still less easy to perceive why the two sections last above cited should be left inharmonious; but nevertheless, if the legislature has seen fit to prescribe different rules, it is the bounden duty of the court to give them effect. This the court was reluctantly driven to do in Mawson v. Mawson, 50 Cal. 539. Section 1465, Code Civ. Proc., at that time provided that the homestead, on being set apart, should be the property of the surviving widow or husband, if there were no minor children. Mawson died intestate. There were no minor children. A homestead was set apart to the widow out of the separate property. The deceased left two children of a former marriage,—heirs at law,—and they appealed. This court adjudged that the title vested in the widow to the exclusion of the heirs at law. By the amendment to section 1465, adopted in 1880, the title under such circumstances is now declared to vest in the heirs; and we cannot, without doing violence to the meaning of the word, hold that it includes devisees; nor can we, without doing equal violence to all rules of statutory construction, read into the section the words "or devisees." Code Civ. Proc. § 1858. The section is plain and unambiguous. Its meaning is in no way uncertain, and, when that meaning is found, nothing is left but to declare it. The wisdom of the law is for the legislature alone. It is concluded, therefore, that the section is a limitation upon the power of testamentary disposition, and operates to vest the title to the homestead in the heirs at law, and so to withdraw it from the disposition made by the testator under his will. Such being the case, the trust in block 121 fails for lack of subject-matter. But, were the other view to obtain, and the property to be considered a part of the trust, the position of respondents would not be bettered; for the trust as to this land differs from that of the Walkerly Block only in permitting a sale of the property before the expiration of the twenty-five years. In all other essential respects the trusts are the same. In the event of a sale, still the proceeds are to be held and invested until distribution, which, as in the case of the Walkerly Block, is deferred to a fixed time. The mere power of sale does not, under such circumstances, save the provisions of the trust, since the proceeds of the sale are still to be held in violation of the law. Civ. Code, §§ 715, 771; Estate of Hinckley, 58 Cal. 457, 481; Hawley v. James, 16 Wend. 163; Haynes v. Sherman, 117 N. Y. 438, 22 N. E. 938. Nor is it the law of this state that the provisions against restraints upon alienation do not apply to trusts of personal property, as we will proceed to consider.

3. The trust in personal property. The es-

sential difference in this state between trusts in real property known as "express trusts" and those in personal property are: First, the former can only be of the kinds permitted by the statute, and no others (Civ. Code, § 857), while the latter may be created generally for any purpose for which a contract may be made (Id. § 2220); second, the former must be created and declared by writing (Id. § 852), while the latter may rest upon parol (Id. § 2222). But to all trusts, whether of real or personal property, the limitation upon the suspension of the power of alienation expressed in section 715, Civ. Code, directly applies. The section is found in division 2, pt. 1, tit. 2, of the Code, where the lawmakers are dealing, as expressly declared, with the modifications of ownership and restraints upon alienation of "property in general." Again, section 771, Civ. Code, shows plainly the applicability of the law to personal property; for if it be only the suspension of the power to alienate real property which is under the ban, power to sell the realty would relieve the difficulty, and yet it is by that section expressly declared that personal property held after sale under the terms of the original trust operates to suspend the power of alienation under section 715, Id. And, finally, the applicability of section 715 to trusts in personal property has often been recognized, and never questioned. Estate of Hinckley, 58 Cal. 457; Goldtree v. Thompson, 79 Cal. 613, 22 Pac. 50; Williams v. Williams, 73 Cal. 99, 14 Pac. 394; Whitney v. Dodge, 105 Cal. 192, 38 Pac. 636. We are not unmindful of the fact that the statutes of the state of New York in express terms put a limitation upon the power to suspend the ownership of personal property. 1 Rev. St. p. 773, § 1. And we have not overlooked the circumstance that the supreme courts of Michigan and Wisconsin have uniformly held that their statutes, similar in terms to our Code provisions, do not apply to trusts in personal property. But it is to be observed that the legislature of this state, in adopting section 715 of the Civil Code, placed it where it must apply; and therefore made it apply to "property in general," while the corresponding section in the Michigan statutes (How. Ann. St. Mich. § 5531) and that of the Wisconsin statutes (Rev. St. Wis. § 2039), are found in the chapters of the law relating to estates in real property, and so have been construed by the courts to be applicable only to trusts in such property. Toms v. Williams, 41 Mich. 552, 2 N. W. 814; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, and 50 N. W. 1103; Palms v. Palms, 68 Mich. 355, 36 N. W. 419; De Wolf v. Lawson, 61 Wis. 469, 21 N. W. 615. In those states it is held that, as to trusts in personal property, the common-law rule still obtains. And it is for the application of this rule that respondents here contend. But even this would not avail to save the trust. The common-law rule against perpetuities does not, as counsel argue, apply only to landed estates. Executory devises, springing and shifting uses, and trusts, whether of realty or personalty, were all within its terms. 1 Jarm. Wills, c. 9; Lewis, Perp. 159; Perry, Trusts, §§ 377, 384; Lewis, Trusts, c. 7; Gray, Perp. § 202; 4 Kent, Comm. 271; Cadell v. Palmer, 1 Clark & F. 372. As Jarman states: "To the test of the rule settled by Cadell v. Palmer every gift of real or personal estate, by will or otherwise, must be brought." 1 Jarm. Wills, 217. By the Thelluson act (39 & 40 Geo. III. c. 98) the maximum period during which the power of alienation could be restrained was lives in being and 21 years and 9 months. Tested by that act, still would this trust be invalid. We hold, however, that section 715 of the Civil Code not only applies to trusts in personal property, but also that it shortens the period permitted by the common law to lives in being. Private trusts in personal property which suspend the power of alienation must be limited, like private trusts in realty, to lives in being; and the trusts here are consequently destroyed by the same vice which invalidated those first considered.

We have thus far construed the trusts without noticing some objections urged by respondents against the right of appellants to be heard. Of those the first is that appellants are estopped from attacking the validity of the trusts. No estoppel is found against the appellants, but the facts which were claimed to establish one are set forth in the findings. Briefly, those facts are that the widow and child had been receiving a family allowance. By stipulation it was agreed that the order of family allowance should be vacated, and that the executors would thereafter pay the widow and child each $416.66⅔ per month, being at the rate of 5 per cent. per annum upon the legacies provided to be paid in the codicil to the will; and the amounts so paid should, upon distribution, be treated as payments of interest upon account of said legacies. The court made its order in accordance with the stipulation. No mention is here made of the trusts, and no waiver, express or implied, of the right to demand a legal interpretation of them could thus arise. The legacies, as has been pointed out, were not within the trusts, but were independent and valid bequests. The fact that under these circumstances the widow had elected to take under the will would have estopped her from denying the validity of the instrument as a will, but did not and could not operate to estop her from insisting upon a due interpretation of the instrument. Appellants still stand affirming the validity of the will as a will, but insist that the trial court has not correctly interpreted some of its provisions. It became the duty of the court for the first time upon distribution to give effect to the legal devises and bequests of the testator, and it could not, even with the consent of the parties, declare valid trusts such as these which are opposed to the express mandate and policy of the law.

It is next urged that, as the court made findings concerning the testator's intent, and decreed distribution in accordance with these findings, and as the findings are not attacked, and will sustain the decree, and as "a volume of extrinsic circumstances bearing on the question was introduced without objection," these appellants are not in a position to combat the decree. But as to this it need only be said that it is the duty of the court in all cases to ascertain the intent of the testator from the language of the will, and the occasions which render parol evidence of circumstances admissible do not here arise. Civ. Code, §§ 1318, 1340. The terms of the will are plain and unambiguous. It may be said of all wills that the testator's intent is to make a valid disposition of his property, and as to most provisions which are deemed invalid there is no difficulty in arriving at his actual meaning and intent. But a court is not, therefore, authorized to modify or vary the plain language of the testator, and thus create a new and valid will for him, even if it were certain that the testator would have adopted the interpretation of the court had he known his own attempt was invalid. So of the trusts decreed by the court it may be said, as was said in Coster v. Lorillard, 14 Wend. 349: "This would approximate nearer to the will of the testator than any other proposed alteration. But, after a diligent inquiry, I have not been able to satisfy myself that there is any principle or decision that would authorize such an interference. It would be arbitrary, and establish a precedent for courts, not to construe wills according to the intent of the testator as derived from a consideration of the langauge used to express it, but to make a will for him; such an one as we undertake to presume he would have made, if advised that his own was void as against law. This I cannot consent to do. Better that the intent of a testator should fail in a particular case than that the court should assume such arbitrary and undefined discretion over his estate. If we cannot execute the whole will, or some distinct and independent portion of it, the whole had better be declared void. The law makes a better one than will usually be made by the court." So, too, where the language of the provisions of a will is plain and unambiguous, the courts are not permitted to wrest it from its natural import in order to save it from condemnation. Cottman v. Grace, 112 N. Y. 299, 19 N. E. 839.

The determination that the trusts are void renders unnecessary any consideration of the other points presented. The trusts being void, it follows as to the property attempted to be devised in trust, that the testator died intestate. It therefore descends to the heirs living at the time of his death. For the foregoing reasons the decree is reversed.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; TEMPLE, J.; VAN FLEET, J.

In re WALKERLY'S ESTATE. (No. 15,592.)

(Supreme Court of California. Sept. 3, 1895.)

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

In the matter of the estate of William Walkerly, deceased. From the decree of distribution certain of the beneficiaries appeal. Affirmed.

Rodgers & Paterson, for appellants. Frederick E. Whitney, H. C. Firebaugh, B. B. Newman, Fox, Kellogg & Gray, H. W. Hutton, and F. D. Brandon, for respondents.

PER CURIAM. This is an appeal from the decree of distribution taken by some of the beneficiaries under the trusts seeking modification of the decree in certain minor particulars. The points raised are made of no moment by the decision of this court upon the appeal of the widow and child from the same decree (No. 15,592, filed Sept. 3, 1895, 41 Pac. 772). The modifications asked for are denied.

In re WALKERLY'S ESTATE. (S. F. 6.)

(Supreme Court of California. Sept. 3, 1895.)

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

In the matter of the estate of William Walkerly, deceased. From the decree of distribution certain beneficiaries appeal. Affirmed.

Rodgers & Paterson, for appellants. Frederick E. Whitney, H. C. Firebaugh, B. B. Newman, Fox, Kellogg & Gray, H. W. Hutton, and F. D. Brandon, for respondents.

PER CURIAM. This is an appeal by certain beneficiaries from the decree of distribution entered in the matter of said estate. The decision of this court in the appeal of the widow and child in the same matter (No. 15,592, filed Sept. 3, 1895, 41 Pac. 772), renders superfluous any consideration of the points here presented, saving that it may be said that it was the duty of the court in probate, upon distribution, to distribute under the will the residue of the estate to the trustees, upon the theory that the trusts were valid. This is what was done. But, the trust having been determined to be void, that attempted distribution was, of course, invalid. The motion to dismiss this appeal, while in point of fact perhaps meritorious, may be denied under the circumstances, without injury to the moving party. It is denied, and the proposition of appellant that the court had no power under the will (and assuming a valid trust) to distribute to the trustees is decided adversely to appellant's contention.

In re WALKERLY'S ESTATE. (S. F. 6.)

(Supreme Court of California. Sept. 5, 1895.)

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

In the matter of the estate of William Walkerly, deceased. From orders, judgments, and decrees settling the final account of the executors certain beneficiaries appeal. Appeals dismissed.

Rodgers & Paterson, for appellant. Frederick E. Whitney, H. C. Firebaugh, B. B. Newman, Fox, Kellogg & Gray, H. W. Hutton, and F. D. Brandon, for respondents.

PER CURIAM. It appearing from the statement of counsel made in open court that his appeal upon behalf of certain beneficiaries from the order, judgment, and decree of the superior court made and given upon November 27, 1893, settling the final account of the executors of the will in the matter of the above-entitled estate, and his appeal from the order, judgment, and decree made and given by the superior court upon August 17, 1892, settling the final account of the executors of the will in the matter of the above-entitled estate, have been, and each of them is, abandoned, and no transcript upon these appeals, or either of them, having been filed as required by law and the rules of this court, it is ordered that said appeals be, and each of them is, hereby dismissed.

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KOELLING v. RUTZ. (S. F. 219.)

(Supreme Court of California. Sept. 4, 1895.)

APPEAL TAKEN FOR DELAY—DISMISSAL—DAMAGES.

On motion to dismiss an appeal, respondent's attorney made affidavit that, prior to giving notice of appeal, appellant urged him to take less than the amount of the judgment, and said that, unless such sum was accepted, an appeal would be taken, and collection indefinitely delayed; that delay was all he wanted; and that after his refusal, and after notice of appeal was given, and an undertaking filed, appellant, through his attorneys, renewed the proposition to press the appeal if the less sum was not accepted. Appellant filed no transcript, and did not controvert such statements. *Held*, that the appeal should be dismissed, with damages against appellant for delay.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Koelling against Rutz, in which defendant appealed from a judgment in favor of plaintiff. Plaintiff moves to dismiss the appeal, and for allowance of damages. Motion granted.

John J. Roche and Isador Danielwitz, for appellant. Otto Tum Suden, for respondent.

HARRISON, J. A motion is made to dismiss the appeal for failure to file the transcript within the time prescribed by the rules of this court, and that the respondent be allowed damages upon the ground that the appeal is not taken in good faith, but for the purpose of hindering and delaying the plaintiff in the collection of the judgment. In support of the latter part of the motion, the attorney for the respondent has filed an affidavit stating that after the rendition of the judgment, and prior to the service of the notice of appeal, one of the attorneys for the defendant proposed to him that the plaintiff accept a less sum than that for which judgment had been given, and informed him that, unless such less sum was accepted in full payment, an appeal would be taken, and the plaintiff delayed in the collection of the judgment for an indefinite period. To the suggestion that the time for presenting a bill of exceptions or a motion for a new trial had expired, and that the appeal must be upon the judgment role alone, which was free from error, the attorney replied that delay was all he wanted, and that the plaintiff had better take a smaller sum at once than the full sum after the disposal of an appeal and its attending labor and trouble; that the plaintiff ought to accept a less sum than the amount of the judgment, and avoid the delays that an appeal would bring; and that, for that reason, the appeal would be taken if a less sum was not accepted. The plaintiff's attorney declined to accept the proposition, and notified the defendant's attorney that if the appeal were taken, and not perfected, he should ask for damages against the appellant for delay. Thereafter the notice of appeal was taken, an undertaking given to stay execution, and the appellant, through his attorneys, renewed his proposition to press the appeal if the less amount were not accepted.

The statements in this affidavit are not controverted by the appellant, and are corroborated by his failure to file any transcript in this court. As they must, therefore, be taken as admissions by him that they are correct, the respondent is entitled to the damages asked. Duncan v. Grady, 99 Cal. 552, 34 Pac. 112. The appeal is dismissed, and the respondent is allowed $50 damages as a part of his costs on appeal.

We concur: GAROUTTE, J.; VAN FLEET, J.

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109 Cal. 12

WOODWARD v. FARIS. (No. 18,439.)

(Supreme Court of California. Sept. 5, 1895.)

ADVERSE POSSESSION—WHAT CONSTITUTES—QUIETING TITLE.

1. Where a grantee of land takes and holds possession of land not described in the deed, claiming to own it, his possession is adverse, though such possession is under the mistaken belief that the land is within the boundaries described in his deed. Smith v. Robarts (Cal.) 9 Pac. 104, distinguished.

2. Civ. Code, § 1007, provides that occupancy sufficient to bar an action to recover property "confers a title thereto, denominated a title by prescription, which is sufficient against all." *Held*, that one who has lost title to land by adverse possession of another is not entitled to a decree, quieting his title to such land, against a person in possession, who fails to connect himself with the title of the person who acquired title by such adverse possession.

Department 2. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by George Woodward, executor of the estate of Michael Bemmerly, deceased, against James Faris, to quiet title, in which there was a judgment for plaintiff. From an order denying a motion for a new trial, defendant appeals. Reversed.

J. W. Hughes and F. E. Baker, for appellant. E. R. Bush and E. B. Mering, for appellee.

TEMPLE, J. This is an action brought to quiet title by the executors of M. Bemmerly, deceased. The evidence and the findings of the court show that M. Bemmerly and his grantors were the owners of the record title to the demanded premises. The findings show that Michael Bemmerly, plaintiff's testator, had owned the southeast quarter of section 33 since 1866, and was the owner at the time of his death. But the court also found that "on or about the 16th day of April, 1866, W. W. Hannum, the defendant's predecessor in interest in and to the said south half of said section 34 (but not including the lands described in plaintiff's complaint), entered into possession of said land and premises, under claim of title thereto, exclusive of any other right, founding such claim upon a certain indenture of deed, bearing date the 16th day of April, 1866, duly executed, acknowledged, and delivered by one Peter Robinson to the said W. W. Hannum, as being a conveyance of said land and premises; that, at the time of the execution and delivery of said deed, the said Peter Robinson did not have possession of the land described in plaintiff's complaint, or any part thereof, nor did he deliver possession of the same, or any part thereof, to said Hannum, at that time, nor did the said Hannum ever, at any time, take or have possession of the same, or any part thereof, until some time between the year 1869 and the year 1872 (the precise time not being ascertainable from the evidence); that in the deed from the said Robinson to said Hannum the said lands were described as the south half of section 34; that at said date, between the years 1869 and 1872, the said Hannum, supposing that the true line of said south half of section 34 included therein the lands described in plaintiff's complaint, extended his said line so as to include said lands, and the said Michael Bemmerly, being at that time alive, and also supposing that the true line of said south half of section 34 included said lands, made no opposition thereto; that, in such supposition and belief, both the said Hannum and the said Bemmerly were mutually mistaken; that there was never any agreement of any kind by and between said Hannum and said Bemmerly that such line should be the true line between their said lands, but that the same remained the boundary line between said parties, as explained in finding 5 herein, from said date till the commencement of this suit; that from said date, between the years 1869 and 1872, until and including the 14th of October, 1879, that said Hannum was in quiet, peaceable, open, notorious, and exclusive occupancy and possession of said lands and premises, claiming title thereto as in this finding expressed, but that such possession and occupancy of said Hannum was not adverse to said Bemmerly; and, in truth and in fact, the lands described in plaintiff's complaint were a part and portion of the said southwest quarter of section 33." It was also found that on the 14th day of October, 1879, defendant entered into possession of the south half of section 34, and of the land in controversy, under a deed from W. W. Hannum, conveying to him the south half of section 34, and has since remained in the occupancy of the demanded premises; but his possession was not adverse to Michael Bemmerly, and defendant did not enter into possession of said land under such deeds as being conveyances thereof. Also, that since 1878 Bemmerly paid all the taxes which were assessed upon the strip of land in controversy. It was doubtless upon this ground that the court considered that defendant's possession could not be the foundation of any adverse right. The court also found as a fact that the plaintiff's cause of action was not barred by the statute of limitations. Judgment having been rendered for the plaintiff, defendant moved for a new trial, and now appeals from an order denying his motion.

It would seem to be plain that, if Bemmerly was the owner of the disputed strip when defendant went into possession of it, in 1879, defendant has not been holding adversely, so as to set the statute of limitations moving in his favor, because he has not paid the taxes on the land. Defendant contends, however, that Hannum was in possession, claiming adversely, for five years prior to 1878, when the statute was passed which requires the payment of taxes by one in possession, claiming adversely to the true owner, in order to set the statute running; that, such being the case, Bemmerly had no title; and as he must recover, if at all, upon his own title, and not upon the weakness of defendant's title, his suit must fail; that, while the court finds that Hannum did not hold adversely, it finds facts which show that he did so hold; and that the general finding is manifestly an erroneous conclusion from the specific facts found. Since this appeal is from an order denying a new trial, and there is an exception that the evidence is insufficient to sustain the finding that plaintiff's testator was the owner of the demanded premises, if the evidence sustains the finding of specific facts we need not consider whether the finding of the ultimate fact will control the finding of the specific facts from which it is a conclusion.

The first question, then, is, do such facts show that Hannum's possession was adverse? All the elements of an adverse possession are found, but it is supposed that the holding was not adverse because Hannum took possession of the land in dispute, and held possession of it, claiming to own it, under the mistaken belief that it was within the boundaries of the south half of section 34. Since, therefore, he claimed no title to any land outside of section 34, and this was not included in that section, there was lacking an essential element of adverse holding, to wit, the claim of title. I find some color for this contention in decisions of other states. Ross v. Gould, 5 Me. 204; Brown v. Gay, 3 Me. 126. The doctrine has not, however, obtained generally, and is, I think, founded upon a fallacy. Most cases of adverse possession which have ripened into title commenced, I doubt not, in mistake. It must be either by mistake or deliberate wrong. It is through mistake only that one can honestly claim to own that which really belongs to another. But this discussion need not be prolonged, for it is only necessary, to set the statute running, that the party should be in possession as owner. The question has been passed upon by this court, and there is no conflict in the decisions. Silvarer v. Hansen, 77 Cal. 584, 20 Pac. 136; Grimm v. Curley, 43 Cal. 250. The reasons for the rule are elaborately considered in Pearce v. French, 8 Conn. 439. See, also, Bunce v. Bidwell, 43 Mich. 542, 5 N. W. 1023.

The case of Smith v. Robarts (Cal.) 9 Pac. 104, is not in conflict with this position. If Hannum had made his inclosure, not claiming that his fences were upon the line, but expecting to move them to the true line when it should be determined, he would not, in that case, be claiming adversely, and the statute would not run. In all the cases cited by the respondent upon this point it appears that the party did not claim that his fence was upon the true line, but admitted, at least, that he was uncertain as to his boundary. In such cases the parties may agree upon a line which shall be the boundary, whether right or wrong; but if one of the coterminous owners takes possession, and claims title to the extent of his possession, he holds adversely, although he was induced to locate his possession through a mistake as to the boundary. If this be so, then Hannum, by adverse holding, acquired a perfect title to the demanded premises. Arrington v. Liscom, 34 Cal. 365; Cannon v. Stockmon, 36 Cal. 540; Williams v. Sutton, 43 Cal. 65; Langford v. Poppe, 56 Cal. 73; Civ. Code, § 1007. But when Hannum conveyed to defendant he simply described the south half of section 34, which does not include the land in controversy. Respondent, therefore, contends that, as defendant has not connected himself with Hannum's title, he cannot claim the benefit of any right which Hannum may have acquired. There is some plausibility in this contention, arising from the fact that it has been constantly held that the defense of the statute is a personal privilege, and is waived unless pleaded. And it has been hinted that no title is acquired by limitation, but that the bar is merely a statutory estoppel. Grant v. Burr, 54 Cal. 300. Whatever may have been the correct view under the former condition of things, there can be no doubt under the Code. Section 1007 provides that occupancy sufficient to bar an action to recover property "confers a title thereto, denominated a title by prescription, which is sufficient against all." No title can be better or more absolute than that. If this be so, then the estate of Bemmerly has no title to the land in controversy, and is not entitled to a decree quieting its title thereto.

It is not necessary here to discuss the rule of pleading which requires a party claiming title by limitations to plead it, when, if he derived his title from any other source, he might avail himself of it without a special plea, and without stating the source of his title. That rule is a survival from a different condition, or prevails because no pains have been taken to discriminate between actions to recover land and actions to enforce personal obligations. If that rule prevails still, a title acquired by limitations is as good as any other title, only, to avail himself of it as conferring a right, a party must specially plead it.

This appeal is only from the order refusing a new trial, and we cannot change the judgment to make it consistent with the findings. The judgment is, therefore, reversed, and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.

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109 Cal. 86

STEPHENS et al. v. SOUTHERN PAC. CO.

(No. 18,369.)

(Supreme Court of California. Sept. 7, 1895.)

CONTRACTS—PUBLIC POLICY—LIMITING LIABILITY.

1. A stipulation, in a lease by a railroad company, exempting the lessor from liability for damages by fire to the lessee's property caused by the lessor's locomotives, or otherwise, is not void as against public policy.

2. A contract that is valid when made is not affected by a change in public policy of the state.

Department 1. Appeal from superior court, Tulare county; W. A. Gray, Judge.

Action by R. K. Stephens and others against the Southern Pacific Company to recover damages for the value of property destroyed through defendant's negligence. Plaintiffs had judgment, and defendant appeals. Reversed.

Foshay Walker, for appellant. Van Ness & Redman, for respondents.

GAROUTTE, J. The plaintiff Stephens was the owner of a certain warehouse situated upon land adjoining the defendant's depot grounds in the town of Hanford, Cal. The said land was held by Stephens under a lease from the defendant. One of the covenants of said lease was as follows: "And it is further agreed that the said party of the first part [defendant] shall not be responsible for any damage caused by fire, whether from railroad engines or from the buildings of the said party of the first part, or by fires caused from any other means, but the risk and damage, from whatever source, shall be alone sustained by the said party of the second part [Stephens]." Upon August 8, 1891, and while said lease was in force, the said warehouse was destroyed by fire which had been kindled by defendant's employés upon adjoining land for the purpose of burning the dry grass, rubbish, etc., thereon. At the time of said fire, the plaintiff Stephens was carrying insurance on said warehouse, in the two insurance companies, plaintiffs, in the sum of $9,000. The insurance was paid, and this action was brought by the insurers and insured jointly to recover from the defendant the value of the premises so destroyed. The verdict and judgment were for the plaintiffs, from which judgment, and from a subsequent order denying its motion for a new trial, the defendant has appealed.

The trial court held the foregoing provision of the contract of lease void, as against public policy, and our attention shall be addressed to the consideration of that question, for, as we view the case, a solution of it is determinative of the litigation. The fact that the defendant is a common carrier has no place in the case. The rights of parties dealing with common carriers, and the duties of common carriers towards parties with whom they deal, and towards the public in general, are elements foreign to any question here involved. At that time it was not dealing with plaintiff Stephens as a common carrier, nor was Stephens contracting with it upon any such understanding or hypothesis. As far as this transaction was concerned, the parties, when contracting, stood upon common ground, and dealt with each other as A. and B. might deal with each other with reference to any private business undertaking. It follows that all those principles of law denying or restricting the right of common carriers to limit their legal liabilities for damages arising from injury to person or property stand upon a different plane, and are not controlling here.

Is this provision of the contract void as against public policy? That the principle of law involved is an original one, as applied to the present state of facts, is apparent when we consider that but a single case has been found directly in point, although it is evident from the argument that counsel upon both sides have very industriously sought for precedents. This provision of the contract is declared by respondents to be opposed to public policy, in this: That it has a tendency to lessen the amount of care that defendant would exercise, both in the selection and operation of its machinery, and in the general conduct of its business, through its employés, in respect to the control of fire, the element here involved. That the undoubted effect of a contract exempting a party from damages flowing from his negligent use of fire is to increase the chances of conflagration,—that is, one who is protected by an agreement against the results of his carelessness in this respect will not take the same care as he otherwise would,—and, therefore, carelessness occasioned and caused by the agreement, increasing the probabilities of conflagrations, injuriously operates upon the interests of the public at large.

The foregoing line of reasoning is ingenious, but we cannot indorse it as sound in law. It has been well said that public policy is an unruly horse, astride of which you are carried into unknown and uncertain paths, and here that horse would be carrying us beyond all limits ever reached before, if respondents' position should meet with our approval. While contracts opposed to morality or law should not be allowed to show themselves in courts of justice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts, recognizing this, have allowed parties the widest latitude in this regard; and, unless it is entirely plain that a contract is violative of sound public policy, the court will never so declare. "The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." Richmond v. Railway Co., 26 Iowa, 191. "Before a court should determine a transaction which has been entered into in good faith, stipulating for nothing that is malum in se, to be void, as contravening the policy of the statute, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical." Kellogg v. Larkin, 3 Pin. 125. "No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people." Swann v. Swann, 21 Fed. 299.

Turning our attention to this provision of the lease, let us concede, for present purposes only, this covenant to be opposed to the policy of the law, if its results are fairly and truly stated by respondents. But we deny that such results would follow. Respondents' argument is that the inevitable and necessary tendency of the covenant is to reduce in some appreciable degree the quantum of care exercised by the defendant in guarding against the destruction of the property of the public by fire. Not the warehouse of the plaintiff Stephens, for, as between him and the defendant, considered alone, there can be no question as to the validity of the contract under consideration. It is the rights and interests of the public which it is claimed are infringed upon, and a trespass upon their interests and rights must be shown, or a case of the present character is a total stranger to any question of public policy.

Were the dangers and risks to the public as to the destruction of its property by fire in any degree increased by the aforesaid covenants? Answering respondents' argument by a like argument, we say, "No." It may be conceded that the covenant had the effect, as to plaintiff's warehouse, to lessen defendant's care in guarding against fire, but, as defendant's care lessened, the owner's care proportionately increased. Knowing that the defendant was absolutely absolved from any legal responsibility for its destruction by fire, we must assume that plaintiff Stephens, the owner, in the protection of his building from the negligence of the defendant's acts, exercised a degree of care commensurate with the dangers that surrounded it; for it cannot be gainsaid that a man of ordinary business understanding, having bartered away any right of action for damages for destruction of his property by fire which might thereafter accrue from defendant, would increase his care and watchfulness in preserving his property from such destruction. We think it must be assumed that, in proportion as the amount of care exercised by defendant in the protection of this property from fire decreased, the amount of care exercised by plaintiff in its protection increased. Having sold his remedy for damages in case of fire, it behooved him to be ever on the alert in the protection of his property. Under any aspect of the case, this question is only material in view of the contingency of a spreading of the conflagration from the warehouse of plaintiff to the property of the public in general, for the whole argument concedes that, if the danger and risk by fire to the property of the public are not increased, then there is nothing whatever in the contention. And thus it is again made apparent to what distant and untrodden paths that unruly horse, public policy, will carry you, unless he be guided by a steady hand and a strong rein.

The remaining question presents itself: Is the result of this covenant necessarily to lessen the degree of care formerly exercised by the defendant towards the property of the public, and which the law ever enjoins upon it to exercise? In other words, are the probabilities of the destruction of the property of the public by fire communicated by defendant—not via the warehouse of plaintiff, but directly communicated—increased by reason of this covenant in the lease? It is argued that, defendant's losses by fire arising from its negligence being materially reduced if a large number of these contracts were outstanding, it would necessarily become careless in the selection of its servants, and neglectful and over-economical in the selection of modern machinery, and thus the dangers to the public from conflagration would be multiplied. We do not see that such result would follow. It must be borne in mind that the lessees of defendant under these contracts are no part of the public. Each one of them has sold his right as one of the public, and is not in a position to complain as to the burdens cast upon him as an individual. The public here are the people holding no leases. The defendant in this case not only owes the public the same duty after the execution of the lease that it did before, but there is no reason in the world why it would not perform that duty in the same way as it had done in the past, however careful or neglectful that performance might be. Why would not this be so? For the public had the same rights and the same remedies against the defendant after as before the execution of the lease, and, likewise, the defendant was liable for damages in the same amount, upon the same property, and upon the same facts. It thus appears that the contract in no way changed the relations and conditions exising between the defendant and the public; and, such being the fact, no reason exists for a change upon its part in the manner of the conduct of its business. While it is true that the making of this countract withdrew plaintiff as one of the public, and, it may be said, thereby reduced the proportions of the public to that extent, still it would seem the refinement of absurdity to hold, for such reason, that, the public being reduced, the care exercised by defendant towards the public would be reduced pro tanto.

The late case of Griswold v. Railway Co. (Iowa) 57 N. W. 843, in its facts is fully analogous to the case at bar, and, upon a rehearing and reargument, a similar covenant in a lease was sustained, as in no manner contravening public policy. Especially is this case valuable as precedent when we pause to consider the stringent provisions of the Code of that state in dealing with the liability of common carriers for damages to property arising from fire and other causes. And doubly so in view of the further salient fact that the lease in that case upon its face appears to indicate that benefits to the lessor in its capacity as a common carrier would accrue by reason of the making thereof. These matters are not found in the case at bar, and, to that extent, the case occupies much broader ground than we are required here to take. The dissenting opinion of the learned chief justice is based, to some extent at least, upon these provisions of the Iowa Code, and the further claim that the railroad company was acting in its capacity as a common carrier in making the lease,—conditions which, we have already suggested, do not surround us here. The remaining objection of the learned chief justice to the validity of the judgment ordered by the majority of that court is in line with these respondents' contention, and, we think, unsound.

Farmer A. is in the habit of burning his stubble field in the fall of the year. B. leases from him a small portion of his farm, for storage or residence purposes, there being a clause in the contract similar to the one here involved. Farmer A., in burning his stubble, allows the fire to escape from his control, and B.'s property is destroyed. Or A. is the owner of a powder factory, and leases to B. an adjoining tract of land. This exemption damage covenant is placed in the lease. The powder plant explodes, and B.'s property is destroyed. These illustrations in principle are parallel with the case at bar. Both the farmer and the factory owner owed the duty to the public of exercising a certain degree of care, one in burning his stubble field, the other in carrying on his factory. If this covenant in the present case had the effect to lessen the degree of care exercised by defendant, it had the same effect in the lease of the farmer and the powder man. If the risks and dangers to the property of the public from fire were increased in this case by reason of the covenant, they were likewise increased in those cases. Yet it would seem a gross trespass upon the rights of parties to make contracts to hold the covenant void, as against the policy of the law, in the hypothetical cases cited. To hold that the interests of the public were of such gravity, and were so interwoven into such a contract, as to vitiate the contract, would carry us far beyond any principle of law yet recognized by courts or law writers.

If the doctrine enunciated by respondent be sound, then a multitude of contracts, covering many and diverse subjects, and which are being entered into every day of the world, and recognized and acted upon both by parties and courts, must fall to the ground. As a striking example, the ordinary contract of fire insurance cannot stand the test, for it cannot be gainsaid that such a contract necessarily has the tendency to lessen the care which the owner would othwise exercise in the protection of his property from fire. Upon respondents' line of argument, such owner owes a duty to the public, possibly in the protection of his own property from fire, certainly in the protection of the property of the public, and, if his care is lessened in the performance of that duty by reason of the contract of insurance, then, surely, the dangers and risks to the property of the public are increased. Yet, notwithstanding this reasoning, courts everywhere have upheld this class of contracts, and repelled all assaults upon them as being opposed to the policy of the law. While it may not be found in the contract itself that the negligence of the owner in causing the fire shall be no bar to a recovery, it has been held always and everywhere that such is the law, even in the absence of express stipulation to that end; and an express stipulation inserted in the contract in accordance with the general principle would certainly in no wise weaken the doctrine. As sustaining this general principle, see Insurance Co. v. Coulter, 3 Pet. 222; Insurance Co. v. Lawrence, 10 Pet. 507; Waters v. Insurance Co., 11 Pet. 213; Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 438, 9 Sup. Ct. 469.

Let us look at another class of contracts which have been sustained by the courts, but sustained wrongfully, if the soundness of the argument advanced by respondents can be maintained. Courts have sustained contracts, made by common carriers with insurance companies, whereby property under their control and in transit has been insured against negligence of their employés, California Ins. Co. v. Union Compress Co., 133 U. S. 387, 10 Sup. Ct. 365; Phœnix Ins. Co. v. Erie Transp. Co., 117 U. S. 312, 6 Sup. Ct. 750, 1176. Following respondents' line of argument, surely such contracts would have a tendency to lessen the care otherwise exercised by common carriers in the transportation of goods, and would thereby trespass upon the rights of the public, and, so trespassing, would render void all contracts of that character. But the courts, after careful investigation, have arrived at a contrary conclusion.

To support the invalidity of this contract, counsel rely upon an act of the legislature, found in the Statutes of 1891 (page 473), which declares a party guilty of a misdemeanor who starts fires in certain localities (without first taking certain precautions), whereby the property of an adjoining or contiguous owner is injured, damaged, or destroyed. If for no other reason, this act of the legislature cannot be relied upon to assist respondents' case, for it was passed subsequent to the making of the contract, and, if the contract was valid when made, no subsequent act of the legislature can render it invalid. It is laid down as an elementary principle in Greenhood on Public Policy that, if a contract conform to the public policy of the state when made, a change in public policy will not avoid it.

We conclude that the line of reasoning indulged in by respondents to support the invalidity of this contract is more specious than sound; that the interests of the public in the contract are more sentimental than real; and that such a contract violates no statute, conflicts with no principle of law, and in no way infringes upon public policy.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

(109 Cal. 96)

KING et al. v. SOUTHERN PAC. CO. (No. 18,370.)

(Supreme Court of California. Sept. 7, 1895.)

RAILROAD COMPANIES—LIABILITY OF LESSEE—LIMITING LIABILITY—FIRES—DAMAGES.

1. Defendant railway company leased certain property, with a stipulation that defendant should not be liable for damage by fire caused by its locomotives or otherwise. Plaintiff was an employé of the lessee, and had goods of his own stored in the lessee's warehouse, which were destroyed by fire caused by defendant's negligence. *Held*, that the fact that plaintiff had knowledge of said stipulation in the lease would not exempt defendant from liability.

2. In an action for the value of goods destroyed through defendant's negligence, an instruction directing the jury, if they found for plaintiff, to assess his damages at a certain sum, with interest from the date of the fire, was erroneous, as, under Civ. Code, § 3288, providing that in "an action for breach of an obligation arising from contract, interest may

be given in the discretion of the jury," the question of interest should have been left to the jury.

Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Action by Charles King and others against the Southern Pacific Company to recover the value of goods destroyed through defendant's negligence. Plaintiffs had judgment, and defendant appeals. Reversed.

Foshay Walker, for appellant. Van Ness & Redman, for respondents.

GAROUTTE, J. In an action entitled Stephens v. Southern Pac. Co. (No. 18,369; this day decided) 41 Pac. 783, damages were sought to be recovered from this defendant for the destruction of a certain warehouse by fire engendered by the negligence of defendant. The plaintiff and respondent King, in this case, had charge of this warehouse, as the agent of Stephens, the owner, at the time of the fire, and now seeks to recover from defendant damages for the destruction by that fire of certain property belonging to him, and then stored in said warehouse. Judgment went against defendant, and this is an appeal from such judgment, and from an order denying the motion for a new trial.

At the trial defendant offered to prove that the plaintiff King had actual notice of the covenant, in the lease to Stephens, exempting defendant from liability for property destroyed by fire, which covenant we have considered at length in the above-mentioned case of Stephens v. Southern Pac. Co. Under objection, defendant was not allowed to make the proof, and the ruling of the court in this regard forms the main ground for the present appeal. Was the question of plaintiff's knowledge of the existence of such a covenant material to the merits of this litigation? We fail to see its materiality. It is not necessary to determine the length and breadth of this covenant, for, of itself, it could in no way bind third parties. Whatever liabilities Stephens assumed thereunder were a matter solely with him and the defendant. And the defendant's primary liability to third parties was the same after as before the making of such a lease. Conceding that all property stored in the warehouse, as between the parties to the lease, was the property of Stephens, yet, as to third parties, such contention avails defendant nothing. Plaintiff King, as the agent of Stephens, received goods in storage, and we do not see that he can be in a different position by reason of having stored his own goods therein than though he had received upon storage the goods of other parties. These goods were not stored by King as Stephens' goods, but rather by Stephens, through his agent, as King's goods. King's agency would seem to be an immaterial element in the case, and no principle of law is cited that would bar a recovery from the defendant, for the destruction of goods arising from its negligence, by any person storing goods in the warehouse under contract with the owner. The question of notice as to this covenant would be immaterial, as a matter in which third parties had no interest. Let us suppose a party storing goods had notice of the lease in this particular. It would put him upon notice of what? Why, simply that by the lease, in its widest possible sense, Stephens would indemnify the defendant against any loss from the destruction by fire of property situated upon the leased land,—a matter certainly of no interest or moment to a party contemplating a storage of his goods in the warehouse. Stephens could not recover for the destruction of his warehouse, or his property stored therein, nor could his lessee, having notice of the covenant. Thomas v. Railroad Co., 82 Mo. 538; Nolon v. Railroad Co., 23 Mo. App. 355. But plaintiff King occupied no such position. He was no lessee. No rights or interests ever passed to him under the lease, and he was in no sense in privity with Stephens. His right to recover grows out of, and is based upon, the fact that he was lawfully entitled to store his goods in the warehouse, without any regard to the exemption clause of the lease made by the owner, and that, while so stored, they were destroyed, through the negligence of the defendant's employés. The cases relied upon to support appellant's contention fall short of the mark. McCoy v. Railway Co., 94 Cal. 568, 29 Pac. 1110, is based upon a section of the Civil Code, and must be read in the light of that section. If the plaintiff in that case had been a tenant of the Boyds, without notice as to their agreement with defendant regarding the opening in the fence, then the doctrine of the Missouri cases above cited would probably have been applicable, and a recovery sustained; but the status of plaintiff was held to be that of a mere licensee of the Boyd Bros., they being at all times in the actual possession of the land, and, for the purposes of the statute heretofore referred to, the owners thereof.

The court gave the jury the following instruction: "If, from the evidence, you are satisfied that the plaintiff King had in the warehouse and addition thereto, referred to in the testimony as 'Blum's Warehouse' the property testified to by him; and that the value of said property was, at the time of its destruction by fire, of the value testified to by him; and that said fire and the destruction of said property was caused by the negligence of the defendant,—you will find a verdict for plaintiffs for $5,500, with interest thereon at the rate of seven per cent. per annum, from the date of the fire." This instruction is clearly erroneous, in this, that it arbitrarily required the jury to add interest from the date of the fire to such sum as they might find to be the amount of the damage caused. In a case of this character, the question of interest must be left to the discretion of the jury. Section 3288, Civ. Code, provides: "In an action for the breach of an obligation arising from contract, and in every case of oppression, fraud or malice, interest may be given in the discretion of the jury." We think the exception to the instruction sufficiently full and explicit, and, the verdict being for a lump sum, a modification of the judgment cannot be made.

For this reason, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; HARRISON, J.

(109 Cal. 116)

GIDDINGS et al. v. 76 LAND & WATER CO. (No. 18,452.)

(Supreme Court of California. Sept. 11, 1895.)

Contract — Construction — Specific Performance—Time Given Plaintiff to Pay for Land —Discretion of Court—Appeal—Bill of Exceptions—When Necessary.

1. A contract between plaintiffs and defendant, a land and water company, gave plaintiffs the option to buy from defendant land described therein, at a certain date, "in accordance with the rules of" the company, at a price stated. *Held*, that plaintiffs were not entitled to any water rights with the land, if they elected to buy, in the absence of any rules by such company entitling them to such rights.

2. A land and water company adopted a system to procure farmers to take leases of lands on cropping contracts, for a period, with the privilege of purchasing; "the purchase price of the land to be in full payment of, and entitle the purchaser to, a permanent water right to the use of the water from defendant's canal, corresponding to the number of acres bought by him, to wit, one inch of water, miners' measurement, per acre." *Held*, that such system did not constitute "rules" of the company, such as would entitle a lessee who decided to purchase "in accordance with the rules" of the company to any water rights with the land.

3. An order denying a motion for leave to file a supplemental complaint is not one of those which are deemed to have been excepted to, under Code Civ. Proc. § 647, so that it may be reviewed, on appeal from the judgment, without a bill of exceptions.

4. In an action for specific performance of a contract to convey land, and also certain water rights, where the court finds plaintiffs entitled to a conveyance of the land, but not of the water rights, and it appears that plaintiffs will not take the land without the water rights, it is not an abuse of discretion for the court, by its decree, to require plaintiffs to pay for the land in 10 days.

Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by E. Giddings and another against the 76 Land & Water Company for specific performance of a contract to convey land, and also certain water rights. From a judgment in favor of plaintiffs for the land only, they appeal. Affirmed.

Thompson & Thompson and O. L. Abbott, for appellants. Daggett & Adams, for respondent.

TEMPLE, J. This appeal is from the judgment, without a bill of exceptions. The action was brought to enforce specific performance of a contract to convey certain land and water rights. The judgment awards to plaintiffs the right to purchase the land, but decides that there was no contract for the sale of any water rights. The contract was in writing, but is not set out at large in the pleadings or in the findings; but the latter contain the terms of payments to be made, and two stipulations taken from the contract. One is as follows: "And it is further agreed that the parties of the second part, their heirs and assigns, shall have the right and privilege of buying the land herein described, from the party of the first part, on or about October first, 1885, in accordance with the rules of the party of the first part, at such rate or price as is now fixed by it for said land, viz. north one-half of northwest one-quarter at twenty-eight dollars ($28), south one-half of north-west one-quarter and southwest one-quarter at thirty dollars ($30), all in section seven, township sixteen south, range twenty-four east, Mount Diablo base and meridian, at —— dollars, United States gold coin, per acre." The other stipulation had reference to the right to continue the lease which contained the contract for two more years. The court further found as follows: "The court finds the fact to be that the defendant never did, in either of said contracts, or orally, or otherwise, or at all, agree to sell or convey to plaintiffs, or either of them, any waters or any water rights or water privileges whatever." The controversy is as to whether plaintiffs were entitled to any water rights with the land in case they elected to purchase. It is admitted that the contract contained no covenant or stipulation to that effect, unless it can be found in the agreement above recited,—that plaintiffs shall have the privilege of buying the land "in accordance with the rules of the party of the first part." Counsel contend that this provision distinguishes this case from Abbott v. 76 Land Co., 101 Cal. 567, 36 Pac. 1, because here is an express reference to the rules of the company. But no rules of the company upon the subject are alleged, or found to exist. The allegation relied upon by plaintiffs' counsel in this respect is as follows: "That, for and in said business of selling its property, defendant, on or about the 16th day of October, 1883, adopted a system which was as follows: 'To procure farmers to take leases of parcels of said lands upon cropping contracts, for the period of one year, with the privilege to the tenant of extending said term from year to year for a further period not exceeding two years, and with the privilege of buying,' etc., * * * 'the purchase price of the land also to be in full payment of, and entitle the purchaser to, a permanent water right to the use of the water from the defendant's canal corresponding to the number of acres bought by him, to wit, one inch of water, miners' measurement, per acre.'" This indicates no rule of the company, but only a system of seeking customers for their land,

and a practice, when a customer was found, of entering into a specific contract with him. If the contracts so made were similar, this would not establish rules of the company, such as would satisfy the reference contained in the contract. But the allegation is denied in the answer, and the above extract from the findings is responsive to the issue so made. In the first place, the answer contains a denial that at the times mentioned in the complaint the defendant had or owned any waters or water rights, by which the lands could or can be irrigated. And then it is denied that the lease or agreement contained any provision which entitled the purchaser to a permanent, or any, water right. And lastly it is averred that "the price established for said land described in said amended complaint was $28 per acre for the north half of the northwest quarter of section seven, described in said amended complaint, and the sum of $30 per acre for the south half of the northwest quarter and the southwest quarter of section seven, described in said amended complaint, without any water privilege or any water right, and that the price of said land was so established for said land alone, and without any water privilege or water right appurtenant thereto, or in connection therewith." If the reference is to such system, it is not proven that the privilege of purchasing the water right was a part of said system.

Appellants also complain of an order refusing to allow plaintiffs to file a supplemental complaint. There is no bill of exceptions in the record, and it is objected that we are in no way legally apprised of the fact, if it be so, that plaintiffs ever asked for leave to file a supplemental complaint, or that such leave has ever been refused. Appellants contend that the order may be reviewed upon the appeal from the judgment, because, as they claim, it was an order made before judgment, and is deemed excepted to, under section 647, Code Civ. Proc. There is printed in the transcript, although not legally a part of the record, what purports to be a copy of the proposed supplemental complaint, of a certain notice, and sundry affidavits; also, a copy of a minute order, and a certificate of the judge that in deciding the motion for leave to file the proposed supplemental complaint he based the decision upon the proposed supplemental complaint and the affidavit of Giddings. It does not appear from this certificate or statement that notice was given of the hearing to the adverse party, nor that it was represented at the hearing, nor how the motion was decided. Counsel contend that this case comes under section 951, Code Civ. Proc., which they say has been construed as not requiring a bill of exceptions, but only that the moving papers be identified. Not conceding that any such ruling has been made as stated, but waiving the point, it is evident that the section referred to can only apply to orders which are themselves appealable. This is an appeal from a judgment. What are the papers used on the hearing which resulted in the judgment? Certainly not papers used on the hearing of the application to file a supplemental complaint, for the papers printed in the transcript show that it was made some months after the trial. Had it been otherwise, however, the judge could not have certified that they were used on the hearing as to the decision or ruling from which the appeal was taken. But the order is not one of those which are deemed to have been excepted to, under section 647, Code Civ. Proc. It is not an amendment to a pleading, and is not so classified in the Code. It is only authorized for the purpose of bringing before the court "facts material to the case occurring after the former complaint or answer." Section 464, Code Civ. Proc. It leaves the former pleading intact, but an amendment to a pleading makes a substituted pleading. Section 472, Code Civ. Proc. I see no distinction between an amendment to a pleading and an amendment of a pleading, and if it is proper to say that both expressions are used in section 473, Code Civ. Proc., the context shows that they refer to precisely the same thing, so far as concerns this attempted distinction. I think the ruling upon the application for leave to file a supplemental complaint cannot be reviewed on this appeal.

The limitation of 10 days which plaintiffs were allowed, after judgment, within which to pay for the land, seems too short, unless it appeared to the court perfectly obvious that plaintiffs would not complete the purchase. And it must have so appeared, for plaintiffs have never offered to complete the purchase without the water right; and counsel for appellants, in their brief in this court, say that without the water right the land was never worth the price charged for it, and which they are required by the decree to pay. Such being the case, it was not an abuse of discretion on the part of the lower court to allow but a short time for payment. If the plaintiffs' counsel could not procure a modification of the judgment in other respects, they would not purchase, and if a modification were obtained a new opportunity would necessarily be afforded. I presume the point was made only to enable this court to afford such opportunity in case appellants should be successful in their contention as to their right to purchase the water right, and, if the view here taken on that question prevails, the point is of no consequence. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

5 Cal. Unrep. 148

ETTER v. HUGHES et al. (No. 18,402.)

(Supreme Court of California. Sept. 18, 1895.)

JUDGMENT—ENTRY ON A VERDICT AGAINST ONE DEFENDANT ONLY.

In assumpsit against W. and M., husband and wife, on a verdict "in favor of defendant M. against plaintiff," without mentioning W., judgment was entered that plaintiff take nothing by the action, and that M. recover her costs. *Held*, that the judgment meant that plaintiff take nothing by his action as against M., and the court was authorized to enter judgment in favor of plaintiff as against W.

Commissioners' decision. Department 1. Appeal from superior court, Madera county; W. M. Conley, Judge.

Action by A. J. Etter against Matilda B. Hughes and William M. Hughes for the recovery of money. The latter consented that judgment be entered against him, and, from a judgment in favor of Matilda B. Hughes, plaintiff appeals. Affirmed.

W. H. Larew, for appellant. H. H. Welsh, for respondents.

BELCHER, C. This action was brought to recover the sum of $452.70, alleged to be due from the defendants, who are husband and wife, to the plaintiff, for groceries, dry goods, and general merchandise sold and delivered by him to them at their special instance and request. Defendant William M. Hughes answered, admitting the indebtedness as against himself, and consenting that judgment be entered against him for the amount claimed by plaintiff in his complaint, and all legal costs of the action. Mrs. Hughes answered separately, and denied generally and specifically each and every allegation in the complaint contained. The case was tried before a jury, and the verdict was "in favor of the defendant Matilda B. Hughes against plaintiff," without any mention of the other defendant. On this verdict, judgment was entered that the plaintiff take nothing by reason of the action, and that Mrs. Hughes recover her costs and disbursements incurred in the action. The plaintiff appeals from the judgment on the judgment roll, without any statement or bill of exceptions.

It was not necessary for the jury to find and return a verdict upon the claim against William M. Hughes. As to that claim, there was no issue, and there could be no trial. And as to him, the court was authorized to enter judgment in favor of the plaintiff upon the pleadings, and it may still do so. "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants." Section 578, Code Civ. Proc. The judgment entered, when properly construed, was only that the plaintiff take nothing by his action as against Mrs. Hughes, and that she recover her costs. There is no substantial merit in the appeal, and the judgment should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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5 Cal. Unrep. 144

ANDREWS v. WILBUR. (No. 18,313.)

(Supreme Court of California. Sept. 12, 1895.)

APPEAL—EXTENT OF REVIEW—CONFLICTING EVIDENCE—RIGHT TO INTEREST.

1. On appeal from an order denying a new trial, only rulings of the trial court assigned as error, and the sufficiency of the evidence to sustain the verdict, can be considered.

2. The verdict of a jury on conflicting evidence will not be disturbed on appeal.

3. An attorney who buys his client's note at less than its face value, and then collects from the client its full value, is liable for interest, on the excess of the amount received by him over the amount paid, from the date of its receipt.

Department 1. Appeal from superior court, Sutter county; E. A. Davis, Judge.

Action by Sarah Andrews against J. L. Wilbur. Judgment for plaintiff. From an order denying his motion for a new trial, defendant appeals. Affirmed.

Wm. G. Murphy and M. C. Barney, for appellant. Forbes & Dinsmore, for respondent.

HARRISON, J. It is alleged in the complaint that, while the defendant was acting as the attorney and confidential agent of the plaintiff, he purchased a promissory note and mortgage that had been executed by her to one Wheeler; that, by reason of his position as her attorney, he received information that the note could be purchased for less than its face, and that thereupon he did so purchase it, in violation of the confidence reposed in him by her, and without her knowledge; that afterwards he received from her the full amount of said note. The plaintiff therefore asked judgment for the amount received by the defendant from her in excess of the amount paid by him for the note. The case was tried by a jury, who rendered a verdict in favor of the plaintiff. A new trial was asked by the defendant, and denied by the court, and from this order he nas appealed.

The sufficiency of the complaint is not involved in this appeal. Upon the appeal from the order denying a new trial, we can only consider the rulings of the court assigned as error, and the sufficiency of the evidence to sustain the verdict. The only ground specified by the appellant, in his statement on motion for a new trial, in which the evidence is insufficient to sustain the verdict, is that the evidence failed to show that at the time of the purchase of the note he held the relation of agent or attorney to the plaintiff. Upon this point it is only necessary to say that this proposition was sharply contested at the trial, and that the main portion of the transcript, containing over 100 pages, relates to evidence upon this point. The appellant in his brief seeks to show that the verdict should have been otherwise; but, as we are precluded from weighing the testimony, the verdict of the jury thereon must be taken as conclusive.

No exception appears to have been taken to the instructions to the jury, and the rulings of the court upon the admission of evidence, to which objections were made, are not such as to justify a reversal.

The plaintiff was entitled to interest, upon the amount received from her by the defendant in excess of the amount he had paid, from the date of its receipt. It was money in his hands belonging to her, which he had received to her use, and which he detained from her. Civ. Code, § 1917. The order is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

In re WELCH'S ESTATE.

WELCH v. YOUNG et al.
(No. 16,010.)

(Supreme Court of California. Sept. 12, 1895.)

PARTIAL DISTRIBUTION OF DECEDENT'S ESTATE.

Partial distribution of a decedent's estate in the hands of a special administrator appointed pending proceedings to remove the general administrator cannot be decreed.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Henry Welch, deceased. Appeal by Mary C. Young and Sarah J. Phillips from a decree directing the payment to Honor Welch, widow of said deceased, of a certain amount. Reversed.

Geo. W. Johnson, for appellants. Garret W. McEnerney, for respondent.

PER CURIAM. The decree of partial distribution appealed from herein was considered by this court, upon an appeal from the same decree on behalf of the special administrator, in case No. 15,890, decided March 15, 1895 (39 Pac. 805), and was then declared to have been made without authority. Upon the authority of that case, and a stipulation filed herein on behalf of the respondent, the decree is vacated and set aside, without costs to either party.

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109 Cal. 50

BROOKS v. CITY OF SAN LUIS OBISPO.
(No. 19,549.)

(Supreme Court of California. Sept. 5, 1895.)

PRINTING ASSESSMENT LIST—OUT OF WHAT FUNDS PAYABLE.

Under Act March 6, 1889, § 8, prohibiting the drawing of a warrant for any expense of the improvement of a street on any other than the special fund raised by assessment for such improvement, the expenses of printing a delinquent assessment list in proceedings to improve a street are only payable out of such special fund.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Assumpsit by Benjamin Brooks against the city of San Luis Obispo. Judgment for defendant. Plaintiff appeals. Affirmed.

Wm. Shipsey, for appellant. W. H. Spencer, for respondent.

VANCLIEF, C. Action of the nature of the common-law action of assumpsit, to recover from the defendant city $362.25 for publishing a delinquent assessment list, pursuant to section 16 of the act of the legislature of March 6, 1889 (St. 1889, p. 70), entitled "An act to provide for laying out, opening, extending, widening * * * any street, * * * and to acquire land," etc., for those purposes. It appears from the complaint that the delinquent assessments, a list of which was published by plaintiff, were levied by the defendant in a proceeding, under said act, to widen Chorro street, and that plaintiff, being the proprietor and publisher of a newspaper, published said delinquent list in his paper at the instance and request of the defendant and its superintendent of streets; that the service was reasonably worth the sum demanded, but that defendant refused and failed to pay therefor any sum whatever. The court sustained a demurrer to plaintiff's complaint, and thereupon, the plaintiff declining to amend, rendered judgment in favor of the defendant. The plaintiff brings this appeal from the judgment on the judgment roll.

It appears that the demurrer was sustained on the ground that the complaint does not state facts constituting a cause of action, because, although it states that there was in the general fund of the treasury of the defendant more than sufficient money to pay the same, there is no allegation that there was any money in the special fund applicable to the expenses of widening Chorro street. Appellant admits that there was no money in said special fund exclusively devoted to the payment of the expenses of widening Chorro street, but contends that he was not restricted to such fund for the payment of his demand, and whether or not he was so restricted is the only question presented by his appeal. Respondent contends that section 8 of said act prohibits the defendant from paying plaintiff's demand from any fund except the special fund raised by assessment for the purpose of widening Chorro street. Section 6 of the act, after providing for the appointment of commissioners to make the assessment, etc., further provides, that "for their services, the commissioners shall receive such compensation as the city council may determine from time to time. * * * Such compensation shall be added and be chargeable as a part of the expenses of the work or improvement." Section 7 authorizes the commissioners to employ such assistance, legal or otherwise, as they may deem necessary and proper; also, to rent an office, and provide such maps, diagrams, plans, books, stationery, lights, postage, expressage, and incur such incidental expenses as they may deem necessary. Section 8 of the act is as follows: "All such charges and expenses shall be deemed as expenses of said work or improvement, and be a charge only upon the funds devoted to the particular work or improvement as provided hereinafter. All payments, as well for the land and improvements taken or damaged, as for the charges and expenses, shall be paid by the city treasurer, upon warrants drawn upon said fund from time to time, signed by said commissioners, or a majority of them. All such warrants shall state whether they are issued for land or improvements taken or damaged, or for charges and expenses, and that the demand is payable only out of the money in said fund, and in no event shall the city be liable for the failure to collect any assessment made by virtue hereof, nor shall said warrant be payable out of any other fund, nor a claim against the city." Counsel for appellant contends that the decision of the question under consideration depends upon the construction to be given to the phrase, "all such charges and expenses," in section 8, and, as this phrase immediately follows sections 6 and 7, it refers only to the charges and expenses mentioned in those sections, which may be incurred by the commissioners, and does not refer to the expense of advertising authorized to be incurred by the superintendent of streets. Conceding this, yet the subsequent parts of section 8 clearly prohibit the drawing of a warrant for any charge or expense of the improvement on any other than the special fund raised by assessment, and expressly declare, that "in no event shall the city be liable for the failure to collect any assessment" made by virtue of the act, and that no warrant shall be a claim against the city. The decision, therefore, is not solely dependent on the construction of the single phrase above mentioned, but upon the construction of the whole section, of which that phrase is only a small part. Besides, there is no question that the expense of advertising the list of delinquent assessments is one of the necessary expenses of the improvement, and I perceive no reason, and none has been suggested, why its payment should not be restricted to the same fund out of which, alone, the expenses of legal services, rent, stationery, and other incidental expenses are to be paid. I think the court below correctly construed the eighth section of the act, and that its judgment should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

HARBAUGH v. HONEY LAKE VALLEY LAND & WATER CO. (No. 18,366.)

(Supreme Court of California. Sept. 6, 1895.)

DEFAULT—WHEN SET ASIDE—DISCRETION OF COURT.

In a case having 21 causes of action, on November 27th defendant's demurrer was overruled, and it was given 30 days to answer. December 5th it demanded a bill of particulars, which was furnished three days afterwards. December 12th defendant filed and served written objections to such bill, and moved for more specific particulars, and on the 27th such motion was granted. The following day default and judgment were entered against defendant, which, in apt time, moved to set aside the default, filing an affidavit of merits. It appeared that defendant's attorney made the mistake in supposing that the order for further particulars operated to extend the time for answering 10 days. *Held*, that an order setting aside the default was on the border line of the court's discretion, but would not be set aside.

Commissioners' decision. Department 2. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by L. A. Harbaugh against the Honey Lake Valley Land & Water Company, in which there was a judgment by default in favor of plaintiff. From an order setting aside the default, and vacating the judgment, plaintiff appeals. Affirmed.

Goodwin & Goodwin, for appellant. F. D. Brandon and J. E. Pardee, for respondent.

SEARLS, C. This is an appeal from an order setting aside a default of defendant, and vacating a judgment rendered thereon in favor of plaintiff. The complaint in the action was filed in the superior court in and for the county of Lassen on the 5th day of August, 1893. On the 4th day of September following, defendant (a corporation having its principal place of business at the city and county of San Francisco) filed its written appearance, whereupon it was stipulated by counsel for the respective parties that defendant should have 30 days thereafter to plead. On the 4th day of October defendant filed and served a demurrer to the complaint, and a demand and notice of motion to change the place of trial to San Francisco. On November 6th the motion to change the place of trial was heard and denied. On the 27th day of the same month the demurrer was submitted to the court without argument, and overruled, and 30 days given to the defendant to answer. On December 5th defendant demanded a bill of particulars, which was furnished December 8th. December 20th defendant served and filed written objections to the bill of particulars furnished, and gave notice that on the 26th inst. it would apply to the court for an order for further and more specific particulars. This last motion of defendant was granted December 27th, and on the 28th day of December, no answer having been filed, the default of defendant was entered, and a judgment thereon in favor of plaintiff for

$6,540.46 and costs. Defendant on the 12th of January, 1894, gave notice of a motion to set aside the default and vacate the judgment, which motion was granted January 18th, upon condition that defendant pay to plaintiff his costs in the action up to that date.

In addition to an affidavit of merits, defendant's affidavits upon the motion showed that defendant, its officers, and its regular attorney, are residents of San Francisco; that it takes two days to communicate by mail with Susanville, where the cause is pending; that defendant's counsel in San Francisco supposed the time to answer had been extended by stipulation, and that the court would grant further time to answer, until defendant could have the benefit of the further bill of particulars to aid it in answering the 21 causes of action which the complaint contained, while the assistant counsel of defendant, who resided at Susanville, where the cause was pending, made the mistake of supposing that the order for further particulars operated to extend the time for answering for 10 days from the date of its entry, until it was too late to interpose an answer within the time allowed. That this was negligence on the part of the defendant is certain. The court below, in the exercise of the discretion confided in it, in view of all the circumstances, deemed it wise to open the default and permit an answer.

We think the action of the court came very near the border line which divides the exercise of discretion from the abuse of such discretion, but, in view of the fact that plaintiff, by his failure in the first instance to furnish a proper bill of particulars, was in some sort the cause of the failure to answer in time, we do not feel called upon to reverse the ruling. It has been said that the power of the court should be freely and liberally exercised, under section 473 of the Code of Civil Procedure, to mold and direct its proceedings so as to dispose of cases upon their substantial merits, and its order will not be reversed unless its power has been exercised in a manner which is calculated to defeat rather than advance the ends of justice. Buell v. Emerich, 85 Cal. 116, 24 Pac. 644. A default inadvertently permitted by a party having a substantial defense presents a case in which great latitude should be extended to the discretion of the court by which the default was set aside. Hitchcock v. McElrath, 69 Cal. 634, 11 Pac. 487; Burns v. Scooffy, 98 Cal. 271, 33 Pac. 86; Watson v. Railroad Co., 41 Cal. 17; William Wolff & Co. v. Canadian Pac. Ry., 89 Cal. 332, 26 Pac. 825. The order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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109 Cal. 107

YORBA v. WARD. (No. 19,437.)

(Supreme Court of California. Sept. 7, 1895.)

In bank.

On petition for rehearing. Denied.

For opinion on appeal, see 38 Pac. 48.

PER CURIAM. After a full consideration of this cause in bank, we are satisfied with the opinion heretofore rendered in department 1, and for the reasons given in that opinion the judgment and order are reversed. 38 Pac. 48.

I dissent: BEATTY, C. J.

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108 Cal. 661

In re CURTIS, Supervisor. (No. 18,401.)

(Supreme Court of California. Sept. 4, 1895.)

REMOVAL OF PUBLIC OFFICERS—APPELLATE JURISDICTION.

Pen. Code, § 772, provides for the removal of public officers, by an accusation in writing, presented to the superior court. Const. art. 6, § 4, gives the supreme court appellate jurisdiction in all criminal cases prosecuted by indictment or information. *Held* that, a prosecution under section 772 not being by indictment or information, the supreme court has no appellate jurisdiction thereof.

Department 1. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

An accusation was filed by D. J. McGowan against William Curtis under Pen. Code, § 772, for the removal of the latter from office. The accusation was dismissed, and McGowan appeals. Appeal dismissed.

Holl & Dunn, for appellant. White, Hughes & Seymour and Johnson & Johnson, for respondent.

HARRISON, J. While the respondent held the office of supervisor of the Fourth district of the county of Sacramento, an accusation was filed against him in the superior court for that county by D. J. McGowan, under the provisions of section 772 of the Penal Code, charging him with collecting illegal fees and neglecting to perform his official duties. To this accusation the respondent filed a demurrer upon various grounds, which was sustained by the court, and, the accuser declining to amend his accusation, the court entered a judgment dismissing the proceeding. From this judgment McGowan has appealed. The respondent has moved to dismiss the appeal upon the ground that an appeal from the action of the court under this section of the Penal Code is unauthorized.

The charge against the respondent is of a public offense,—a neglect of official duty, or misdemeanor in office,—and the proceeding against him is a criminal proceeding in the nature of an impeachment. In re Marks, 45 Cal. 199. At the common law an officer guilty of neglect of official duty was liable to indictment and punishment by removal from office. Throop, Pub. Off. c. 32; Bac. Abr. "Offices & Officers," N. See, also, opinion of Kent, J., in note to People v. Denton, 2 Johns. Cas. 275. Article 4, § 18, of the constitution of this state, after providing that certain state officers shall be liable to impeachment for misdemeanor in office, declares: "All other civil officers shall be tried for misdemeanor in office in such manner as the legislature may provide." By section 772 of the Penal Code the legislature has provided a manner for the trial of certain misdemeanors in office, by authorizing an accusation in writing, verified by the oath of any person, to be presented to the superior court, and if, upon a hearing thereon, after a citation to the accused, the charges are sustained, the court is authorized to remove the accused from office. These proceedings are intended to be summary, and, as the legislature has made no provision for a review of the action of the superior court, its judgment is final. See Appeal of Houghton, 42 Cal. 35; Bixler's Appeal, 59 Cal. 550. By article 6, § 4, of the constitution the supreme court is given appellate jurisdiction "in all criminal cases prosecuted by indictment or information in a court of record on questions of law alone." Section 682 of the Penal Code declares that "every public offense must be prosecuted by indictment or information, except (1) where proceedings are had for the removal of civil officers of the state." The "information" here authorized is that named in the constitution (article 1, § 8) as the equivalent of an indictment, and which is to be prepared by the district attorney under the provisions of section 809 of the Penal Code. The case of In re Marks, supra, was prosecuted under the provisions of the act of March 14, 1853 (St. 1853, p. 40), and by the provisions of section 6 of that act either party might appeal to the supreme court as in other cases. The provisions of this section ceased to exist upon the adoption of the codes, and section 1235 of the Penal Code authorizes an appeal to this court only in such criminal actions as amount to a felony. As the appellate jurisdiction of this court in criminal cases given by the constitution extends only to such as are prosecuted by indictment or information, we have no jurisdiction to entertain the present appeal. The appeal is dismissed.

We concur: GAROUTTE, J.; VAN FLEET, J.

109 Cal. 100

COX v. LOS ANGELES TERMINAL RY. CO. (No. 19,559.)

(Supreme Court of California. Sept. 7, 1895.)

CARRIERS—EJECTION OF PASSENGER—LIABILITY FOR DAMAGES—REFUSAL TO PAY FARE—ABSENCE OF CONDUCTOR'S BADGE—EXCESSIVE DAMAGES.

1. Plaintiff, a girl 10 years old, and three others, about the same age, boarded defendant's train for a station to which the fare was 10 cents each. Plaintiff tendered the conductor 20 cents, as the fare for all. He told her that unless they paid 10 cents each they would have to get off. Plaintiff said, if the others had to get off, she would also. Thereupon the conductor handed the money back, and at the next station they all got off. *Held*, that defendant was not liable to plaintiff for damages.

2. Neither the fact that, at a previous time, another conductor allowed the three girls to ride for 10 cents, or that another passenger said she would pay the fare for the other girls, without tendering it, rendered defendant liable.

3. Civ. Code, § 488, requires every conductor to wear on his cap, or other conspicuous place, a badge indicating his office, and provides that no conductor without such badge is authorized to demand or receive fare from a passenger. *Held*, that where a passenger who refuses to pay fare recognizes the conductor as such, and does not refuse to pay fare because of the absence of such badge, or object to its absence, and the conductor puts him off the train, the company is not liable because such conductor wore no badge.

4. A verdict for $500 in favor of a girl 10 years old who, with three other girls, was put off a railroad train, at a station, for failure to pay fare, is excessive, in the absence of evidence justifying exemplary damages, or taking the case out of the rule given in Civ. Code, § 3333.

Department 1. Appeal from superior court, Los Angeles county; W. A. Clarke, Judge.

Action by H. L. Cox, a minor, by W. E. Cox, guardian ad litem, against the Los Angeles Terminal Railway Company to recover damages for being ejected from defendant's train, in which there was a verdict for plaintiff. From an order denying a new trial, defendant appeals. Reversed.

T. E. Gibbon, for appellant. W. E. Cox and W. D. Gould, for respondent.

HARRISON, J. This action was brought in behalf of the plaintiff, an infant of the age of 10 years, to recover damages for having been expelled from a train of the defendant, upon which she had taken passage as a passenger. At the close of the testimony on behalf of the plaintiff, the defendant asked for a nonsuit, which was denied, and, after other testimony had been introduced, the cause was submitted to the jury, who rendered a verdict in favor of the plaintiff for $500. A motion for a new trial was made and denied, and the defendant has appealed.

1. The motion for a nonsuit should have been granted. The plaintiff, in company with two younger sisters, and another girl about her own age, were attending school at Tropico, in the county of Los Angeles, and, on the morning in question, had taken passage upon the cars of the defendant, at Bond station, for the purpose of being carried to Tropico station, about a mile and a quarter distant. The rate of fare between Bond station and Tropico was 10 cents. When the conductor asked for their fare, the plaintiff tendered him 20 cents as the fare for herself and her two sisters. The conductor told her that the fare was 10 cents for each of them, and that unless they paid that amount of fare

they would have to get off. He also told the plaintiff that the 20 cents was enough to pay for two of them, but that the others would have to get off. The plaintiff then told the conductor that she did not like to go on without the others, and that, if they got off, she would get off too. Thereupon the conductor handed the money back to plaintiff, and when the next station was reached he stopped the train, and the plaintiff, with her sisters and the other girl, got off. There was no evidence of the use of any violence or oppression or force towards the plaintiff on the part of the defendant or its employés. On the contrary, the entire evidence shows that the conductor was civil and gentle in his intercourse with the plaintiff.

The plaintiff's right of action is limited to the conductor's treatment of herself alone, and as, instead of accepting the offer of the conductor to ride for the fare tendered by her, she chose to take back the money, and get off the car with her sisters, rather than go on without them, her leaving the car must be regarded as a voluntary act on her part. The fact that, on a previous occasion, another conductor had allowed the three girls to ride for 10 cents, did not render the act of the conductor in demanding the regular fare on this day improper, or place the defendant in the wrong. Nor is the plaintiff entitled to recover from the defendant because another passenger said that she would pay the fare for the other girls. No tender of fare was made by her, and the plaintiff, instead of availing herself of the offer, testifies that she did not hear it made.

2. Section 488, Civ. Code, is as follows: "Every conductor, baggage-master, engineer, brakeman, or other employee of any railroad corporation, employed on a passenger train or at stations for passengers, must wear upon his hat or cap, or in some conspicuous place on the breast of his coat, a badge, indicating his office or station, and the initial letters of the name of the corporation by which he is employed. No collector or conductor, without such badge, is authorized to demand or to receive from any passenger any fare, toll, or ticket, or exercise any of the powers of his office or station; and no other officer or employee, without such badge, has any authority to meddle or interfere with any passenger or property." There was evidence tending to show that the conductor, on this morning, did not wear any badge upon his cap, and the court gave to the jury the following instruction: "Every conductor employed on a passenger train must wear upon his hat or cap, or in some conspicuous place upon the breast of his coat, a badge indicating his office or station, and the initial letters of the name of the corporation by which he is employed; and no conductor without such badge is authorized to demand or receive from any passenger any fare or ticket, or exercise any of the powers of his office, and no conductor without such badge has any authority to meddle or interfere with any passenger or property,"—and, further, instructed the jury: "If you find that the conductor in this instance did not have upon his cap or breast such a badge, then he had no right to meddle or interfere with the plaintiff; and if he did interfere, and compelled her to leave the train, such act would be unlawful, and your verdict should be for the plaintiff."

The object of this section is not to limit the power of the corporation in the conduct of its business, but it is for the protection of passengers, by requiring a designation of the person whom they are to recognize as entitled to receive their fare, or to represent the corporation in other respects. The restraint which the section places upon the authority of a conductor is to be limited to the matters specified therein, and is not to be extended to cases not included within the language of the section. Without a badge indicating his office, the conductor is not "authorized" to demand or receive any fare or ticket from the passenger, or to exercise any of the powers of his office or station. The passenger, in such case, would be justified in refusing to pay him the fare, or to surrender to him his ticket, or to comply with his orders; but it does not follow that if the passenger recognizes him as the conductor, and pays his fare, or complies with his directions, he can recover the fare back from the corporation, upon the ground that the conductor was not "authorized" to receive it, or maintain an action against the corporation for complying with the directions of the conductor, on the ground that he was not authorized to give them. The passenger does not become entitled to free transportation upon the railroad by reason of the omission of the conductor to put on this badge, and if, after recognizing him as the conductor, and treating with him as such, when he is without the badge, the passenger would avail himself of the protection intended by this section, he should place his refusal to pay the fare, or to comply with his directions, upon this ground, in order that the conductor might have an opportunity to obviate the objection. The plaintiff herein made no objection to paying the fare to the conductor at the time he demanded it, but recognized him as sufficiently authorized to receive it, irrespective of the absence or presence of a badge. Nor did she, at the time she got off the car, make any objection to so doing upon the ground that the conductor was without his badge. As she was not entitled to ride upon the road without paying her fare, she was deprived of no right by being excluded from the cars for failure to make such payment; and, if there was any reason why she should not have been excluded, she ought then to have stated the reason. After having complied with the order of the conductor, without making this objection, she cannot afterwards be allowed to raise an objection which, if then stated, might have been obviated. The latter clause of the first of the above instructions goes beyond the language of the Code. The language of the section is that "no other officer or employee without such badge has any authority to meddle or interfere with any passenger or property," whereas the jury were told that "no conductor without such badge has any authority to meddle or interfere with any passenger or property." The use of the term "other officer or employee" expressly excludes the conductor from the limitations of authority contained in this clause, and confines such limitation to the acts specified in the preceding clause of the sentence.

3. We are of the opinion that the verdict was excessive. Without reviewing the evidence, it is sufficient to say that there was no evidence before the jury which justified them in giving punitory or exemplary damages, or to take the case out of the rule given in section 3333 of the Civil Code. See, also, Tarbell v. Railroad Co, 34 Cal. 616; Gorman v. Southern Pac. Co., 97 Cal. 6, 31 Pac. 1112. The judgment and order are reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

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5 Cal. Unrep. 149

Ex parte WOODS. (Cr. 62.)

(Supreme Court of California. Sept. 19, 1895.)

BURGLARY—SUFFICIENCY OF JUDGMENT.

Defendant pleaded guilty to a charge of burglary in the first degree, and the judgment recited that, "whereas defendant has been convicted of the crime of burglary in the first degree, * * * it is ordered," etc. *Held*, that the judgment was valid, though the minutes of the court did not show that any evidence was heard to prove the degree of the crime of which defendant was found guilty, there being nothing in the minutes to contradict the recitals of the judgment.

John Woods, convicted of burglary in the first degree, petitioned for a writ of habeas corpus. Petition dismissed.

C. T. Jones, for petitioner. H. F. Carter, Third Deputy, for respondent.

GAROUTTE, J. Petitioner was charged by information with the crime of burglary. A prior conviction for a like offense was also alleged against him. He pleaded guilty, and the judgment under which he is held recites that "whereas the defendant, John Woods, has been convicted of the crime of burglary in the first degree and a prior conviction of felony, it is ordered that he be imprisoned in the state prison for the term of twenty years." The judgment, upon its face, is a valid and legal judgment, and one which the court clearly had power to make; but petitioner insists that the minutes of the court taken at the time defendant pleaded, and also when judgment was pronounced, fail to indicate that any evidence was heard tending to show the degree of the crime of which defendant was found guilty. There is nothing in the point. The judgment itself recites that the defendant was convicted of burglary of the first degree; and, conceding that the minutes of the court could be introduced upon this hearing for the purpose of contradicting recitals found in the judgment, still we find nothing in those minutes of a contradictory character. They are silent upon the question, and under such circumstances recitals in the judgment that the petitioner was convicted of the crime of burglary in the first degree must control. We see no ground entitling the prisoner to his discharge. The petition is dismissed, and petitioner remanded.

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5 Cal. Unrep. 146

MASTERSON v. CLARK, Sheriff. (No. 18,348.)

(Supreme Court of California. Sept. 17, 1895.)

REPLEVIN—COMPLAINT.

A complaint in replevin, which fails to state that plaintiff is the owner or is entitled to the possession of the property at the commencement of the action, is defective.

Department 1. Appeal from superior court, Glenn county; Seth Wellington, Judge.

Action by James Masterson, Jr., against P. H. Clark, sheriff of the county of Glenn, to recover the possession or value of certain personal property. Plaintiff had judgment, and defendant appeals. Reversed.

Ben. F. Geis, for appellant. Charles L. Donohoe, for respondent.

PER CURIAM. The plaintiff brought this action to recover the possession or value of 300 head of sheep. The complaint was filed September 20, 1893, and it avers that on the 8th day of that month plaintiff was the owner and entitled to the possession of said sheep; that on the said 8th day of September defendant, without plaintiff's consent, and wrongfully, came into possession of said property, and still retains possession of the same; that on the 11th day of said month plaintiff demanded of defendant the possession of said sheep, but to deliver the possession thereof the defendant refused, and still refuses; that defendant still unlawfully withholds and detains said sheep from the possession of plaintiff, etc. A general demurrer to the complaint was interposed and overruled. The defendant then answered, denying the plaintiff's ownership or right to the possession of the sheep, and setting up facts to justify his taking possession of the same. The case was tried, and the findings and judgment were in favor of the plaintiff. The defendant appeals from the judgment entered against him, and has brought the case here on the judgment roll alone. The only question presented for decision is, did the complaint state facts sufficient to constitute a cause of action? It is contended for appellant that the complaint was fatally defective, because it entirely failed to state that the plaintiff was the owner and entitled to the possession of the sheep when the action was commenced. The same question arose in Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 750. In that case the complaint was very similar to the complaint in this case, and it was held to be defective, and cause for reversal. On the authority of that case the judgment here appealed from must be reversed, and the cause remanded, with leave to the plaintiff to amend his complaint if so advised. So ordered.

(108 Cal. 684)

BRADFORD v. WOODWORTH. (No. 18,342.)

(Supreme Court of California. Sept. 5, 1895.)

SALE—ACTION FOR PRICE—CONTRACT.

In an action to recover the value of lumber sold to defendant, to be used in the construction of a quartz mill on the R. mine, it appeared that defendant was the president of the Y. Mining Company, which owned the mine, and for which defendant was constructing the mill; that he did not inform plaintiff, nor did the latter know, that defendant was acting as agent of the Y. Company, and that the lumber was for such company, but that plaintiff contracted with defendant as the owner of the R. mine, and as the principal in the transaction. *Held*, that defendant was liable.

Department 2. Appeal from superior dcourt, Tuolumne county; G. W. Nicol, Judge.

Action by S. S. Bradford against F. H. Woodworth to recover the value of lumber alleged to have been sold to defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

J. D. Redding and J. F. Rooney, for appellant. F. W. Street, for respondent.

TEMPLE, J. Appeal from the judgment, and from an order denying a new trial. This action was brought to recover the value of lumber alleged to have been sold by plaintiff to defendant, to be used in the construction of a quartz mill on the Rising Sun Mine. The answer denies all the material allegations of the complaint, and avers that the lumber was sold by plaintiff to the Yosemite Mining Company, a corporation incorporated in the state of Illinois.

The court found that the lumber was sold to the defendant, but that at the time the defendant was the president of the Yosemite Mining Company, and, for that company, was in charge of, and engaged in the management of, the Rising Sun Mine. The court further found as follows: "That neither at the time the defendant contracted with plaintiff for the lumber and materials furnished defendant as aforesaid, nor during any of the time plaintiff was furnishing the said lumber and materials, did the defendant inform the plaintiff that he, said defendant, was acting as the president of, or as the agent of, the Yosemite Mining Company; nor did the plaintiff know at or during any portion of the time from September 15, 1883, to and including the 2d day of April, 1884, that the defendant was the president of, or the agent of, the Yosemite Mining Company; and the defendant did not, at or during any of said time, inform plaintiff that the said Yosemite Mining Company was the owner of said Rising Sun Mine, or that the lumber and materials furnished and delivered to the defendant as aforesaid were, for the said Yosemite Mining Company; and plaintiff did not know, during any of said time, that said lumber and materials sold and delivered by him to the defendant as aforesaid were for the said Yosemite Mining Company, or that said company was the owner of said Rising Sun Mine. That plaintiff dealt and contracted with the defendant as the owner of said Rising Sun Mine, and as the principal in the transaction." It is claimed that the evidence does not support this finding, but a careful reading of the transcript convinces me that it is only one of numerous cases presented here where the real claim is that the finding is not supported by the preponderance of the evidence. Certainly the testimony of the plaintiff himself supports the finding in every respect, and the opposing testimony is not very positive upon the most material points. It tends rather to show that plaintiff may have known that defendant was the agent of some company. Under such circumstances, we cannot disturb the finding. The facts being as found, the defendant is liable.

Appellant also complains of certain alleged errors of law in refusing to admit evidence offered by him. But I find no prejudicial error in the rulings. The record does not show a stipulation that the minute book might be used in evidence, and, if it did, the book was not attached to the deposition, or returned with it. It was then incumbent upon defendant to prove its identity, unless that was admitted. The minute order showing authority to purchase the mine was read in connection with the deposition. For all other purposes for which the book was offered, it was clearly incompetent, even if its identity and genuineness had been admitted. The judgments offered were not competent evidence upon any issue in the case. It was proper to permit plaintiff to explain, in rebuttal, the telegram which had been introduced by the defendant to contradict his testimony. The order and judgment are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(108 Cal. 666)

SPINNEY v. DOWNING et al. (No. 18,346.)

(Supreme Court of California. Sept. 4, 1895.)

CONTRACT OF SALE—WHEN COMPLETE—ESTOPPEL.

1. Where persons agree that a proposed contract shall be made in writing, such contract is not binding on either until reduced to writing, and signed by both.

2. Where persons agree that a proposed contract for the sale of brick shall be made in writing, the fact that the vendor delivered part of the brick, and the vendee has signed a contract, will not estop the vendor from asserting that there was no contract, because it was not reduced to writing, and signed by both of them.

Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by Joseph Spinney against H. W. Downing and others to foreclose a mechanic's lien for brick furnished. Defendants filed a cross complaint for breach of contract to furnish all the brick. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Reversed.

L. L. Cory, for appellant. F. H. Short, for respondents.

VAN FLEET, J. Action to enforce a material man's lien for the value of a quantity of brick furnished and used in the erection of a certain building. By way of cross complaint and ground for affirmative relief, the defendant Downing set up that he and the plaintiff entered into a certain contract whereby plaintiff agreed to furnish and deliver to said defendant all the brick required for the construction of the building, the brick to be of a certain quality, and at a specified price per thousand; that plaintiff delivered a portion, only, of the brick so contracted for, and then neglected and refused to deliver any more, whereby defendant was compelled to procure brick for the completion of the said building elsewhere, and at a higher price per thousand, to defendant's damage, etc., for which he prayed judgment. Judgment went against plaintiff, and from the judgment, and an order denying him a new trial, he appeals.

We think it clear that the alleged contract counted upon by defendant Downing in his cross complaint never became a completed contract. It appears, without conflict, that it was the understanding and agreement between the plaintiff and Downing that the proposed contract should be reduced to writing, and signed by both parties. This fact is made very clear by the evidence. The paper as drawn up was signed by Downing, but, for some reason which does not appear, never was signed by the plaintiff Spinney. It therefore never became a binding or subsisting obligation upon either. It is a general rule, to which this case presents no exception, that, when it is a part of the understanding between the parties that the terms of their compact are to be reduced to writing, and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon, or it does not become a binding obligation upon either. This is essentially true when, as here, the proposed contract contains reciprocal stipulations and covenants upon the part of each as a consideration for the acts of the other. Ambler v. Whipple, 20 Wall. 546; Fuller v. Reed, 38 Cal. 99; Morrill v. Mining Co., 10 Nev. 125. The case last cited is much in point, the facts not being essentially dissimilar to those of the case at bar. In that case the parties agreed upon the terms of contract for the sale and delivery of a certain quantity of wood by plaintiff to defendant, but it was understood that the contract should be put in writing, and signed by both parties. It was accordingly reduced to writing, and was duly executed by defendant, but was not signed by plaintiff, nor did the latter give a bond, as was required, for the faithful performance of the contract. He did, however, commence at once to deliver the wood, and continued to deliver it until stopped by the defendant. He brought an action for the breach of the contract, and, in passing upon the case on appeal the supreme court of Nevada say: "From the facts thus found, we think, independent of the giving of the bond, that the contract declared on was never completed. It is true, the parties verbally agreed to the terms of the contract as stated in the complaint, but it was to be reduced to writing, and signed by both parties. And it was signed by McDonald, as the agent for defendant, but the plaintiff, for what reason does not appear, failed to sign it at the same time. True, four days afterwards he went to Waters' office for the purpose of signing it, and, failing to find it, proceeded to act under its terms. But the contract thus prepared was to be signed by both parties. It contained mutual obligations, each of which being the consideration of the other, * * * and, as the plaintiff failed thus to sign it, no reciprocal assent thereto can be implied. There is no contract unless the parties thereto assent; and they must assent to the same thing, in the same sense. 1 Pars. Cont. 475. It is essential to the existence of every contract that there should be a reciprocal assent to a definite proposition, and, when the parties to a proposed contract have themselves fixed the manner in which their assent is to be manifested, an assent thereto in any other or different mode will not be presumed. Notwithstanding the instrument declared upon was fully executed on the part of defendant, the contract was still incomplete, and neither party bound thereby."

It is urged, however, by respondent, that the appellant is estopped to deny the binding obligation of the contract because he proceeded, with full knowledge of its terms, to perform it by delivering a portion of the brick to Downing. We do not think the facts bring the case within the doctrine contended for. The case is not distinguishable in that regard from the case of Morrill v. Mining Co., supra. The same point was there made,—that Morrill, by proceeding to execute the contract by delivering the wood, thereby ratified it, and made it a valid and binding contract, equally obligatory upon the parties as though he had signed it. But the court held that the doctrine contended for could not apply in such a case; and quote from Johnston v. Fessler, 7 Watts, 48, where it is said: "To render a proposed contract binding, there must be an accession to its terms by both parties. A mere voluntary compliance with its conditions by one who had not previously assented to it does not render the other liable on it." The court also cite Northam v. Gordon, 46 Cal. 582, and conclude: "The action is upon the contract. Morrill neglected to sign the agreement, and also neglected to give the required bond. He consequently failed to accept respondent's offer according to its terms, and there was, therefore, no contract such as was declared upon." We think that case decisive of this. Furthermore, estoppels must be mutual, and it is obvious, under the rule above laid down, that Downing could not have been held bound under the proposed contract, which Spinney had failed to sign, but could have repudiated it at any time. In view of this conclusion the other questions do not require notice, since they will not arise upon a new trial.

Judgment and order reversed, and a new trial ordered.

We concur: HARRISON, J.; GAROUTTE, J.

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109 Cal. 42

ADLER v. NEWELL et al. (No. 18,415.)

(Supreme Court of California. Sept. 5, 1895.)

MORTGAGE—CONFLICTING ASSIGNMENTS—EFFECT OF TRANSFERRING FORGED NOTE FOR DEBT—FORECLOSURE.

1. A. gave a mortgage to M. to secure a note of the same date, the words "Secured by mortgage" being written on the note. M. subsequently indorsed the note to a bank, and also assigned the mortgage, but did not deliver the mortgage itself, and the assignment was not recorded. Afterwards M. made a copy of the note, forged A.'s name thereto, and indorsed and delivered the same, together with the mortgage itself, and a written assignment thereof, to defendant, who paid the face value of the note. This assignment was recorded, and defendant, who found that the mortgage stood in M.'s name on the records, and had no knowledge of any previous assignment, supposed that the note delivered to him was genuine. The real note, signed by A., remained in possession of the bank as collateral for moneys loaned to M. *Held*, that the mortgage security of the bank was not affected.

2. The assignment of a mortgage is not a "grant of an estate in real property," within Civ. Code, § 1107, which declares that such grants are conclusive, except as against one who in good faith acquires a title or lien "by an instrument that is first duly recorded."

3. A mortgage, being a mere incident to the debt, belongs to the holder of the collateral note, and can be foreclosed only by him.

Department 2. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by Moses Adler against Sidney Newell and others to determine to whom the amount due upon a mortgage on plaintiff's premises should be paid. From a judgment for the Bank of Lodi, one of the defendants, defendant R. C. Sargent appeals. Affirmed.

Louttit, Woods & Levinsky, for appellant. Frank H. Smith and W. C. Green, for respondent.

McFARLAND, J. The plaintiff, Adler, being the owner of certain premises upon which there was a mortgage executed by a former owner, and being desirous of paying the amount of the mortgage, discovered that there were hostile claimants of the ownership of said mortgage. Thereupon he brought this action to have it determined to whom the amount of money due upon the mortgage should be paid, and deposited said money in court. He made Sidney Newell, R. C. Sargent, Francis Cogswell, and the Bank of Lodi defendants. The action was dismissed as to Newell, and, Cogswell having filed a disclaimer, the contest was between the defendants Sargent and the Bank of Lodi. The court found in favor of the Bank of Lodi, and judgment was rendered that the money be paid to said bank. Sargent appeals from the judgment, and from an order denying his motion for a new trial.

The mortgage in question was executed on October 4, 1890, by A. H. McBride to J. F. Moseley, to secure a promissory note of that date, made by McBride to Moseley or order for $7,000, payable "one year, with privilege of two years, after date." On the note was written "Secured by mortgage." The other facts found by the court, and necessary to be noticed, are, briefly, these: In December, 1890, the said Moseley indorsed said note in blank, and delivered it to Guy W. Currier, cashier of said Bank of Lodi, "for the use and benefit of said bank, and not otherwise," and also a written assignment of said mortgage; but he did not deliver the said mortgage to the bank until after the commencement of this action. The note and assignment remained in the possession of the bank continuously from that time until the commencement of this action as collateral security for moneys loaned by said bank to said Moseley. During all of that time Moseley was largely indebted to the bank, and at the commencement of the action he was thus indebted in an amount greater than the amount due on said mortgage. But the said assignment was not recorded. In April, 1891, Moseley made a copy of the note, and forged the name of McBride thereto, and indorsed and transferred the same, with an assignment of the mortgage, and the genuine mortgage itself, to said defendant Newell. Afterwards, on August 17, 1891, he made a second copy of said note, and forged the name of McBride thereto, and having, by some means, obtained possession of the mortgage from Newell, he indorsed the second copy, and delivered it, together with the mortgage, and also a written assignment of the mortgage, to the defendant Sargent, who paid Moseley therefor the full amount due upon the note. The assignment of the mortgage had in it this language: "Together with the note therein described, and the money due and to grow due thereon, with interest." This assignment was recorded in the recorder's office of the county where the premises are situated on August 19, 1891. Sargent had no knowledge that the note had been transferred or the mortgage assigned to any other person, and supposed that the copy which he received was the genuine note referred to in the mortgage. He also made due inquiries, and found that the mortgage stood in Moseley's name on the records. In December, 1891, Moseley, being indebted to the bank in the sum of $11,637.31, gave his note for that amount, indorsed by Francis Cogswell; and, the said McBride note not being considered sufficient security, Moseley was requested to furnish more collateral, which he promised to do; and on the following day he sent to Cogswell an assignment of a forged note and mortgage of one Clark for $23,168. In this assignment he also included an assignment of the McBride note and mortgage which the bank already held, but this was not done at the bank's request, as the bank deemed its title perfect. This last assignment was, however, afterwards recorded on June 30, 1892. Cogswell was cashier of the bank, and took said note and assignment for the bank, and never had any interest in the same.

Appellant contends that some of the findings of fact are not sustained by the evidence, but this contention cannot be sustained. There was a fair amount of evidence tending to prove each fact found. The transcript shows over 40 exceptions to rulings of the court in relation to the admissibility of evidence, but, as these exceptions are not much pressed in the briefs, we will pass this part of the case with the remark that none of said rulings about the correctness of which there can be any doubt are of importance enough to work a reversal of the case. The real question in the case, and one that is elaborately and ably argued, is whether, under the facts found, the court correctly awarded the mortgage money to the bank. It is contended that the title of the bank is invalid, because there was no delivery to it of the mortgage,—that is, the paper on which the contract of mortgage was written. But the bank had the note to secure which the mortgage was executed, and "the assignment of a debt secured by mortgage carries with it the security." Civ. Code, § 2936. Appellant contends that such assignment is good only "as between the parties," and void as to certain third persons,—subsequent purchasers in good faith, etc. But transactions good between the parties thereto are good as against all others, unless there be some law to the contrary. Now, the general law which governs the point in question is that the assignment of the debt carries the mortgage; and, unless there be some other law to the contrary, one in possession of a mere instrument of mortgage, which purports on its face to be security for a certain note, is bound to know that, if the note had been assigned to another, the mortgage is of no legal value to him. The only other law that can be plausibly invoked is to be found in the recordation laws. These are purely statutory, and whoever founds a right upon them must point out the statutory language which gives him such right. Some of the argument of counsel for appellant would be very forcible if addressed to the question, what ought the law about the recordation of assignments of mortgages to be? It might be well, perhaps, if recording of, or the failure to record, had the same effect upon such assignments as upon grants, mortgages, etc., but such is not the provision of the Code. The contention of appellant is that the so-called assignment to him on August 17, 1891, and recorded two days afterwards, is paramount to the prior indorsement and transfer of the note and assignment of the mortgage to respondent, because the latter was not recorded. But, in the first place, there was no valid assignment to appellant, because the note to which the mortgage was an incident had already been assigned to and was in the possession of the respondent, who had also a written assignment of the mortgage,—if that were necessary to give any further validity to the transaction. And, in the second place, section 1107 of the Civil Code, relied on by appellant, applies only to grants of real estate. The language is, "Every grant of an estate in real property" is conclusive, etc., except as against one who in good faith acquires a title or lien "by an instrument that is first duly recorded." But an assignment of a mortgage is not a "grant of an estate in real property." A mortgage itself is not such a grant although it is specially provided that mortgages of real property may be "recorded in like manner and with like effect as grants thereof." Civ. Code, § 2952. The provision about the recordation of an assignment of a mortgage is in section 2934; and the provision is that "such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor." There is no provision as to prior assignees, or that the recordation should have "like effect" as recordations of grants. Probably the legislature did not intend to hamper too greatly the transfer and exchange of debts and obligations secured by mortgages, which are usually in the shape of negotiable paper; but, whatever the reason, we must observe the language of the Code.

We see nothing in the point that respondent waived all prior rights by receiving the note and assignment made by Moseley on December 30, 1891. The second assignment of the McBride mortgage was, without the request or desire of respondent, included by Moseley in an assignment which he sent of the forged Clark note and mortgage. If this was of any consequence, it was, in law, nothing more than a further assurance; and its acceptance by respondent was in no sense a waiver of its existing title. Neither is it of any importance that appellant got possession of the mortgage, for, being a mere incident to the debt, it belongs to the holder of the note, and could be foreclosed only by the latter. In Ord v. McKee, 5 Cal. 515, the note had been made to Ord, and the mortgage to secure it had been made to McKee; and the court said: "Nor can his right of action be defeated on the ground that the mortgage to secure the payment of the note was made to McKee, and not to himself. A mortgage is a mere incident to the debt which it secures, and follows the transfer of a note with the full effect of a regular assignment. Ord, having the right to the note, had undoubtedly a right to foreclose the mortgage." We see no reason to disturb the judgment. The appellant, Sargent, has, no doubt, suffered great loss; but that is usually the case where a man, though careful and prudent, has been deceived by a forgery. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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109 Cal. 73

DEERING et al. v. RICHARDSON-KIMBALL CO. et al. (No. 19,471.)

(Supreme Court of California. Sept. 6, 1895.)

APPEALABLE ORDERS—RES JUDICATA — GARNISHMENT—PRIORITY OF LIENS.

1. An order formally directing a garnishee to pay the funds in its possession to plaintiff is appealable, but an order denying a motion to set it aside, not presenting any new features, is not.

2. On an issue as to the priority of various garnishments, plaintiff introduced the judgment in another action, wherein plaintiff and claimant separately intervened, claiming priority over the claims of plaintiff in that action, who had twice garnished the same fund,—once before claimant, and both before plaintiff; that, after plaintiff in said action stated that he claimed nothing under his first garnishment, claimant stated that he would proceed no further with his intervention, he not being further interested. *Held*, that said judgment did not estop claimant from asserting his priority in said fund, as against plaintiff.

3. The court should not unconditionally order a garnishee to pay the money in its possession to the judgment creditor, where there were other and prior claimants to the fund, whose rights were not adjudicated; but the creditor should be directed to bring an action under Code Civ. Proc. § 720, providing that if a person having property of the judgment debtor claims an interest therein adverse to him, or denies the debt, the court may authorize the judgment creditor to institute an action against such person for the recovery of such interest or debt.

4. A note payable to defendant, and deposited with a bank as collateral, is subject to garnishment, and the lien so acquired extends to the amount collected thereon by the garnishee.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Motion by Deering & Co. for an order requiring the Los Angeles National Bank, as garnishee, to apply the moneys in its possession belonging to Richardson-Kimball Company to the payment of its judgment. I. A. Lothian appeared as a claimant of the fund. From an order granting said motion, and from an order refusing to set aside said order, said garnishee and said claimant appeal. Reversed in part, and affirmed in part.

Walter Bordwell and Allen & Flint, for appellants. S. A. W. Carver and Carver & Preston, for respondents.

VANCLIEF, C. The controversies involved in the four appeals to be considered in the above-entitled cause arose in proceedings supplementary to execution had in the case of Deering & Co. v. Richardson-Kimball Company, in which the plaintiff recovered a judgment against the defendant, Richardson-Kimball Company, for the sum of $1,416.74, on January 16, 1892, upon which execution was issued, and returned wholly unsatisfied, prior to February 24, 1893. On February 24, 1893, the plaintiff, in due form, upon affidavit, applied to the judge of the superior court for an order requiring the Los Angeles National Bank to appear before said judge, and answer concerning certain debts, moneys, effects, credits, and other property in its possession, or under its control, alleged by plaintiff to be the property of said defendant. Thereupon the judge made an order addressed to the bank, and commanding its cashier, F. C. Howes, to appear before said judge on February 27, 1893, to be examined concerning such debts, moneys, credits, and other property in the possession or under the control of said bank, and further commanding the bank not to pay or transfer said debts or other property until duly released, etc. On the day of this application (February 24, 1893), plaintiff caused to be served on George H. Kimball and I. A. Lothian a notice to the effect that on February 27, 1893, and immediately after the examination of Howes, cashier of the bank, the plaintiff would move the court for an order requiring the bank to apply any debts, credits, or other property of the defendant, in its possession or under its control, to the satisfaction of plaintiff's judgment. On the appointed day Howes, the cashier, appeared and was examined; and, in addition to his testimony, certain documentary evidence was admitted against the objection of Lothian, who appeared, and opposed the motion on the ground that a garnishment in his favor had been served on the bank prior to that of the plaintiff, and claimed that a judgment in his favor against the defendant Richardson-Kimball Company, should be first satisfied from the property of defendant in possession of the bank. From the testimony of the cashier of the bank, and other evidence, the court made written findings of facts, and, as conclusions of law, found that all the property of defendant in the possession of the bank, to wit, $1,356.22, should be applied in payment of plaintiff's judgment, and formally ordered the bank to pay said sum of $1,356.22 to the plaintiff, Deering & Co., "and that execution issue therefor." This order was entered and docketed as a judgment on June 30, 1893; and, within 60 days thereafter, Lothian and the bank, separately, appealed from the order on a bill of exceptions as to questions of both law and fact. They also each separately, moved the court to vacate and set aside said order. These motions to vacate the order having been denied, each has appealed from the order denying the motion to vacate the former order. The four appeals are represented here by one transcript, containing only one bill of exceptions. But counsel for all the parties interested have stipulated that such transcript shall constitute the record on each of the four appeals.

1. Counsel for respondent contend that the two appeals from the order denying the motions to vacate the former order should be dismissed, and I think this point is well taken, and should be sustained. The former order was an appealable order (McCullough v. Clark, 41 Cal. 298); and an order denying a motion to set it aside, which presents no new features not before the court when it exercised its judgment upon the original matter, is not appealable (Railroad Co. v. McGrath, 74 Cal. 49; Goyhinech v. Goyhinech, 80 Cal. 409, 22 Pac. 175; Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103).

2. The appeal of Lothian from the former order (applying the funds in possession of the bank to plaintiff's judgment) will be first considered, and to that end a further statement of the material facts of record is necessary:

As to the property of defendant, Richardson-Kimball Company, in possession of the bank, it was found that it consisted of a promissory note made by F. J. Byrne to defendant (whether negotiable or not does not appear), indorsed and deposited in the bank by defendant on June 22, 1888, as collateral security for the payment of defendant's note of that date to the bank. The bank obtained judgment against Byrne on said collateral note on May 14, 1890, for the sum of $2,393.18, which was paid to the bank's attorneys on August 28, 1891, and by them delivered to the bank on August 31, 1891, from which the bank realized, over expenses of collection, the net sum of $2,184.55, so much of which as was necessary for that purpose the bank then applied to the full payment of the debt for which Byrne's note had been pledged, after which payment there remained in possession of the bank the sum of $1,356.22, for which it was responsible to defendant, and no part of which had been paid to defendant at the date of the order appealed from. Garnishments had been served on the bank, in actions against the Richardson-Kimball Company, in the following order: First, in an action by F. A. Carter, on July 8, 1889; second, in an action by George H. Kimball, on August 19, 1891; third, in an action by I. A. Lothian, on August 29, 1891; fourth, in the above-mentioned action by George H. Kimball, another garnishment was served on the bank on August 31, 1891; fifth, in this action by William Deering & Co., on September 7, 1891. In each of these actions against the Richardson-Kimball Company a judgment in favor of plaintiff had been rendered, entered, and docketed, before plaintiff commenced the proceeding supplementary to execution in question here. On the hearing of plaintiff's motion supplementary to execution, Lothian contended that, inasmuch as the garnishment in his favor was prior to that of Deering & Co., his judgment for the sum of $446.56 should be first satisfied from the funds in possession of the bank, and that only the residue thereof could be applied to the judgment of Deering & Co. In answer to this, Deering & Co. contended that Lothian was estopped from claiming priority of his garnishment by a former judgment in the aforesaid action of George H. Kimball v. Richardson-Kimball Company, and, to prove the alleged estoppel, offered in evidence the judgment roll in that action, which was admitted against Lothian's objection. In that action, Lothian and Deering & Co. each filed a separate intervention complaint, alleging that the action and the attachment therein were fraudulent, as against the creditors of the Richardson-Kimball Company, for various reasons, the principal one of which was that the defendant therein was not indebted to the plaintiff, Kimball, in any sum whatever, at the time that action was commenced. The intervention complaints were in no wise connected with each other, although each was composed of substantially the same allegations against Kimball. There was no issue between the interveners as to the priority of their respective garnishments. Neither disputed the alleged date or validity of the other's garnishment. Nor does the judgment roll in that case show any trial or decision as to the relative dates or priorities of garnishments. The common object of the interveners was to defeat the garnishments in favor of Kimball, only one of which, however, was prior to that of Lothian, while both were prior to that of Deering & Co. Lothian was interested in defeating only the first. The second did not conflict with his rights. When the causes between the interveners and plaintiff in that action came to trial, the plaintiff therein stated to the court that he claimed nothing by virtue of his first garnishment, served August 19, 1891. This satisfied Lothian, and thereupon his counsel "stated in open court that he would not proceed further upon his intervention." No evidence was introduced by either party, except said statement of Kimball; and thereupon the cause, upon Lothian's intervention, was submitted to the court. The court then proceeded to try the issues on the intervention of Deering & Co.; and the result was a finding by the court that the Richardson-Kimball Company was not indebted to Kimball at the time he commenced his action, but that he was then largely in debted to that company. After these trials the court made written findings as to each intervention. As to Lothian, it found as follows: "The court finds the following facts: First, upon the intervention of I. A. Lothian, that the plaintiff has no claim of lien upon any money or other property held by the Los Angeles National Bank by virtue of the writ of attachment levied on August 19, 1891; said attachment having been levied, as alleged in the amendment to the complaint in intervention, by I. A. Lothian. As to all other facts in said intervention of Lothian, the findings were waived. As conclusions of law, the court finds that said intervener, Lothian, has no cause for intervention herein, and that judgment should be entered accordingly against said intervener." Upon these findings the court adjudged "that the intervener, Lothian, take nothing by his intervention herein."

This judgment is not in accord with the findings of fact, but, conceding that it is a valid judgment, there is nothing expressed or implied in the findings or judgment touching the relative priorites or dates of the garnishments by Lothian and Deering & Co. Turning to the pleadings, we find no issue as to such dates or priorities. Each intervener alleged the date of his garnishment. Lothian alleged his to have been served on August 29, 1891, and Deering & Co. alleged its garnishment to have been served on September 7, 1891. Neither of these allegations was denied. As before remarked, the sole object of each intervener was to gain preference for his attachment over that of Kimball. Yet, in the proceeding supplementary to execution by Deering & Co. against the bank, the court adjudged that Lothian was estopped by the judgment in the case of Kimball v. Richardson-Kimball Company (wherein Lothian and Deering & Co. were interveners) from claiming priority of his garnishment over that of Deering & Co., and that all money in possession of the bank belonging to the Richardson-Kimball Company be paid to Deering & Co. As above stated, I think the judgment roll in the intervention case appeared upon its face to be irrelevant to the proceeding supplementary to execution, and for that reason should have been rejected; but, however this may be, it seems clear that the court below erred in construing that judgment to be an estoppel of Lothian to claim priority or preference for his attachment, as against that of Deering & Co. "That only is deemed to have been adjudged in a former judgment which appears on its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." Code Civ. Proc. § 1911; Black, Judgm. § 599; Lillis v. Ditch Co., 95 Cal. 554, 30 Pac. 1108. This solution of the question as to estoppel necessitates a reversal of the order appealed from, as to Lothian. Other points made by Lothian are also made by the bank on its appeal from the same order, and, so far as necessary, will be considered on that appeal.

3. On the appeal by the bank, the appellant contends that the court erred in ordering it, unconditionally, to pay the money in its possession to Deering & Co., and that upon the facts disclosed by the testimony of the cashier of the bank, and found by the judge, as hereinabove stated, the judge was authorized only to make an order to the effect that Deering & Co. might bring an action against the bank, as provided by section 720 of the Code of Civil Procedure, to which action other persons claiming liens upon the money by prior attachments might be made or become parties, to the end that all adverse claims might be adjusted and conclusively settled in such action, so that the bank would thereby be protected against them. In thus contending I think the appellant is clearly right, and fully sustained by the adjudged cases in this state, of which the following are more or less directly in point: Roberts v. Landecker, 9 Cal. 262; Parker v. Page, 38 Cal. 522; Robinson v. Tevis, 38 Cal. 614; Hartman v. Olvera, 51 Cal. 502; Ex parte Hollis, 59 Cal. 414. See, also, Hagerman v. Tong Lee, 12 Nev. 332. There is no pretense of bad faith on the part of the bank, according to the testimony of whose cashier the judge found the facts. Indeed, there is no dispute about the facts. It clearly appears that the garnishments of Carter and Lothian were duly served on the bank prior to that of Deering & Co.; and, although Kimball's first garnishment had been decided to be invalid as against Deering & Co. and Lothian, Kimball was not estopped from claiming it valid against Carter. Conceding, but not deciding, the extremely doubtful proposition that in summary proceedings of this kind a judge, referee, or court may try and conclusively settle all adverse claims to the property sought to be applied to the satisfaction of a judgment, yet all known adverse claimants should have an opportunity to be heard; otherwise, they would not be bound by any order made, nor would the garnishee be protected by any such order from their just claims, and might be compelled to satisfy them. Code Civ. Proc. § 544; Robinson v. Tevis, 38 Cal. 611; Wade, Attachm. § 504. In this case neither Carter, the first garnisher, nor Kimball, the second had any notice of the supplementary proceeding, and neither of them appeared. It is contended for respondent, however, that the Byrne note, in possession of the bank as a pledge, was not subject to attachment, and that only the money realized therefrom by the bank was attachable, and, therefore, that Carter acquired no lien on the money collected by the bank after the service of his garnishment; and this theory seems to have been adopted by the judge who heard the motion and made the order. But this theory is unsound. All debts and credits of a defendant in possession of another are attach-

able by garnishment. The Byrne note, in possession of the bank as collateral security for a debt of the defendant in attachment, Richardson-Kimball Company, was a "credit," and the defendant's interest in it was attachable by garnishment of the bank (Gow v. Marshall, 90 Cal. 565, 27 Pac. 422); and the lien of Carter's attachment not only fastened itself upon the note, but transferred itself to the money, when collected thereon by the garnishee (Robinson v. Tevis, 38 Cal. 614). The facts disclosed by the bank through the testimony of its cashier, which the judge found to be true, was equivalent to a denial of the alleged debt of the bank to the Richardson-Kimball Company, in the sense of section 720 of the Code of Civil Procedure. In view of the numerous attachments of that debt, the bank was not obliged to pay it to the defendant in the attachment suits until those attachments should be discharged. Nor was it bound to pay it to either of the plaintiffs in attachment, or to the sheriff for them, until a settlement of their adverse claims thereto by a judicial tribunal whose determination would be conclusive upon all claimants, and afford ample protection to the bank. Conceding that the bank might have interpleaded the adverse claimants, it substantially did so, by fully informing the judge of all the adverse claims and claimants. It was then the duty of the judge to deny the motion for an order on the bank to pay the money to Deering & Co.; but, if moved to do, he might have made an order permitting Deering & Co. to institute an action against the bank as provided in section 720, Code Civ. Proc. In such an action all persons claiming to be interested might and should have been the parties; and, if all such were not made parties by the plaintiff, the bank could have caused them to be brought in, and then paid the money into court, thereby relieving itself of all responsibility.

I think the two appeals from the order denying the motions to vacate the order requiring the bank to pay to plaintiff herein the sum of $1,356.22 should be dismissed, but that, on the appeal of I. A. Lothian and the Los Angeles National Bank from the last above mentioned order, said last-mentioned order should be reversed, with leave to the respondent to apply for an order permitting it to institute an action against the Los Angeles National Bank, pursuant to section 720 of the Code of Civil Procedure.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal of I. A. Lothian and the appeal of the Los Angeles National Bank from the order denying appellants' motions to vacate a former order requiring said bank to pay to respondent the sum of $1,356.22 are dismissed. But, on the appeals by said Lothian and said bank from said former order, that order is reversed, and respondent corporation has leave to apply to the superior court, or to the judge thereof, on the findings of record in the proceeding supplementary to execution, for an order permitting it to institute an action against the Los Angeles National Bank pursuant to section 720 of the Code of Civil Procedure.

5 Cal. Unrep. 139

SIMPSON v. SIMPSON. (No. 19,487.)

(Supreme Court of California. Sept. 7, 1895.)

ABATEMENT—PENDING ACTION—CONTINUANCE.

1. The pendency of an action by the husband to annul the marriage on the ground that it was contracted under duress does not prevent an action by the wife for divorce on the ground of nonsupport.

2. In an action for divorce the affidavit for a continuance stated that defendant, a material witness, was in another state, and too poor to attend the trial, and that his deposition could not be obtained within a month; that the evidence in an action pending in another state by defendant against plaintiff to annul the marriage could not be obtained by the day set for trial. Plaintiff stipulated that the uncertified copy of the evidence in the other action might be used as though duly certified, and waived alimony. *Held*, a continuance was properly refused.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Sarah B. Simpson against B. F. Simpson for a divorce. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Callen & Neale, for appellant. William H. Fuller and Clarence L. Barber, for respondent.

VANCLIEF, C. Action for divorce on the grounds of desertion and willful neglect to provide for plaintiff the common necessaries of life, in which the judgment was in favor of plaintiff, dissolving the bonds of matrimony. Defendant has appealed from the judgment and from an order denying his motion for a new trial. The alleged defenses to the action were: First, a general denial of each and every allegation of the complaint; second, that the defendant married the plaintiff under duress, by threats of plaintiff's father and brother-in-law to kill him unless he married plaintiff; third, that there was another action pending in the state of Colorado between the same parties for the same cause.

1. The appellant contends that the findings of fact by the court are not justified by the evidence, but I think the evidence quite sufficient to justify all such findings.

2. It is contended that the court erred in deciding that the action pending in the state of Colorado was not for the same cause as this action. The record of that cause, which was offered in evidence by defendant, shows that it was an action brought by the defend-

ant herein against the plaintiff in this action to annul the alleged marriage of plaintiff and defendant herein, on the ground that the plaintiff in that action submitted to the performance of the marriage ceremony under duress as aforesaid, and was not an action for divorce. Surely, neither that cause of action nor the relief sought thereby was the same as in this action, and the court did not err in so deciding.

3. Appellant contends that the court erred in denying defendant's motion to postpone the trial. The motion was made on the affidavit of one of defendant's attorneys, showing that defendant was a material witness in his own behalf to prove the alleged duress; that he resided in Denver, Colo., and by reason of his poverty was unable to pay the expense of a trip to this state, and therefore his testimony could be procured only by deposition; that affiant knew of no other witness by whom the alleged duress could be proved; that a postponement of one month would be necessary to enable affiant to procure defendant's deposition, but did not state that affiant expected to procure it within that period. The affidavit further stated that the evidence necessary to prove the plea of another action pending in the state of Colorado could not be procured in time for the trial on the day set. Counsel for plaintiff opposed the motion to postpone the trial, and offered to stipulate, as they afterwards did, that the uncertified copy of the record of the action pending in Colorado, then in possession of defendant's attorneys, might be admitted in evidence without objection, and with the same effect as if duly certified, and also waived plaintiff's claim for alimony. Plaintiff also proved that summons was personally served on defendant in Denver, Colo., four months prior to the day set for the trial of the case. Considering all the circumstances, I do not think the denial of the motion to postpone the trial was an abuse of the discretion of the court. But, even if it can be said to have been error, I think it appears that the defendant was not injured thereby. In the first place, it appears by the record of defendant's suit in Colorado that he earnestly desired to free himself from the bonds of matrimony, which were dissolved in this action without costs, except the sum of $20.15, which he will probably never pay. The only difference, in effect, between the decree of divorce in this action and a decree annulling the marriage in his action in Colorado is that the latter would scandalize the plaintiff (to marry whom he appears to have been under the strongest possible moral obligation), and bastardize his natural son, born after the alleged marriage. In the second place, it appears to be hardly possible that defendant's testimony as to the alleged duress could prevail over the strong evidence to the contrary given at the trial. A new trial should not be granted on the ground of harmless error. I think the order and judgment appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment appealed from are affirmed.

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109 Cal. 122

MOORE v. HAMERSLAG. (No. 18,352.)

(Supreme Court of California. Sept. 12, 1895.)

PUBLIC LANDS—LOCATION IN ANOTHER'S NAME.

1. Under Rev. St. U. S. § 2322, vesting in the locator of a mining claim the exclusive right to its possession, a location of a mining claim may be made by one person in the name of another.

2. Where one, acting under Rev. St. U. S. § 2322, vesting in a locator of the mining claim the exclusive right to its possession, locates and has a mining claim recorded in another's name, the legal title thus vested in the other cannot be defeated by a subsequent parol agreement that it is to be held by him in trust.

Department 1. Appeal from superior court, Fresno county; S. A. Holmes, Judge.

Action by S. C. Moore against A. Hamerslag for breach of contract to reconvey a mining claim alleged to have been located by agreement in his name. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

J. A. Hannah, for appellant. Sayle & Coldwell, for respondent.

HARRISON, J. The plaintiff located a mining claim under the laws of the United States, February 8, 1888, in the name of the defendant, signed the name of the defendant to the location, and posted and left the notice on the mine. In the following March he left a copy of the notice with the county recorder, to be recorded, unless he should otherwise instruct him within a few days, and paid the fee for recording, but never gave any further instructions to the recorder. Shortly after this, he saw the defendant, and informed him that he had posted notice on the claim in his name; and in his testimony says: "I told him that I had posted a notice on a claim in his name, and that before I had it recorded I came to see him if it was satisfactory with him to have the mine stand in his name, and deed it back to me, as Mr. Stephens had formerly agreed to do; and he said it was agreeable." Soon after this interview with the defendant, the plaintiff conveyed an undivided half of the claim to one Broder, and he and Broder continued in possession of the mine, expending money in working it, taking to themselves all the proceeds. In December, 1890, the defendant, at the request of Broder, conveyed the mining claim to him. In February, 1891, the plaintiff demanded from the defendant a conveyance of the claim, and upon his refusal brought this action to recover damages for the breach of his agreement to make such conveyance. Judgment was rendered in his favor for $600. The defendant has appealed.

A mining claim is real estate (Melton v. Lambard, 51 Cal. 258), and under the provisions of the statute of frauds can be transferred only by operation of law, or an instrument in writing. The provision of section 2322 of the Revised Statutes of the United States conferring upon the locator of a mining claim "the exclusive right of possession and enjoyment" to the claim is in the nature of a legislative grant of interest in the land; and the interest thus conveyed to the locator by the government cannot be transferred by parol, or otherwise than in accordance with the statute of frauds. Goller v. Fett, 30 Cal. 481; Garthe v. Hart, 73 Cal. 541, 15 Pac. 93. The location may be made in the name of another than the actual locator (Morton v. Mining Co., 26 Cal. 527; Rush v. French, 1 Ariz. 105, 25 Pac. 816): and when so made the person in whose name it is made becomes vested with the legal title to the claim (Van Valkenburg v. Huff, 1 Nev. 142); and it is not necessary for its validity that it should be recorded (Thompson v. Spray, 72 Cal. 533, 14 Pac. 182). By virtue of the acts done by the plaintiff in reference to the mining claim in question, the defendant became vested with the legal title thereto as fully as if the plaintiff had located the claim in his own name, and afterwards, by a conveyance absolute in form, and without any consideration, transferred it to the defendant. The defendant could not, by any oral declarations subsequent to such conveyance, render himself a trustee for the plaintiff, or bind himself to transfer the claim to him. "An absolute conveyance of lands cannot, after its execution, be turned into a trust by any oral declarations of the parties thereto." Feeney v. Howard, 79 Cal. 525, 21 Pac. 984; Hasshagen v. Hasshagen, 80 Cal. 514, 22 Pac. 294; Sherman v. Sandell (Cal.) 39 Pac. 797. The plaintiff did not locate the claim in the name of the defendant by reason of any fiduciary relations between them (see Feeney v. Howard, supra), nor was it made under any prior agreement on the part of the defendant to hold the same in trust for him. The cases of Gore v. McBrayer, 18 Cal. 583, and Moritz v. Lavelle, 77 Cal. 10, 18 Pac. 803, do not aid the plaintiff, and are not in contravention of this rule. In both these cases the location was made under a prior agreement between the parties that it should be for the joint interest of both. At the time of the transaction involved in Gore v. McBrayer a mining claim could be transferred by parol, the statute requiring it to be in writing having been passed in 1860; and in Moritz v. Lavelle the location was made by both parties in the name of the defendant, upon the express agreement between them at the time of the location that, in consideration of the prior agreement of the plaintiff to furnish the means for its location and working, the defendant would transfer an interest therein. In Gore v. McBrayer the location was orignally made in the name of both parties, and it was held that the interest thereby vested in the plaintiff could not be defeated by tearing down the notice and making a new location, in which the plaintiff's name was omitted. The court should have excluded the oral evidence of the agreement by the defendant to reconvey the mining claim to the plaintiff, and should have granted the nonsuit asked by the defendant. The judgment and order are reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

108 Cal. 670

TUFFREE et al. v. POLHEMUS et al. (No. 19,499.)

(Supreme Court of California. Sept. 4, 1895.)

ADVERSE POSSESSION—QUIETING TITLE—WHO MAY MAINTAIN ACTION—DETERMINATION OF EQUITABLE RIGHTS—PAROL PARTITION.

1. One who invokes the statute of limitations in his favor in order to establish his title by adverse possession to portions of a Mexican grant has the burden of showing that a "perfect grant" existed prior to the issuance of his patent.

2. Title by adverse possession cannot be successfully asserted by one who has failed to pay the taxes on the property, especially against one who he asserts had agreed to pay them for him.

3. It is too late to attack the sufficiency of a pleading after evidence has been introduced in support of its allegations without objection.

4. The owner of an equitable right may maintain an action to quiet his title and have adverse equities adjudicated therein and determined inferior.

5. Where a tract of land was purchased by five tenants in common, and, at their direction, deeded to a trustee for them, and they entered into a verbal agreement that they would each select a portion of the land for cultivation, and that the selection so made should be owned by the one selecting it in severalty, evidence that one of the five made a parol gift of his selection to his daughter, who cultivated the same, and made considerable improvements thereon, having exclusive possession for more than 15 years, establishes, as between the other cotenants and the daughter, a partition by parol, though such other cotenants may not have known that she was occupying it as a gift from her father.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action to quiet title by Caroline Borromeo Tuffree and J. K. Tuffree, her husband, against C. B. Polhemus, Moses Hopkins, Alfred Robinson, and others. There was judgment for plaintiffs against defendant Polhemus, and for the defendants other than Polhemus against plaintiffs, from which, so far as it is against them, both parties appeal. Modified.

A. M. Stephens and Chapman & Hendrick, for plaintiffs. Stephen M. White and Bricknell & White, for defendants.

GAROUTTE, J. This action was brought to quiet title to a tract of land containing 640 acres. The complaint is in the usual form, and contains the additional allegation that plaintiff Mrs. Tuffree had been in the open, notorious, peaceable, continuous, and adverse possession of the tract for more than 15 years. The answer denied the allegations of the complaint, and alleged that by a tripartite indenture, executed in 1868, between Abel Stearns and his wife of the first part, Alfred Robinson of the second part, and Samuel Brannan, E. F. Northam, Charles B. Polhemus, Edward Martin, and Abel Stearns, parties of the third part, they, Stearns and wife, conveyed to Robinson certain lands, including the lands here involved. The lands so conveyed were several Mexican grants, containing more than 100,000 acres. The deed was made to Robinson, in trust to hold possession, and sell and convey upon such terms and in such quantities as he might see fit, with the consent of the parties of the third part. In the findings of fact the trial court declared "that about the time of the execution of the indenture the beneficiaries (parties of the third part) did enter into a verbal agreement that they would each select a section from among the lands, and that these selections so made should be owned by the persons selecting in severalty; their object being to demonstrate, by planting and cultivating, the productiveness of the soil." The court further found that under such agreement Polhemus made a selection of the land here in dispute; that this selection was made in the year 1872, and Polhemus verbally stated to his daughter, plaintiff Tuffree, that he gave her the land; and she, relying upon such statements and representations, with his consent and approval, took possession thereof, with her husband, cultivated and improved the same, and has been living thereon since that time. The court further found that neither Robinson nor any of the parties of the third part, except Polhemus, knew that Mrs. Tuffree was holding and claiming the land under the gift from Polhemus, nor did they know that Polhemus had selected this particular land under the agreement aforesaid. At this time Polhemus owned one-fourth of all the land conveyed to the trustee, Robinson. During all the time since 1872, plaintiffs have cultivated the land, and have made improvements thereon to the value of $7,000, with the knowledge of the trustee and the parties of the third part; and during said time plaintiff Mrs. Tuffree has claimed said land, and asserted that she owned the same under an agreement with her said father, Polhemus. The court further found "that the trustee had paid the taxes, and the premises constituted a portion of a Mexican grant, and that a patent therefor had issued on the 21st of May, 1877." As conclusions of law the court declared that there was an executed parol gift from Polhemus to Mrs. Tuffree, and that such gift vested in her all the title to said property held by Polhemus, but not the title of his cotenants. The court also concluded that there was no executed parol partition of the lands, nor any part of them, and that the plaintiffs were entitled to judgment against Polhemus, and that the defendants other than Polhemus were entitled to judgment against the plaintiffs. Both parties appeal from the judgment so far as it is against them, and also from an order denying their respective motions for a new trial; and cross appeals are now before us upon the one transcript.

1. Did the plaintiff Mrs. Tuffree secure title to this property by adverse possession for the requisite period? Without a consideration of the evidence as to the character of her possession, we are prepared to say that she has not shown herself to be in a position to successfully plead the statute of limitations. This land constituted a portion of a Mexican grant, a patent to which was not issued until May 21, 1877. The statute of limitations did not commence to run until the date of the patent. Anzar v. Miller, 90 Cal. 342, 27 Pac. 299. In some of the earlier cases it has been intimated that possibly the statute might run before confirmation and issuance of patent where a "perfect grant" existed; but, when invoking the statute of limitations, it would seem to be somewhat of a misnomer to term any Mexican grant a "perfect grant" until confirmed by commission or court, and a patent issued upon such confirmation. Especially would this seem to be so in view of Botiller v. Dominguez, 130 U. S. 238, 9 Sup. Ct. 525, where it is held that every grant, however perfect, must be submitted to and confirmed by the proper authorities before any valid title vests. But in this case, if the principle were otherwise, Mrs. Tuffree would not be benefited, for the burden would still be upon her to show the existence of a "perfect grant" prior to the issuance of the patent, and this she has not attempted to do. Since the issuance of the patent she has not obtained title by adverse possession, for she has paid no taxes upon the land. Neither does it appear that Polhemus paid the taxes for her benefit, or at all; for the court has found that Robinson, the trustee, paid the taxes. As an element in the creation of her title, it was all-important that she should have paid the taxes. This she has not done. Nor does the fact that Polhemus promised to pay them for her extricate her from the difficulty. Polhemus is one of the parties against whom she is invoking the statute, and she certainly should not have relied upon his promises. We conclude that Mrs. Tuffree has no title by virtue of the statute of limitations.

2. Defendants insist that, inasmuch as plaintiff's title is purely equitable, her remedy is an action for specific performance, and that an action to quiet title cannot be maintained; and further contend that, if this conclusion be erroneous, still, under any circumstances, the facts showing her equitable title should be set out by her complaint. We do not deem

it necessary to determine whether or not the allegations of the complaint are sufficiently broad to justify proof of an equitable title in Mrs. Tuffree, for the evidence showing her equitable title was admitted without objection, and it is now too late to attack the sufficiency of the pleading in this particular.

3. There are cases in this state holding that the possessor of an equitable title cannot bring an action to quiet such title against the holder of the legal title (Von Drachenfels v. Doolittle, 77 Cal. 295, 19 Pac. 518; Nidever v. Ayers, 83 Cal. 39, 23 Pac. 192; Bryan v. Tormey, 84 Cal. 126, 24 Pac. 319; Harrigan v. Mowry, 84 Cal. 456, 22 Pac. 658); and this is the general doctrine (Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. 1129). But, as this court in the past has had occasion to remark, section 738 of the Code of Civil Procedure is broad in its terms. It possesses no limitations or restrictions, and we see no reason why it does not vest in the holder of an equitable title the right to come before the court, and have his equities declared superior to any and all opposing equities. If there are outstanding and antagonistic equities, we know of no sound policy which would deny claimants thereunder an adjudication upon them by virtue of the provisions of this section of the Code. In Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, it was held that the owner of an equitable interest was entitled to have his interest set aside in partition, and we repeat with approval what is there said as to this class of estates: "In fact, in most cases in this state the difference between equitable and legal estates is of no practical importance. They are both estates originating by law, and held under law, and in that sense are legal estates; and where a court is at liberty to rely upon the rule of equity of considering that as done which ought to be done, the difference between an estate so regarded and an estate at law is not worthy of consideration." It is apparent at a glance that, if an action for partition will lie in such a case, then an action by the holder of an equitable title against parties claiming adverse equities should be recognized and countenanced under the foregoing section of the Code. For these reasons we think the action maintainable against all the defendants except Robinson, the holder of the legal title.

4 Many findings of the court have been attacked by the opposing appellants as unsupported in the evidence. It would subserve no useful purpose in this opinion to enter into an examination of the record in this regard in detail. We have carefully gone over it, and are fully satisfied that all of the material findings of fact are supported by the evidence. Upon those findings we entirely agree with the trial court in its conclusion of law that the parol gift of this land by Polhemus to his daughter, Tuffree, vested in her his interest therein, for that there was an executed parol gift to her cannot be questioned by the evidence or findings.

5. Upon the remaining branch of the case we are compelled to arrive at a contrary conclusion from that of the trial court. The findings of fact establish an executed parol partition; and that land may be partitioned by parol in this state is well settled. Long v. Dollarhide, 24 Cal. 218. We have here a tract of land containing more than 100,000 acres, owned by five tenants in common. The land appears to have been wild and uncultivated. The title was placed in the name of one Robinson, who appears to be a mere naked trustee. The cotenants evidently were desirous of renting and selling; and with the object of demonstrating, by planting and cultivating, the productiveness of the soil, they entered into a verbal agreement that they would each select a section from among the lands comprising this immense tract, and that such selection, so made, should be owned by the person selecting in severalty. Under this agreement Polhemus selected a section which he gave to his daughter, the plaintiff herein. She entered into the possession thereof, claiming the same; has had the exclusive possession for more than 15 years; has cultivated the same, and made improvements thereon to the value of $7,000; and said cultivation and making of improvements were known to Robinson and all the cotenants. This is a strong showing, and clearly indicates an example of an executed, parol partition, for Mrs. Tuffree certainly stands in as good a position with reference to this case as Polhemus himself would if he had done these things and was now seeking to quiet his title against his cotenants. There is nothing in the findings to nullify the conclusion we have arrived at upon the foregoing facts, unless it be the following: "That none of said beneficiaries, except the said C. B. Polhemus had any knowledge that said named plaintiffs were occupying or improving said land under any gift from said Polhemus; nor did said beneficiaries, or either of them, except said Polhemus know that said land had been selected as aforesaid; nor did they agree that said land, so selected, should be owned by the said Polhemus, or by his donee, Caroline B. Tuffree, in severalty." We do not see how this finding could have any weight if, as previously suggested, Polhemus were the party plaintiff; and likewise we think it avails nothing against Mrs. Tuffree. This finding of fact discloses nothing violative of the original agreement of partition. We do not see how it is material upon this question that Polhemus' cotenants should have had knowledge that Mrs. Tuffree based her rights upon a gift from her father; nor how it becomes material that the cotenants should have been informed that Polhemus had selected this particular tract of land under the agreement; nor that they should have agreed after the selection that the land so selected should be owned by the said Polhemus, or his donee in severalty. That whatever selection was made by any

of these cotenants should belong to them in severalty was the original agreement in the first instance, and we see no necessity for a ratification thereof after the selection was made. This tract of land covered an immense territory, and Polhemus' right of selection of any particular tract was as broad as the territory itself. It is evident the owners did not reside upon this body of land, and their lack of knowledge as to Polhemus' selection, or the claims of Mrs. Tuffree thereto, may well be accounted for upon this theory; but, be that as it may, we think none of the facts declared by this finding of the court defeat plaintiff's claims that her acts, taken in connection with those of Polhemus, constituted an executed parol partition under the original agreement. For the foregoing reasons, the judgment in favor of the plaintiffs and against the defendant Polhemus is affirmed; the judgment in favor of the defendants, other than the defendant Robinson, is reversed, and the superior court is directed to enter judgment upon the findings of fact in favor of the plaintiff and against the said defendants other than the defendant Robinson. The order denying a new trial to the defendant Polhemus and to the plaintiffs is affirmed. The costs of this appeal are to be taxed against the defendants other than Robinson.

We concur: HARRISON, J.; VAN FLEET, J.

On Motion for Rehearing.

(Oct. 2, 1895.)

PER CURIAM. The judgment in favor of the defendant Robinson in affirmed.

109 Cal. 1

STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS v. HOUSER. (No. 19,409.)

(Supreme Court of California. Sept. 5, 1895.)

CORPORATIONS — LIABILITY OF STOCKHOLDERS — SALE OF SHARES—NOTICE.

1. Defendant sold a manufacturing plant to plaintiff corporation, taking in part payment thereof 400 shares of its corporate stock, at $50 per share. There was no indorsement on the certificate that it was for fully-paid or nonassessable stock, nor was there any such understanding between the parties. At the time of this transaction each of plaintiff's stockholders had paid $50 per share on his stock. *Held*, that defendant's stock was subject to the same conditions and liabilities that it would have been subject to had he been an original subscriber.

2. Under Civ. Code, § 337, which provides that, if any portion of the assessment levied against the capital stock of a corporation shall remain unpaid on the day specified in the assessment notice, the secretary must, unless otherwise ordered by the board of directors, cause to be published "in the same papers" in which the notice of assessment was published a notice of sale, etc., the board may order such notice of sale to be published in a paper other than that in which the notice of assessment appeared.

3. The secretary of a corporation, on the order of the president, sent by mail to each of the seven directors a written notice of a special meeting, properly addressed and postpaid, three days before the time fixed for the meeting. *Held*, that notice was given as required by Civ. Code, § 320, and the acts of the five directors present were valid.

4. Notice to the directors of a corporation of a special meeting will be presumed, in the absence of proof to the contrary, though not recited in the record of the meeting.

5. Where written notices of a special meeting were properly addressed, and sent by mail, postpaid, to each of the directors of a corporation, the presumption is that the notices were received.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the Stockton Combined Harvester & Agricultural Works against Daniel Houser to recover an assessment on shares of stock. From a judgment for defendant, plaintiff appeals. Reversed.

Nichol & Orr and J. L. Murphey, for appellant. Anderson & Anderson and S. L. Carter, for respondent.

BELCHER, C. The plaintiff is a manufacturing corporation organized under the laws of this state, and having its principal place of business in the city of Stockton. Its capital stock is $300,000, divided into 3,000 shares, of the par value of $100 each. On October 14, 1885, defendant became the owner of 400 shares of plaintiff's capital stock, and at that time more than one-fourth of its entire capital stock had been subscribed for and taken. On the day named there was issued to and accepted by defendant a certificate for the said shares of stock, and ever since he has continued to be, and now is, the owner and holder thereof. On October 4, 1892, one-half of the par value of the subscribed capital stock of plaintiff had been paid, and no more. At that time plaintiff was indebted to divers creditors in sums aggregating about $150,000, and was unable to meet its liabilities and satisfy the claims of its creditors, and for such purpose it was necessary that an assessment of $25 per share on the subscribed capital stock of plaintiff—the same being one-half of the amount then unpaid on such capital stock—should be levied and assessed by the directors of plaintiff. On October 4, 1892, at a regular meeting of the board of directors, there was duly adopted a resolution levying an assessment on the subscribed capital stock of the corporation in the sum of $25 per share, and upon the adoption of such resolution the plaintiff's secretary caused to be published in a newspaper printed and published in the city of Stockton, for the time and in the manner required by law, a notice of such assessment; and on the same day copies of said notice were mailed to the several stockholders of plaintiff, at their several places of residence. By the resolution levying the assessment, November 7, 1892, was fixed as the time when the stock on which the assessment should remain unpaid should become delinquent, and November 26, 1892, as the day for the sale of delinquent stock. No part of defendant's assessment was paid, and on November 22d a resolution was adopted by the board of directors of plaintiff waiving further proceedings for the collection of said assessment by sale, and electing to proceed by action at law to recover the amount of the assessment, as provided in section 349 of the Civil Code. Pursuant to the resolution last above referred to, plaintiff commenced this action to recover from defendant the sum of $10,000, —the amount of such assessment. The defendant answered, denying that he ever subscribed for any of the capital stock of the plaintiff; and alleging that in 1885 he purchased from the plaintiff 400 shares of its capital stock at the price of $50 per share,—that being the price agreed upon between plaintiff and defendant as the full purchase price of said stock,—and then and there paid to plaintiff $20,000 in full for said shares of stock; and further denying that there is due or owing or unpaid to the plaintiff by the defendant any sum on account of said assessment, or on any account. The case was tried by the court without a jury, and the findings and judgment were in favor of the defendant. The plaintiff appeals from the judgment, and brings the case here on the judgment roll and a bill of exceptions.

The third and fifth findings of the court are as follows: (3) "The defendant did not subscribe for any of the capital stock of plaintiff at any time, or at all. In the year 1885 the defendant purchased and received from the plaintiff 400 shares of the capital stock of plaintiff, at the price of fifty dollars per share. That was the price agreed upon between plaintiff and defendant as the full purchase price of said stock, and defendant then and there paid to plaintiff said full purchase price, by conveying to the plaintiff certain property belonging to defendant, which was accepted by said plaintiff as the full purchase price of said 400 shares of stock, in lieu of the twenty thousand dollars in cash." (5) "There was not on October 4, 1892, or at any time since defendant purchased said 400 shares of stock, any amount or part of the value or purchase price of said 400 shares remaining unpaid." It is claimed for appellant that these findings were not justified by the evidence; and whether they were justified, or not, is the principal question presented for decision.

It was proved that the plaintiff was organized as a corporation in 1883, and that at the time of the transaction with the defendant each of its stockholders had paid to the corporation $50 per share on their several shares of stock. It was also proved that in October, 1885, the defendant was the owner of a manufacturing plant in Stockton, consisting of a block of land, the buildings thereon, machinery, tools, materials, etc., which he offered to sell to plaintiff for $100,000, to be paid as follows: Plaintiff to assume a mortgage on the property amounting to the sum of $25,000, and to pay in cash $30,000 in 30 days from date, and $25,000 in 12 months from date, and to pay $20,000 by the issuance to defendant of 400 shares of its capital stock at $50 per share. This offer was accepted by plaintiff, and the trade was consummated on October 14th by the delivery to defendant of plaintiff's promissory notes for the two cash payments, and a certificate for 400 shares of its stock, and by the delivery to plaintiff of defendant's deed of his said property. The certificate was in the usual form, and was accepted and receipted for by the defendant in the usual manner. There was no indorsement on the certificate that it was for fully-paid or nonassessable stock, and no evidence was introduced that it was agreed or understood by the parties at the time of its issuance, or at any time, that the stock should be nonassessable. Under these circumstances, it must be presumed that the stock so received was taken and held by defendant subject to the same conditions and liabilities that it would have been subject to if he had been an original subscriber for it, or had purchased it from an original subscriber. In Upton v. Tribilcock, 91 U. S. 45, an actual subscriber to the stock of an insurance company, upon which he agreed to pay 20 per cent., was held responsible for the balance, and could not escape liability therefor because of representations by the agent, at the time of the subscription, that he would be only responsible for that amount, or by proving a subsequent arrangement with the company canceling the subscription, and accepting, as in full payment, his note for the 20 per cent. agreed to be paid. In Webster v. Upton, 91 U. S. 65, a person holding certificates of stock by transfer from the original subscriber, and standing upon the books of the corporation as a stockholder, was held liable for the balance due upon the stock, without proof of an express promise on his part to pay. In Pullman v. Upton, 96 U. S. 328, a transferee of stock, who caused the transfer to be made to himself on the books of the corporation, as security for a debt of the transferrer, was held liable for the balance due on such stock. And see Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, where the foregoing cases are cited, and their import stated. See, also, Green v. Abietine Medical Co., 96 Cal. 322, 31 Pac. 100. Without following the able arguments of counsel further, or noticing the numerous authorities cited, it seems enough to say that in our opinion the appellant's contention that the findings above quoted were not justified by the evidence must be sustained. But, conceding this to be so, respondent still insists that there are two other points which are fatal to appellant's cause of action:

1. At the meeting of the board of directors held October 4th, at which the assessment

was levied, the board duly adopted a resolution directing the secretary of plaintiff to publish the notice of the assessment in the Stockton Independent, and to publish the notice of delinquent sale in the Evening Mail; both being newspapers of general circulation, printed and published in the city of Stockton. This resolution was not entered in the minutes of the board, but the notices were published in the papers as directed for the time and in the manner required by law. Section 337 of the Civil Code provides that, "if any portion of the assessment mentioned in the notice remains unpaid on the day specified therein for declaring the stock delinquent, the secretary must, unless otherwise ordered by the board of directors, cause to be published in the same papers in which the notice hereinbefore provided for shall have been published, a notice" of sale substantially in a form specified. It is argued that the meaning of this section is that the secretary must "publish," unless directed not to publish, but that, if he publish the notice at all, it must be in the same paper that the notice of assessment was published in, and that the result of the failure to publish the notice of delinquent sale in the manner required by the statute is to make all the proceedings void, except the levy of the assessment (citing section 346, Civ. Code), and hence the defendant's stock never became delinquent, and the action cannot be maintained. We do not understand section 337 to have the meaning imputed to it. As we read the section, it means that the notice of sale must be published in the same paper as the notice of assessment, unless otherwise ordered by the board; but the board may order the notices to be published in different papers, and if they are regularly so published the requirements of the statute are complied with. It must be held, therefore, that the publication in the Evening Mail was authorized and sufficient.

2. It is also argued that the meeting of the board of directors on November 22d was a special meeting, at which only five of the seven directors were in attendance, and that no sufficient notice of the meeting was given to the directors, and hence the members present were not authorized to transact any business, and the action taken to waive further proceedings for the collection of defendant's assessment by sale, and to proceed by action at law to collect the amount of the assessment, was unauthorized and void. Section 320 of the Civil Code provides: "When no provision is made in the by-laws for regular meetings of the directors and the mode of calling special meetings, all meetings must be called by special notice in writing, to be given to each director by the secretary, on the order of the president, or, if there be none, on the order of two directors." The only provision of the by-laws of plaintiff as to the notice of special meetings is, that "notice thereof of at least two days shall be given to the directors, and shall be in writing, signed by either the secretary, president, or the directors making such call." It was proved that notice in writing of the special meeting of November 22d, signed by the secretary, was sent by him by mail, properly addressed and postpaid, to each of the directors, about three days before the day named for the meeting; that the notices were sent in accordance with the direction of the president; and that five of the directors were present at the meeting, and took part in its proceedings. The presumption is that all of the notices thus sent were received, and there was no evidence that any one of them was not received. The question then is, was notice of the meeting given to each director as required by the Code and by-law? In Granger v. Mining Co., 59 Cal. 678, it was held that, in the absence of proof to the contrary, notice to the directors of a meeting will be presumed, though not recited in the record of the meeting. The court said: "It is contended that there was no authority to execute the instruments in question vested in the president and secretary by the above resolution, because the meeting at which it was passed was a special one, and there was no evidence that such a notice of the meeting as was required by law (Civ. Code, § 320) was served on the directors. This question was presented in Sargent v. Webster, 13 Metc. (Mass.) 497. In that case the board of directors at a meeting passed a vote authorizing an assignment of all its property to one of the creditors of the corporation, who bound himself, by a counter bond, to apply the proceeds of the property so assigned to the payment of the debts and obligations to him, and to pay over to the corporation any balance that remained. There were five directors, and three only were present at the meeting which passed the resolution authorizing the assignment. It was contended that the assignment was not binding on the corporation because it did not appear that notice of the meeting was given to all the directors. The court, per Shaw, C. J., thus disposed of the point: 'Another objection of this same kind is that it does not appear that notice of the meeting was given to all the directors. But the contrary does not appear, and it would be hazardous to decide that every vote passed by an aggregate body is void if it do not appear by the record that all were notified. We believe it is not usual, in corporate records, to state how members were notified. The presumption "omnia rite acta" covers multitudes of defects in such cases, and throws the burden upon those who would deny the regularity of a meeting, for want of due notice, to establish it by proof.'" In Younglove v. Steinman, 80 Cal. 375, 22 Pac. 189, a question similar to that now under consideration was presented. The court said: "It is contended, in support of the appeal from the judgment and order denying a new trial, that the evidence shows that the meeting of the board of direct-

ors at which the assessment was levied was not a legal meeting, for the reason that no notice of the meeting was given. But the court below found that the meeting was 'duly and regularly convened,' and that the assessment was 'lawfully and rightfully' levied. This included a finding that the necessary notice was given, and the finding is supported by sufficient evidence." The record in that case shows that written notices of the meeting were sent to all of the directors, and that the notice to the plaintiff, who was one of the directors, was sent to him by mail. The case of Harding v. Vandewater, 40 Cal. 77, cited and relied upon by respondent, is not in point. In that case there was no proof that any notice of the meeting had been given to the two absent trustees. In view of the authorities, we conclude that the notice of the meeting of November 22d, as given to the directors, was sufficient, and that the board was authorized to take action as it did. The judgment should be reversed, and the cause remanded.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded.

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5 Cal. Unrep. 142

McDONALD v. SOUTHERN CALIFORNIA RY. CO. (No. 19,534.)

(Supreme Court of California. Sept. 11, 1895.)

CONVEYANCE OF RIGHT OF WAY—CONSTRUCTION AND EFFECT.

A conveyance to a railroad company of the right of way for its road, as located, constructed, and operated on the highway in front of the grantor's premises, to wit, on Third street, "for the full length and frontage of lots 23 and 24 in block 25," of a certain survey, and also the right to use "such street" for railroad purposes, with an acknowledgment of payment for "all damages sustained by me by reason of the construction of said railroad upon said street, and by reason of the operation thereof, and particularly * * * for damages for any injury caused by the construction of said railroad in front of my property hereinbefore described," is a grant only of the right of way in front of the two lots; and the damages for which satisfaction is acknowledged are limited to those which had been sustained by construction and operation of the road in front of such lots, and do not apply to damages afterwards sustained by reason of a defective bridge on the road, not in front of the lots.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by William McDonald against the Southern California Railway Company for damages to plaintiff's premises, caused by a defectively constructed bridge. Judgment for plaintiff, and defendant appeals. Affirmed.

W. J. Hunsaker, for appellant. Paris & Allison and Goodcell & Leonard, for respondent.

HARRISON, J. When this case was here upon the former appeal (101 Cal. 206, 35 Pac. 643, 646) it appeared from the findings that "said bridge and all approaches thereto are located within the right of way in said deed described, and constitute part of the premises thereby granted to the California Central Railway Company"; and it was held that, by virtue of the conveyance from the plaintiff to the predecessor of the defendant, he had given a license for the maintenance of the bridge in the condition it was at the time of the conveyance. The cause was remanded for a new trial, and the superior court has now found "that, at the time said deed was executed, the bridge described in plaintiff's complaint, and referred to in the evidence, was not, nor was any part thereof, situated upon the lands of the plaintiff described in his complaint, or upon the extension of Third street in front of his lands, but that the eastern abutment of said bridge was situated upon the land of Third street extended westerly about 150 feet west of the westerly line of plaintiff's lands." The other facts found by the court being substantially the same as upon the former appeal, judgment was rendered in favor of the plaintiff, and the defendant has appealed.

The appellant still contends that, by reason of the conveyance above referred to, the plaintiff is estopped from a recovery for any damage sustained by reason of the defective construction of the bridge. By that conveyance, the plaintiff, in consideration of the sum of $750, granted "the right of way for the main track of said railroad, as the same is now located, constructed, and operated in and upon the highway in front of grantor's premises, to wit, in and upon Third street, as extended west from the limits of the city of San Bernardino, for the full length and frontage of lots 23 and 24 in block 25 of the five-acre survey of the Rancho San Bernardino," and also "the right to exercise the right to use such street for railroad purposes, as it is now doing for its main track." To this grant was added the following clause: "I do hereby acknowledge full and entire satisfaction or payment of any and all damages sustained by me by reason of construction of said railroad upon said street, and by reason of the operation thereof; and particularly do I acknowledge payment for damages for any injury caused by the construction of such railroad in front of my property hereinbefore described." The right of way which is thus granted is by its terms limited to "the full length and frontage of lots 23 and 24 in block 25 of the five-acre survey of the Rancho San Bernardino," upon Third street, as extended west from the limits of the city of San Bernardino; and the following clause, granting the right to use "such street" for railroad purposes, has the same limitation. As the plaintiff could not grant a right of way over property that he did not own, and could not grant the right to use a street, except in front of his own property, it is not to be assumed that it was intended that his grant should have reference to any other property than that which he owned, or to any other street than "the highway in front of grantor's premises," which is described therein. The clause upon which the appellant relies in support of its claim is that in which the plaintiff acknowledges satisfaction of "all damages sustained by me by reason of the construction of said railroad upon said street, and by reason of the operation thereof." We are of the opinion, however, that the "said street" designated in this clause is that portion of Third street which had been previously named in the instrument, and that the damages for which satisfaction was acknowledged were limited to those which had been sustained by the construction and operation of the railroad in front of the plaintiff's property, and which are "particularly" designated in the last clause of the instrument. It would require explicit language to justify the conclusion that it was the intention of the parties that the instrument should apply to damages that the plaintiff might afterwards sustain by reason of a defective structure upon the road at a point remote from his land; and for this purpose it is immaterial whether the structure was 150 feet or a mile away. It is more reasonable to conclude that the negotiation and compensation were limited to the property respecting which he had the right to bargain, and which is particularly described in the instrument. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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109 Cal. 111

CENTERVILLE & K. IRRIGATION DITCH CO. v. BACHTOLD. (Sac. 21.)

(Supreme Court of California. Sept. 11, 1895.)

BOND ON SEPARATE APPEALS—MOTION TO DISMISS.

1. Where a single bond is executed on appeal from a judgment and orders other than one denying a new trial, and the bond states that it is executed "on such appeal," without designating the particular appeal on which it is executed, all the appeals will be dismissed.

2. A motion to dismiss an appeal on the ground that the order appealed from is not appealable cannot be sustained pending a motion to dismiss the appeal on the ground that the appeal has not been perfected.

3. The filing of a proper bond in the appellate court in lieu of one void for ambiguity will not confer jurisdiction on such court to hear the appeal.

Department 1. Appeal from superior court, Fresno county; E. W. Risley, Judge.

Action by the Centerville & Kingsburg Irrigation Ditch Company against one Bachtold. From a judgment for defendant, an order denying a new trial, and one denying a motion to dismiss the action, plaintiff appeals. On motion by defendant to dismiss appeal. Granted.

Frank H. Short, for appellant. Horace Harves, Stanton L. Carter, and W. B. Good, for respondent.

HARRISON, J. The plaintiff gave notice to the defendant February 7, 1895, that he appealed to this court "from the decision entered in said action in said superior court, on the 8th day of July, 1893, in favor of the defendant in said action and against the plaintiff, and from the whole thereof, and also from the order denying plaintiff's motion for a new trial, made and entered in the minutes of said court on the 10th day of December, 1894, and also from the order of the court made and entered in the minutes of the court on the 7th day of February, 1895, denying plaintiff's motion to dismiss said action"; and on the same day filed with the clerk of the superior court an undertaking on the said appeals from the three orders, in which the sureties, "in consideration of such appeal," entered into one $300 undertaking for costs on the appeal. The respondent has moved to dismiss the appeals upon the ground that the undertaking is defective, in that there should have been a separate undertaking for each of the three appeals from the orders named in the notice of appeal.

It is the settled rule of practice in this court that when an appeal is taken from two or more orders, or from a judgment and an order, whether the notice of such appeal is given by separate notices or in one instrument, the appellant must file the jurisdictional undertaking for $300 for the appeal from the judgment and from each of the orders appealed from, except in the single instance of an appeal from a judgment and an order denying a new trial. If a single undertaking for $300 is given, and refers to only one of the orders appealed from, or to the judgment alone, this court will have jurisdiction of only the matter so referred to in the undertaking, and the other appeals will be dismissed. Horn v. Water Co., 18 Cal. 141; Bornheimer v. Baldwin, 38 Cal. 671; Berniaud v. Beecher, 74 Cal. 617, 16 Pac. 510; Wood v. Pendola, 77 Cal. 82, 19 Pac. 183; Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657; Crew v. Diller, 86 Cal. 554, 25 Pac. 66; Paving Co. v. Bolton, 89 Cal. 154, 26 Pac. 650. If the undertaking has no special reference to either matter appealed from, but it is conditioned generally upon "such appeal" (People v. Center, 61 Cal. 191; Corcoran v. Desmond, 71 Cal. 100, 11 Pac. 815), or "said appeals" (McCormick v. Belvin, 96 Cal. 182, 31 Pac. 16), all the appeals will be dismissed upon the ground that by reason of its ambiguity it cannot be determined for which appeal it was given.

It is urged by the respondent that only one of the orders named in the notice of appeal is an appealable order, and that, as the appeal from that order is the only legal consideration for the undertaking, it must be referred to that appeal alone; and, consequently, that the foregoing rule is not applicable to the present case. We are of the opinion, however, that, although this suggestion is not without force, it is not sufficient to take the case out of the rule aforesaid. There are two classes of cases in which an appeal may be dismissed,—one, where the order appealed from is not an appealable order; the other, when the appeal has not been perfected as prescribed by the legislature. Although the action of the court is the same in each class of cases, it is effected for different reasons, and is governed by a consideration of different principles. Formerly it was the practice, if the appeal had not been perfected, to decline to hear the appellant (Biagi v. Howes, 63 Cal. 384); but the present practice is to grant a motion to dismiss, and thus remove an apparent appeal from the records in the case. A motion to dismiss an appeal upon the ground that the order is not appealable assumes that the appeal has been perfected, and that there is a properly authenticated record before this court of the action of the superior court. Whether the order appealed from is an appealable order is a question of law, which can be determined only by a judicial comparison of the record containing the order, with the statutes prescribing the orders from which appeals may be taken; and, as this court has no jurisdiction of an appeal until after it has been perfected, we cannot, upon a motion to dismiss an appeal upon the ground that it has not been perfected, look into the record, either for the purpose of determining whether the order appealed from is appealable, or whether the appeal is without merit, or whether the court below has committed error in its rulings. On the other hand, whether an appeal has been perfected is a question of fact depending upon proceedings subsequent to the entry of the order in the court below. When a motion to dismiss an appeal is made upon this ground, the character or nature of the order appealed from is not involved, and the action of the court is limited to determining whether the steps taken for the appeal are in compliance with the statute prescribing the mode of taking an appeal. The two motions proceed upon different records,—the one upon a record of the action of the court below culminating in and including the order appealed from, while the other is to be determined upon a record of proceedings taken by the appellant subsequent to and independent of the order appealed from. We do not mean to be understood as holding that the respondent may not waive any defects on the part of the appellant in perfecting his appeal, and ask for a dismissal of the appeal from a nonappealable order, but that, when a motion to dismiss an appeal is made upon the ground that the appeal has not been perfected, the appellant cannot ask the court to look into the record for the purpose of determining whether the order he has appealed from is appealable. The appellant cannot protect himself against a defective appeal by saying that he had no right to appeal.

The subsequent filing of an undertaking in this court, approved by one of the justices, does not obviate the objection to the appeal, or confer any jurisdiction upon this court to hear the appeal. The undertaking filed in the superior court "is so ambiguous that it must be regarded as if it had never been filed." Home & Loan Associates v. Wilkins, 71 Cal. 626, 12 Pac. 799. It was held in that case that to allow a new undertaking to be filed under such circumstances would, in effect, permit an appeal to be perfected after the time fixed by law. The motion to dismiss the appeals is granted.

We concur: GAROUTTE, J.; VAN FLEET, J.

109 Cal. 19

LANGDON v. BLACKBURN et al. (No. 19,583.)

(Supreme Court of California. Sept. 5, 1895.)

EQUITY—VACATING PROBATE OF WILL.

1. Equity has no jurisdiction to set aside the probate of a will on the ground of fraud, mistake, or forgery, this being within the exclusive jurisdiction of the probate court.

2. Equity will not give relief by charging the executor of a will or the legatee thereunder with a trust in favor of a third person, alleged to be defrauded by the forged or fraudulent will, where the probate court could afford relief by refusing probate of the will in whole or in part.

3. In an action against the legatees under a will, brought four years after its probate, it was alleged that K., plaintiff's intestate, was the surviving sister of testator; that defendants, to defraud K., forged a will in which all of testator's estate was left to them, and had it admitted to probate; that K. lived 400 miles from the place where her brother resided in his lifetime, and that at the time he died she was 65 years old, and ignorant of legal and business matters; that, shortly after testator's death, defendants sent K.'s son to her, who told her that her entire interest in the will was $3,000; that K., believing this, accepted that amount. There was no allegation that K. had not received notice of probate, as required by law. Plaintiff prayed that defendants be adjudged to hold in trust for K.'s estate the amount K. would have been entitled to as decedent's surviving sister had there been no will. *Held*, that equity would not grant such relief, there being no fraud collateral to, and extrinsic of, the procedure which culminated in the decree of the probate court.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Maria M. Langdon, administratrix of the estate of Maria Kirshner, deceased, against Cecelia Blackburn and another, to enforce an alleged trust. From a judgment for defendants, plaintiff appeals. Affirmed.

Thompson & Thompson, for appellant. Graves & Graves, for respondents.

BELCHER, C. This is an action to enforce an alleged trust. The averments of the complaint are mostly upon information and belief, and are in substance as follows: James H. Blackburn died in the county of San Luis Obispo on January 27, 1888, leaving a large estate, and, as his only heirs at law, two brothers, one sister, and the children of a deceased sister. The defendant Daniel D. Blackburn, who was and is the husband of the other defendant, Cecelia Blackburn, was one of the surviving brothers, and Maria Kirshner, the plaintiff's intestate, who died May 5, 1893, was the surviving sister. Long prior to January 13, 1888, the said James H. Blackburn became weak physically and mentally, and wholly subject to the will and control of defendants. He had no volition, mind, or will of his own, and he so continued until he died. While he was in this condition, the defendants conspired together to defraud the said Maria Kirshner, and to cheat her out of her one-fourth interest in the estate of her brother, and to get the whole estate for themselves. To that end, they procured and caused to be drawn up, in legal form, a paper which purported to be the will of said James H. Blackburn, giving his property to them, and omitting all mention of his said sister. On the said 13th day of January they caused him "to be raised up in his bed (to which he was then confined in mortal sickness), a pen placed in his hand by a person other than himself, and who was in defendants' employ, and, upon defendants' order, direction, and procurement, and not otherwise, without the will, volition, or knowledge of said James H. Blackburn, the said other person moved the pen, and caused it to write the name of said James H. Blackburn, as being his signature to said purported will." At the time when his signature was so written upon said purported will, "the said James H. Blackburn was unconscious. He knew nothing whatever of what was being done. He had neither will, purpose, nor volition in said matter. He did not, and he never did, sign said purported will." He never directed or authorized its preparation, and "he never in any wise dictated or suggested its terms, or any of them, or knew anything about it or of its existence." Defendants thereupon took the said forged will, and kept it until after Blackburn died. On February 6, 1888, they caused the same to be presented to the superior court of San Luis Obispo county for probate, and thereafter such proceedings were had that on the 28th of that month an order was made admitting it to probate as and for the last will of said deceased. Afterwards, by procurement of defendants, the property of the estate, of the value of about $1,000,000, was distributed to and taken and held by them. Plaintiff's intestate was entitled to one-fourth of the property of the estate, but was awarded no part of it. Plaintiff's intestate was about 65 years of age, and quite ignorant as to legal and business matters. She resided in Yuba county, more than 400 miles from San Luis Obispo county; and as to all of the before recited facts in regard to the said pretended will she was by the said defendants purposely, willfully, and carefully kept in ignorance, until about seven months before she died, when she first learned of the existence of said facts, and that she had been robbed by said proceedings. Shortly after the death of Blackburn, the defendants, to carry out and effectuate their scheme to deprive Mrs. Kirshner of her share in the estate of her brother, and to prevent her from making inquiries in the matter, employed and hired one Henry Findley (her son by her first marriage) to visit her, and tell her that her entire interest in the estate of her deceased brother was the sum of $3,000 only. By their procurement and under their employment, Findley did visit his mother at her home in Yuba county, and did tell her that her interest in her brother's estate was $3,000, and no more. She believed the statements of her son, and relied upon them as true. Thereupon, as a part of their scheme to defraud Mrs. Kirshner and to cheat her out of her share of the estate, defendants paid over to her the said sum of $3,000, which was all she ever received from the said estate. "In their said fraudulent purpose defendants succeeded. Misled by her said son and his false statement aforesaid, she, the said Maria Kirshner, did believe that the $3,000 by defendants paid her was her full share of the estate, and accordingly she made no inquiry in the premises, and knew nothing of said probate proceedings. But for said false statement, her reliance thereon, and the payment of said money to her, she, the said Maria Kirshner, would have had her suspicions aroused, would have made inquiries in the premises, have discovered that said purported will was a forgery, and would have opposed the probate thereof." By this fraudulent scheme and its accomplishment, defendants received and converted to their own use property of the value of about $250,000, which should and otherwise would have come to said Maria Kirshner during her life, and now properly belongs to her estate. Immediately on the discovery of the frauds above detailed, as to the forging of said will and the deception practiced upon her in inducing her to believe that $3,000 was her full share of the estate of her brother, and within a year before the commencement of this action, said Maria Kirshner demanded of defendants that they account for and turn over to her the one-fourth part of said estate so as aforesaid taken and held by them; but so to do defendants refused, and they still refuse. Said James H. Blackburn, when he died, left no will, or purported will, other than the one above mentioned. The prayer is that defendants be adjudged to hold one-fourth part of the property of the estate so received by them in trust for the estate of Maria Kirshner, and for an accounting. A general and special demurrer to the complaint was interposed and sustained, and the appeal is from the judgment thereupon entered.

The case in all of its main features, is in no way distinguishable from that of the Broderick Will Case, decided by the supreme court of the United States, and reported in 21 Wall. 503. In that case the relief sought was that the will be declared a forgery, and the probate and all subsequent proceedings be annulled and set aside, or that the defendants be charged as trustees, etc. It was held that a court of equity has no jurisdiction to avoid a will or to set aside the probate thereof on the ground of fraud, mistake, or forgery, this being within the exclusive jurisdiction of the courts of probate, and also that a court of equity will not give relief by charging the executor of a will or a legatee with a trust in favor of a third person, alleged to be defrauded by the forged or fraudulent will, where the court of probate could afford relief by refusing probate of the will in whole or in part. The opinion was delivered by Mr. Justice Bradley, and in speaking of the exclusive jurisdiction of the probate court of California in probate cases, and the questions which can be tried in probate proceedings, he, on page 516, said: "Incompetency, restraint, undue influence, fraudulent representations, and any other cause affecting the validity of the will, are specially mentioned as questions upon which issues might thus be framed. Various provisions were added calculated to secure a thorough investigation on the merits. * * * In view of these provisions, it is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of justice and truth. The question recurs, do the facts stated in the present bill lay sufficient ground for equitable interference with the probate of Broderick's will, or for establishing a trust against the purchasers of his estate in favor of the complainants? It needs no argument to show, as it is perfectly apparent, that every objection to the will or the probate thereof could have been raised, if it was not raised, during the proceedings instituted for proving the will, or at any time within a year after probate was granted, and that the relief sought by declaring the purchasers trustees for the benefit of the complainants would have been fully compassed by denying probate of the will. On the establishment or non-establishment of the will depended the entire rights of the parties, and that was a question entirely and exclusively within the jurisdiction of the probate court. In such a case a court of equity will not interfere, for it has no jurisdiction to do so. The probate court was fully competent to afford adequate relief." And in State v. McGlynn, 20 Cal. 234, in which it was sought to have the probate of the Broderick will vacated and set aside, on the ground that the alleged will was a forged paper, and to have the property of the estate adjudged to have escheated to the state of California, Norton, J., delivered the opinion of the court, and, after a review of the authorities (on page 274), said: "The court of chancery has no capacity, as the authorities have settled, to judge or decide whether a will is or is not a forgery; and hence there would be an incongruity in its assuming to set aside a probate decree establishing a will, on the ground that the decree was procured by fraud, when it can only arrive at the fact of such fraud by first deciding that the will was a forgery. There seems, therefore, to be a substantial reason, so long as a court of chancery is not allowed to judge of the validity of a will, except as shown by the probate, for the exception of probate decrees from the jurisdiction which courts of chancery exercise in setting aside other judgments obtained by fraud. But whether the exception be founded in good reason or otherwise, it has become too firmly established to be disregarded. At the present day it would not be a greater assumption to deny the general rule that courts of chancery may set aside judgments procured by fraud than to deny the exception to that rule in the case of probate decrees. We must acquiesce in the principle established by the authorities, if we are unable to approve of the reason. Judge Story was a staunch advocate for the most enlarged jurisdiction of courts of chancery, and was reluctant to allow the exception in cases of wills, but was compelled to yield to the weight of authority,"—citing 1 Story, Eq. Jur. § 440. And see, also, McDaniel v. Pattison, 98 Cal. 86, 32 Pac. 805, and Fealey v. Fealey, 104 Cal. 354, 38 Pac. 49.

The cases in which a court of equity is authorized to interfere and set aside a former judgment on the ground of fraud are those only where the fraud was extrinsic or collateral to the matter tried. U. S. v. Throckmorton, 98 U. S. 61; Estate of Griffith, 84 Cal. 107, 23 Pac. 528, and 24 Pac. 381; Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, and 27 Pac. 537. In the case last cited it is said: "That a former judgment or decree may be set aside and annulled for some frauds there can be no question; but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest."

Conceding, then, without deciding, that the rule as to extrinsic or collateral frauds applies to judgments or decrees of probate courts, the question is, are the allegations here sufficient to bring this case within the rule? It is claimed for appellant that the voluntary action of defendants in sending to Mrs. Kirshner "her son to assure her that $3,000 was coming to her, that this was all which she was entitled to, and defendants' payment of that money to her as her entire interest, in view of existing conditions, were an outside fraud collateral to and extrinsic of the procedure that culminated in the decree." Mrs. Kirshner must have known of the death of her brother, and that she was one of his heirs, and presumably must have known that he left a large estate. The law required that when a petition for the probate of a will is filed, and the will produced, the time for the hearing must be fixed, and notice of the hearing published in a newspaper for a certain length of time (Code Civ. Proc. § 1303), and that copies of the notice of the time appointed for the probate of the will must be sent by mail to the heirs of the testator residing in this state (Id. § 1304). It must be presumed, therefore, there being no allegation to the contrary, that a proper notice of the application to probate the will in controversy was published and sent out as required by law, and that Mrs. Kirshner received the notice sent to her; and, being thus notified, it became her duty, within a year at least after its probate, to make inquiry as to the validity and contents of the will. But counsel say: "She might have attended court,—been present all the time,—and seen nothing to cause suspicion." If that be so, it furnishes no excuse for her remaining quiet and making no inquiry as to any of the transactions for nearly four years. It will be observed that it is not alleged in the complaint that young Findley said anything to his mother about the will or its terms, or the probate thereof, or that he advised or even suggested that it was unnecessary for her to be present at the hearing, or to employ counsel to represent her thereat, or to make any inquiries about the will or the estate. He simply told her that her interest in the estate was only $3,000, and, the money being afterwards paid, she quietly rested on that assurance until after the time to institute a contest had elapsed. Id. § 1327. This did not, in our opinion, constitute such an extrinsic or collateral fraud as will enable the representative of her estate to now claim the relief asked for. The demurrer was properly sustained, and the judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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109 Cal. 63

McGAHEY v. FORREST et al. (No. 18,425.)

(Supreme Court of California. Sept. 6, 1895.)

MORTGAGE ON HOMESTEAD—FORECLOSURE AFTER DEATH OF MORTGAGOR—PRESENTATION OF CLAIM—WHEN NECESSARY.

Code Civ. Proc. § 1500, provides that mortgages may be foreclosed on the property of a decedent without previous presentation to the administrator for allowance, where all recourse against any other property is expressly waived, but no attorney's fee is recoverable. Section 1475, as amended in 1880, provides that where a homestead has been selected from community property and recorded prior to the death of the husband or wife, and, after his or her death, is returned in the inventory appraised at not exceeding $5,000, the superior court must set it off to the survivor, and that if there be liens or incumbrances on it the claims secured thereby must be presented and allowed as other claims. *Held* that, where a homestead is set off to the surviving husband or wife out of community property mortgaged by them, the mortgage may be foreclosed thereon without presenting it to the administrator for allowance, if plaintiff expressly waives all recourse against other property of the estate, and his claim to attorney's fees.

Commissioners' decision. Department 2. Appeal from superior court, Modoc county; C. L. Claflin, Judge.

Action by John McGahey against Nellie Forrest, administratrix of the estate of John M. Forrest, deceased, and others, to foreclose a mortgage. From a decree for plaintiff, defendants other than Nellie Forrest, Jr., appeal. Affirmed.

Goodwin & Stewart, and D. W. Jenks, for appellants. G. F. Harris, for respondent.

SEARLS, C. This is an appeal by the defendants Nellie Forrest (administratrix of the estate of John M. Forrest, deceased), Nellie Forrest, Sr. (widow), and Mary Forrest and John Shannahan Forrest (infant children of said deceased and of said Nellie Forrest, Sr.), from a judgment in favor of plaintiff foreclosing a certain mortgage executed by John M. Forrest, deceased, during his lifetime, upon two certain parcels of land situate at Alturas, county of Modoc, to secure the payment of a promissory note dated September 14, 1891, made by said Forrest, deceased, for $2,400, and interest at 1 per cent. per month, payable one year after date. The mortgage was duly recorded. After the death of John M. Forrest, and the appointment of his administratrix, one of the parcels of land covered by the mortgage, which was of the community property of deceased and his wife, Nellie Forrest, Sr., was set apart by the court as a homestead for the family of deceased. Subsequently the plaintiff presented the following creditor's claim to the administratrix:

"The undersigned, creditor of John M. Forrest, deceased, presents his claim against the estate of said deceased, with the necessary vouchers, for approval, as follows:

Estate of John M. Forrest, Deceased,

1893. To John McGahey, Dr.	
June 13th. To amount of promissory note executed by John M. Forrest, for the sum of $2,400, on the 14th day of September, 1891, with interest at 1 per cent. per month, payable annually, secured by mortgage of even date, as of record upon the record book of Mortgages, No. 6, pages 463–4–5, Modoc County Records,—copy of said note herewith attached.....	$2,400
Interest for one year to September 14th, 1892 (Indorsed)..............	288
Interest for one year to date, June 14th, 1893	216
Total	$2,904
1892. Cr.	
September 14th, by amount paid as interest due.......................	288
	$2,616"

Then follows a copy of the promissory note, and the usual affidavit, verifying the claim, which was duly allowed by the administratrix, approved by the judge in probate, and filed with the clerk, and by him duly registered. The complaint in foreclosure waives all recourse against other property of the estate than the mortgaged premises; waives counsel fees, etc. Copies of the mortgage and of the claim, as presented to the administratrix, were attached to the complaint, and made a part thereof.

A demurrer was interposed by defendants to the complaint upon the grounds: (1) That it does not state facts sufficient to constitute a cause of action. (2) That it is ambiguous, in this: It cannot be determined therefrom whether the mortgage described in the complaint was ever presented to the administratrix of the estate of John M. Forrest, deceased, as a claim against said estate. (3) That it is uncertain; and specifying the same reason as that given for its ambiguity. The demurrer was overruled, an answer filed, and the facts agreed to by the parties, as above stated.

The question presented here involves two propositions, viz.: (1) Was any presentation of the claim of the plaintiff necessary? (2) If so, was the description of the mortgage in the claim, as presented to the administratrix, sufficient?

The argument of appellant is that, as to so much of the mortgaged property as is covered by the homestead, the mortgage, as such, should have been presented to the administratrix, and the claim secured thereby allowed as other claims, and that this was not done for the reason that the claim, as presented and allowed, contained no sufficient description. Section 1493 of the Code of Civil Procedure requires "all claims arising upon contracts, whether the same be due or not due or contingent," to be presented to the executor or administrator for allowance, and if not presented within the time limited they are barred forever, etc. There is an exception to the general rule in the case of mortgages, which, under section 1500, Code Civ. Proc., may be foreclosed upon the property of the decedent without a previous presentation, where all recourse against any other property of the estate is expressly waived in the complaint, but in such cases no counsel fees shall be recovered. This right to maintain an action upon a claim secured by a mortgage upon the property of the decedent is, in turn, limited by section 1475 of the same Code, as amended in 1880, which section provides, in substance, that where a homestead has been selected and recorded, prior to the death of the decedent, and is returned in the inventory appraised at not exceeding $5,000, etc., the superior court must set it off to the persons in whom the title is vested by the preceding section; that is to say, in cases where it was selected from the community property, to the survivor. In such cases, if there be subsisting liens or incumbrances upon the homestead, the claims secured thereby must be presented and allowed as other claims against the estate, and are to be paid out of the funds of the estate, if sufficient, and can only be enforced against the homestead for the deficiency after exhausting the other funds of the estate. The necessity of presenting a claim secured by mortgage upon a homestead to the administrator was upheld in Bollinger v. Manning, 79 Cal. 7, 21 Pac. 375, and in Camp v. Grider, 62 Cal. 20. In the case last cited it was said that section 1475 creates an exception, in case of homesteads declared in the lifetime of the decedent, to the general rule in cases of mortgages and other liens provided for in section 1500, and that the reason of the rule is to preserve the homestead, if possible. In Perkins v. Onyett, 86 Cal. 348, 24 Pac. 1024, the necessity of presenting a claim to the administrator, where secured by a mortgage upon the homestead, was again upheld. There can be no question of the necessity of presenting for allowance a claim secured by mortgage upon a homestead, within the cases provided for in section 1475. But that section, in express terms, only applies to "the homestead selected and recorded prior to the death of the decedent." The homestead in this case did not exist at the time of the death of the deceased, but was set apart subsequently by the superior court in probate, and is what is known as a "probate homestead." Here, then, we have a general rule, provided by section 1500, that the holder of a mortgage or lien upon real property of a decedent may enforce such mortgage or lien without presentation, provided he is willing to waive any claim against decedent's estate over and beyond that upon the property to which the lien attaches. This rule under section 1475 does not apply to cases in which such mortgage or other lien exists upon a "homestead selected and recorded prior to the death of the decedent," but in such cases the claim must be presented to the administrator. To hold that the exception extends to probate homesteads is to enlarge its scope, and apply it to a class of cases not included by the language of the statute within its provisions, and to enlarge the exception beyond the expressed intention of the lawmakers. There appear some reasons for not so enlarging the statute, founded upon the fact that so to do would, in many cases, result in shrouding the rights of lien holders in uncertainty. A. holds a mortgage upon the property of a decedent. He is not required to present it to the administrator for allowance, as a predicate to his right to enforce his lien as against the specific property. If, when the time to present claims has run in part, a probate homestead is declared and set apart, he must present his claim, he will be deprived, pro tanto, of the time for presentation allowed to other creditors; and if the time for presentation of claims has expired, as it may well do, and a homestead is then set apart by the court, including the mortgaged property, one of two things must follow: Either his lien is cut off entirely, and his right to foreclose without presentation of his claim for allowance is extinguished, or it must be held that in such a case the exception mentioned in section 1475 has no application. "Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others. There is then a natural inference that its application is not intended to be general." Suth. Stat. Const. § 327. Section 1475 enumerates the things to be affected by its provisions, viz. homesteads "selected and recorded prior to the death of the decedent," and, by implication, excludes all others. It follows that homesteads set apart by the order of the superior court during the pendency of probate proceedings, and which had no existence prior to the death of the decedent, are not included in section 1475, but are left to the control of section 1500 of the same Code, and that a prior lien thereon may be enforced without the necessity of presenting the claim secured thereby to the executor or administrator, provided the holder is willing to expressly waive in his complaint, and does waive, all recourse against any other property of the estate.

This conclusion renders it unnecessary to discuss the sufficiency of the description of the plaintiff's mortgage in his claim, as presented to and allowed by the administratrix. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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109 Cal. 53

HENEY v. PESOLI et al. (S. F. 32.)

(Supreme Court of California. Sept. 6, 1895.)

QUIETING TITLE—PLAINTIFF'S TITLE—SEPARATE PROPERTY OF MARRIED WOMAN.

1. One has title to maintain an action to quiet title, though she has sold the land, and given a deed in escrow, to be delivered when the last payment of purchase money is made, and the purchaser has gone into possession, the last payment not having been made, and possession, by provision of Code Civ. Proc. § 738, not being necessary for maintenance of the action.

2. Under Civ. Code, § 162, providing that all property owned by the wife before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property; and section 164 (as amended by St. 1889, p. 328), providing that when property is conveyed to a married woman the presumption is that title is thereby vested in her as her separate property,—the presumption arising from a deed to a married woman, strengthened by the fact that the first payment was with her separate property, and that at the time of the purchase, when her husband was solvent, they both declared that she was buying it for herself, with her own money, and was going to pay for it, is not rebutted by the fact that the remaining payments thereon were made with money obtained by their joint note and secured by their joint mortgage on said land and other separate property of hers, he never having paid anything on the note, but it having been reduced by payments by her from her separate property, and the balance having been assumed by a purchaser of the property from her.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Anna A. Heney against Charles F. Pesoli and others. Judgment for plaintiff. Defendants appeal. Affirmed.

H. W. Bradley and Dorzel Stoney, for appellants. Ash & Mathews, for respondent.

SEARLS, C. This is an action to quiet the title of plaintiff to a city lot upon the easterly side of Gough street, city and county of San Francisco. Plaintiff had judgment quieting her title as prayed in her complaint, from which judgment defendant Charles E. Pesoli appeals. The appeal was taken within 60 days next after the rendition of judgment, and the record contains a bill of exceptions setting out evidence introduced at the trial. Anna Heney was at all the times herein mentioned up to November, 1894, a married woman, the wife of W. J. Heney, who departed this life in said month of November, 1894. Defendant Pesoli was a creditor of W. J. Heney, and on the 3d day of November, 1893, he brought suit in the superior court in and for the city and county of San Francisco against said W. J. Heney, to recover the sum of $1,000 and interest thereon, and at the same time caused a writ of attachment against the property of said W. J. Heney to issue, which writ was levied upon the lot of land in dispute in this action. Such proceedings were had in the action of Pesoli v. W. J. Heney that on the 23d day of May, 1894, the superior court aforesaid duly rendered and entered a judgment in said cause in favor of said Charles E. Pesoli and against said W. J. Heney for $1,090.78, together with costs, etc., which judgment, and the lien thereof, and the lien of said attachment as merged in the judgment, constitute, so far as appears, the only claim or interest of the defendant and appellant herein in and to the property in dispute. The theory of defendant was and is that the land in question was the community property of W. J. Heney and Anna, his wife, and that as such it was subject to the payment of the debts of W. J. Heney, the husband, and to the lien of defendant's judgment, which is still in full force and vigor. Plaintiff, on the other hand, claims that the property in question was purchased by her on the 28th day of May, 1889, and the title thereto taken in her own name, and as her separate property and estate, and paid for with her separate means. The court found that on the 3d day of November, 1893, and for a long time prior thereto, plaintiff was the owner of and in possession of the land and premises, and that at the time of the commencement of the action she was the owner and holder of the legal title thereto; that said land, premises, and the improvements thereon were purchased and acquired by plaintiff on May 28, 1889, in her own name, and as her separate property and estate, with her separate means; that it was and is her separate property and estate, and that her husband, W. J. Heney, never acquired or had any interest or estate therein, and that it was not the community property of plaintiff and her husband, was not purchased or acquired with community funds, and that her husband, W. J. Heney, never had any community interest therein, and that it was not subject or liable at any time to attachment or lien or judgment or execution as the property of W. J. Heney, and that the defendant has no lien thereon.

There was testimony tending to show that in May, 1889, the plaintiff, Anna J. Heney, purchased the property from one Lyman C. Park for $15,000, and paid $4,000 in cash from her separate funds, was to pay some $3,000 and interest at the end of one year, and assumed the payment of a mortgage thereon for $7,500, and received a deed from said Park to her and in her name under date of May 28, 1889, which was duly acknowledged and recorded May 28, 1890. Plaintiff went into possession of the property at the date of her purchase in 1889. There was evidence tending to show that on the 28th day of May, 1890, plaintiff and her husband mortgaged the property to the Vallejo Commercial Bank to secure the payment of their joint and several promissory note for $11,000 and interest. This last mortgage covered some two or three other lots of land in San Francisco owned by plaintiff, and standing in her name, and which she testified was her separate property. The existing mortgage upon the lot here in dispute seems to have been taken up when this $11,000 mortgage was given. The evidence tended to show that at the date of the purchase of the lot in dispute W. J. Heney declared it was as and for his wife's separate property that the purchase was made, and that her money was to pay for it. It was also shown that prior thereto, and at the date of such purchase, W. J. Heney was solvent. On the part of defendant there was evidence tending to show that on or about March 18, 1894, plaintiff and her husband entered into a written agreement with one William H. Jordan for the sale of the premises in dispute to the latter for $15,800, to be paid in installments, the purchaser to assume the mortgage to the Vallejo Bank, which had been reduced by plaintiff to $10,000. A deed of conveyance was executed by plaintiff and her husband, and deposited in escrow, to be delivered to Jordan when the last payment of purchase money was made. The purchase money had not all been paid at the date of the trial, and the deed had not been delivered. Jordan went into possession when the agreement was executed. The written agreement was objected to by plaintiff, and ruled out as evidence by the court, but its contents were substantially proven by parol without objection.

Defendant introduced his judgment roll in his action against W. J. Heney, showing his lien upon the property, provided said Heney had any interest therein subject to such lien. Counsel for appellant make three points upon which they urge a reversal of the judgment, viz.: (1) That plaintiff failed to show title in herself; (2) that plaintiff's title had passed to W. H. Jordan; (3) that the property was community property, having been purchased with community funds, and therefore W. J. Heney had a leviable interest in said premises.

The first and second points really involve the same proposition, and may be put in the form of an interrogatory, thus: Had plaintiff title to the land at the date of suit brought? We do not doubt but that in an action to quiet title the burden rests upon the plaintiff to show title in himself, and if he fails to make out a case he is not entitled to recover. Winter v. McMillan, 87 Cal. 256, 25 Pac. 407; San Francisco v. Ellis, 54 Cal. 72. Possession was also formerly necessary to enable a party to maintain an action to quiet title, but, under section 738 of the Code of Civil Procedure, is not now required. Plaintiff, according to the evidence, received a deed to the land in her own name from Park, dated in May, 1889, but which was probably not delivered until the date of her last payment, in May, 1890. This (waiving for the present the question as to whom the title inured) vested the legal title to the premises in her, and, as the agreement to convey to Jordan, and the execution and placing in escrow of a deed to him, to be delivered upon making payment of the purchase price, did not have the effect of vesting title in him until payment was made, and the deed delivered, it must be held that at the date of suit brought, and at the date of the trial, as payment in full had not yet been made, and no delivery of the deed had been had, the title remained in the plaintiff.

The more important question for consideration in the case is as to whether the premises, upon being conveyed to plaintiff, became and were the community property of said plaintiff and her husband, and hence subject to the lien of defendant's judgment. "All property of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues and profits thereof, is her separate property." Civ. Code, § 162. Section 163 contains a like provision in regard to the separate property of the husband. Section 164 was amended March 18, 1889, which amendment took effect May 19, 1889 (St. 1889, p. 328), and reads as follows: "All other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her as tenant in common, unless a different intention is expressed in the instrument, and the presumption in this section is conclusive in favor of a purchaser or incumbrancer in good faith and for a valuable consideration." Prior to this amendment, property conveyed to the wife during coverture was presumptively community property, yet the wife might show by extrinsic evidence either that it was paid for out of her separate property, or that it was intended as a deed of gift; and in either event it became her separate property. Higgins v. Higgins, 46 Cal. 259; Rico v. Brandenstein, 98 Cal. 469, 33 Pac. 480. So, too, it was held that a husband free from debt could purchase property with community funds, and direct a conveyance to his wife, with intent to make it her separate estate, and the deed would take effect as a gift; and, if the deed was one of bargain and sale, reciting a valuable consideration, it was competent to show by parol the real facts, in order to rebut the presumption that it was common property. Woods v. Whitney, 42 Cal. 358. Again, where property is acquired partly with separate funds and partly with community funds, it becomes in part community property, in proportion to the separate and community funds invested in it. In the case at bar the plaintiff purchased the property during coverture, and took a deed in her own name, reciting a valuable consideration. Such deed so taken was, under section 164 of the Civil Code, as amended in 1889, prima facie evidence that the premises so purchased became and are the separate property of the plaintiff. This presumption is strengthened by testimony showing that of the $15,000 purchase money plaintiff advanced and paid $4,000 from her separate estate or funds. To this extent, then, plaintiff, irrespective of the presumption arising from her deed, under the doctrine of Estate of Bauer (Cal.) 21 Pac. 759, became the owner of a separate estate in the property. There is also her own testimony and the declarations of her husband, made at the time of purchase, that his wife was purchasing it for herself, and was going to pay for it; that she was buying it with her own money; that she had been without a home a good while, and he was glad she had selected it, so that she could have it, etc. This was sufficient to show that it was the intent of the parties that plaintiff should take and hold the property as her separate property, and to authorize the court below in finding that it was her separate property, and that her husband, W. J. Heney, had no estate or interest therein, unless such conclusion is negatived by the fact that in 1890 the husband, W. J. Heney, joined with her in executing a promissory note for $11,000, and a mortgage upon the premises in question and other lots of land, the separate property of plaintiff, to secure the payment of such promissory note. Had W. J. Heney advanced any part of the purchase price of the property from community funds, it would have become pro tanto community property; but he did not do so. The purchase price was $15,000. Of this sum plaintiff paid $4,000, assumed a mortgage for $7,500, and was to pay the residue at the end of one year. Not having funds in hand, she borrowed $11,000, paid off the existing mortgage, made the final payment, and gave a new mortgage, in which her husband joined. She sold some separate property, and reduced the mortgage to $10,000, which has been assumed by Jordan in his contract to purchase the premises. Assuming, then, that the property was purchased by the plaintiff as and for her separate property, and that her husband paid no part of the purchase price, we do not find in the mere fact that her husband joined with her in a note and mortgage to secure a part of the purchase price, but paid nothing on account thereof, anything to rebut the deduction that it was and is the separate property of the plaintiff. In Flournoy v. Flournoy, 86 Cal. 286, 24 Pac. 1012, real estate had been conveyed to the wife as her separate property. She joined with her husband in a note and mortgage upon the land to raise money to pay off a prior mortgage thereon, and it was held that the money thus realized upon such joint mortgage was her separate property. Applying the doctrine of that case to the present one, and it follows that the money secured by the joint note and mortgage of plaintiff and her husband, and which went to pay for the land, was the separate property of the plaintiff, and inured to her sole benefit.

The case of Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719, which seems scarcely in line with Flournoy v. Flournoy, supra, was doubted, though not overruled in the latter case. We think Schuyler v. Broughton may be differentiated from the present case. There the land was conveyed to the wife in her own name, by a deed which upon its face showed a consideration paid by the wife, and did not show that the land was conveyed to her to hold as her separate property. She paid a portion, viz. $200 of the purchase price from her separate property. Thus far the case is parallel with the one at bar, but here the parallel ceases. In that case, so far as appears, there was no showing by extrinsic evidence that it was the intention of the spouses that the wife should purchase and take the title and enjoyment as her separate estate, and hence the court held that, as to the purchase money borrowed by the wife, but not secured by any lien or mortgage upon the property, the money so borrowed, and the estate so far as paid for therewith, became the community property of the spouses. In the present case, the extrinsic evidence tended to show the intent to purchase the property by plaintiff as her separate estate, which intent was acquiesced in by her husband. That being so, the money borrowed and secured by a mortgage upon her separate property became also her separate property, and when it went to pay the residue of the purchase price of the land the whole estate vested in the plaintiff as her separate property. It is rational to conclude that money borrowed upon the security of the separate real estate of one of the spouses will, in the absence of any showing to the contrary, be treated as the separate property of the party owning such real estate. A like rule is applicable to funds raised upon the security of community property.

The agreement of plaintiff to convey to Jordan was properly excluded as evidence. It provided for a deed from plaintiff to be executed and placed in escrow, to be delivered upon final payment of the purchase price. The only object of the evidence was to serve as a link in a chain showing that title had passed from plaintiff, and therefore that she could not maintain the action. But before the agreement was offered in evidence it had appeared, as it did again later, that the final payment had not yet been made, and that the deed still remained in escrow. This being so, the agreement became unimportant as evidence. The judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(109 Cal. 160)

BATES v. CORONADO BEACH CO. (No. 19,570.)

(Supreme Court of California. Sept. 23, 1895.)

CORPORATIONS—CONTRACTS—PARTNERSHIP AGREEMENT—ULTRA VIRES.

1. A finding that plaintiff and defendant entered into a contract to deal in lands, and divide the profits and losses, is not overcome by evidence that defendant's agents refused to have it reduced to writing till he obtained a certain release, it not being one of the terms of the contract that it should be reduced to writing, and plaintiff having paid to defendant his contribution to the venture, and transferred land to the person designated by defendant, and defendant having used the money to discharge obligations on the land, and afterwards disposed of the land.

2. It is not ultra vires for a corporation to enter into a contract with an individual to engage in a certain venture, profits and losses to be divided equally among them, where all the management of the enterprise is intrusted to the corporation.

3. The entering into a contract by a corporation, within the apparent scope of its business, is a determination on its part, conclusive against it, that the contract was "essential," within Civ. Code, § 354, empowering a corporation to enter into contracts essential to the transaction of its ordinary affairs.

4. Though plaintiff, in entering into a partnership agreement with defendant, violated his obligations to a third person, defendant cannot for this reason avoid liability for its share of the losses, the contract having been fully executed without objection of such third person.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Frank E. Bates against the Coronado Beach Company for an accounting on a partnership agreement. Judgment for plaintiff. Defendant appeals. Affirmed.

Gibson & Titus, for appellant. C. L. Barber and Conklin & Hughes, for respondent.

HARRISON, J. The facts upon which the plaintiff seeks to recover are stated in the opinion upon the former appeal herein. Bates v. Babcock, 95 Cal. 479, 30 Pac. 605. Upon a retrial of the cause after it had been remanded, a nonsuit was granted as to the defendant Babcock, and judgment was rendered in favor of the plaintiff and against the appellant. The court found that the plaintiff and the appellant entered into a contract February 23, 1888, by which it was agreed that they should purchase certain lands and other property from the Millers, sell the same, pay certain debts and incumbrances thereon, and divide the profits and losses arising therefrom equally between them. This was the main issue upon the trial in the superior court; and, as the evidence on behalf of the plaintiff was ample to sustain the finding, the conclusion of the court must be accepted as determinative of the issue. The conclusion of the court is not overcome by the evidence to the effect that Babcock, who acted in behalf of the appellant, refused to have the contract put in writing until the plaintiff should obtain a certain release from the Millers. It was not one of the terms of the contract between the plaintiff and the appellant that it should be reduced to writing and signed by them; but, after they had made the contract and agreed upon its terms, Slaughter, an attorney, who was present at the negotiation offered to put it in writing, but Babcock replied that he did not want a written contract at that time. Both of the parties to the agreement immediately entered upon its performance, and carried it out according to its terms. The plaintiff gave to the defendant the $15,000 which was his contribution to the venture, and transferred the title to the land then held by him to the person designated by the defendant; and the defendant disposed of the money in discharging obligations upon the land, and afterwards disposed of the land. Under these circumstances, it cannot be held that it was the intention of the parties that the agreement should not be operative until it had been reduced to writing, or that the omission to have it formally executed deprived the plaintiff of the rights acquired thereby.

The court was justified in finding that Babcock was authorized to make the contract on behalf of the appellant. It was alleged in the complaint, and not denied, that Babcock was the president and general manager of the appellant corporation; and it fully appeared from the evidence that he had assumed the management and control of the general business of the appellant with full knowledge and acquiescence of its officers, and that at a meeting of its stockholders, held subsequent to the making of this contract, all of his acts were ratified and confirmed by them. Irrespective of the estoppel upon the appellant arising from the advantage derived by it from the full performance of the contract on the part of the plaintiff, these facts make the acts of Babcock in entering into the contract binding upon the appellant. Crowley v. Mining Co., 55 Cal. 273; McKiernan v. Lenzen, 56 Cal. 61; Seeley v. Lumber Co., 59 Cal. 22.

It was not ultra vires for the appellant to enter into the agreement with the plaintiff. The power of a corporation to enter into a general partnership with an individual or with another corporation is not here involved. The ground upon which this power is sometimes denied is that a partnership implies the power of each partner, under his authority as a general agent for all the purposes of the partnership, to bind the others by his individual acts, whereas the statutes under which a corporation exists require its powers to be exercised by a board of directors, and preclude it from becoming bound by the act of the one who may be only its partner. There is, however, in the present case, no question of agency in the management of the affairs of the corporation. The plaintiff paid the money to the appellant, and transferred to its appointee the title to the land, so that the entire management of the business contemplated by the contract was intrusted to the corporation itself. There is no rule of law that will preclude a corporation from entering into a contract with an individual which will have the effect to carry out directly or indirectly the object of its incorporation, and to provide in that agreement that the gains or losses of the venture shall be borne equally by both parties. Section 354 of the Civil Code provides: "Every corporation, as such, has the power: * * * (8) To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation." Whether a contract is "essential" to the transaction of its ordinary affairs, or for the purposes of the corporation, is to be determined by the corporation or those to whom the management of its affairs is intrusted. If it is within the apparent scope of its organization, the fact that the contract has been entered into by it, or by its representative, is a determination on the part of the corporation that it is essential, and the corporation will not be permitted thereafter to question its effect. The appellant was incorporated for the purpose, among others, of selling or otherwise disposing of the lands upon Coronado Beach, in blocks or lots. It had conveyed the lots in question to the Millers, and held mortgages thereon to a large amount. The property was incumbered with other liens. There was a possibility that insolvency proceedings would be commenced, either by or against the Millers, by which the securities held by the appellant would be impaired. The real-estate market was inactive, and, as was soon ascertained, was in a falling condition. Creditors were pressing their claims against some of the property, and the appellant was anxious to have the property disposed of, in order that it might be freed from these obligations. Under these circumstances, it must be held that the contract was not only within the scope of its organization, and essential to the transaction of its ordinary affairs, but that it was a prudent step on the part of the appellant for preserving the value of the securities which it had taken upon its sale of the lands.

The relation existing between the plaintiff and the Millers at the time of entering into the agreement cannot be made by the appellant a ground for repudiating its contract with the plaintiff. If it be assumed that in making the contract with the appellant the plaintiff violated his obligation to the Millers, that was a matter for which he was liable to them alone, and from which he could be released by them. After the contract between the plaintiff and the appellant has been fully executed, without any objection on the part of the Millers, the appellant cannot allege the possibility of an objection on their part as a defense to its liability for its share of the losses, any more than it could have alleged such matter as a defense to the plaintiff's claim for his share of the profits, if there had been any profits realized from the venture.

Several rulings of the court during the progress of the trial are assigned as error, but none of them seem entitled to any extended consideration, nor could a different ruling upon the respective matters have changed the conclusion of the court. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

109 Cal. 125

GARBERINO v. ROBERTS. (No. 18,326.)

(Supreme Court of California. Sept. 12, 1895.)

CONTRACT TO CONVEY LAND—BREACH.

A conveyance of land to a third person by one bound by an executory contract to convey it to another at a future date is not a breach of such contract, and does not entitle such other to treat the contract as abandoned before the time of performance arrives.

Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by G. B. Garberino against James Roberts for breach of contract to convey land. From a judgment for defendant, plaintiff appeals. Affirmed.

W. D. Grady and James Gallagher, for appellant. Frank H. Short, for respondent.

VAN FLEET, J. A general demurrer was sustained to the complaint, and, plaintiff electing not to amend, judgment was entered dismissing his action, from which he appeals.

The action was to recover back the first installment paid under an executory contract for the sale of land, and damages for the breach of said contract by defendant. The material averments of the complaint are that plaintiff and defendant, on the 9th day of November, 1891, entered into a contract, whereby, in consideration of the payment by plaintiff of $200 down and $400 to be paid in one and two years thereafter, with interest, defendant sold and agreed to convey to plaintiff a certain lot in the town of Fresno. That at the time of the execution of the contract defendant was the owner of the title in fee of the lot to be conveyed, but thereafter, on the 25th day of January, 1892, and before the date at which said contract was to be performed, defendant, without the knowledge and against the will and consent of the plaintiff, conveyed the said lot by grant to a third party; and did thereby, as it is alleged, "place without and beyond his, the said defendant's, power the fulfillment and performance of the covenants, conditions, and agreements on his part to be observed and performed," by reason of which plaintiff "elects to rescind said agreement." The only question, of course, is whether the complaint states a cause of action, and this question depends upon the further one whether the facts plead show a breach of the alleged contract of sale by defendant. The sole ground relied upon as constituting such breach is the conveyance of the lot by the defendant to a third party pending his contract with the plaintiff to convey to the latter, the plaintiff's contention being that the defendant, by conveying away his title, put it absolutely without his power to fulfill his contract with plaintiff, and thereby gave plaintiff an immediate right of action for rescission. There is no question but that, where a party, having contracted to do a thing upon a given day, before the day of performance arrives repudiates his contract, or voluntarily puts it out of his power to perform, the other party to the contract may treat it as rescinded, and bring his action for the breach immediately and without awaiting the stipulated day. But the question here is whether the mere fact that defendant conveyed the lot under the circumstances alleged had the effect to put it without his power to perform at the future date agreed upon, since it is not alleged that defendant has repudiated his contract, or refused to carry it out, unless the fact of conveying the lot to another is the legal equivalent of such repudiation. In Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320,—a case of precisely the same character as the present,—it was held that the conveyance by the vendor of the land contracted for to a third party before the time for performance of the contract of sale is not a breach of that contract, and does not entitle the purchaser to treat the contract as abandoned or rescinded before the time of performance arrives. "One may sell land," say the court in that case, "which he does not own, and yet be able, when the time of performance arrives, to furnish a good title. In the meantime the purchaser would not be at liberty to disaffirm the contract on the ground that then the vendor was unable to make a good title. It would be incumbent upon him to offer to perform, or to show that at the time of performance the vendor could not furnish the title." And in Shively v. Water Co., 99 Cal. 259, 33 Pac. 848,—another action of like character and purpose,—it is said: "Rescission or abandonment of the contract by defendant gives plaintiff his cause of action, but a transfer of the land to third parties of itself does not constitute such abandonment or rescission. It does not necessarily follow from such transfer that defendant has placed it out of his power to comply with the terms of the contract. Such transfer creates no breach of the contract. Non constat but plaintiff's rights were expressly reserved by its terms. Defendant, as yet, has not defaulted, and might not suffer default when the balance of the purchase price was tendered and a deed demanded; and the plaintiff is not entitled to recover the money paid until he shows the default of the defendant. This question was directly presented in Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320, and it was there held that a conveyance by the vendor was not a breach of the contract, and a demurrer was sustained to the complaint for that reason. We are entirely satisfied with the principle laid down in that case."

The facts alleged in the case at bar make a case not distinguishable in principle from the foregoing. It is true that in this case the plaintiff alleges that the act of the defendant in conveying the lot put it absolutely out of his power to perform his contract, but that is a mere legal conclusion, drawn from the antecedent facts, and in no way strengthens or adds to the facts upon which it is predicated, and which we have seen do not warrant such conclusion. Nor does the fact that in both Joyce v. Shafer and in Shively v. Water Co., supra, the plaintiff himself was in default in his payment for the land essentially distinguish those cases from the one at bar as to the point here involved. Although the plaintiff here is not himself in default, he cannot recover unless he shows a state of facts putting the defendant in default; and this the facts alleged do not do. Plaintiff treated the defendant's conveyance as a rescission of the contract, and brought his action at once, without waiting for the day of performance provided, whereas, in order to put defendant in the wrong, it was incumbent upon him to await the time of performance provided in his contract, and thereupon make his tender of performance and demand his deed. We think the demurrer was properly sustained, and the judgment is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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5 Cal. Unrep. 150

WELLS v. SNOW et al. (No. 18,419.)

(Supreme Court of California. Sept. 20, 1895.)

NONSUIT—REVIEW OF EVIDENCE—NEW TRIAL.

1. Where there is evidence to sustain a material issue for plaintiff, a motion for a nonsuit is properly denied.

2. A finding of fact by the court will not be disturbed where there is a substantial conflict in the evidence.

3. Newly-discovered evidence, merely cumulative in character, is not ground for a new trial.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by B. C. Wells against W. N. Snow and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

G. C. Freeman and F. H. Short, for appellants. George B. Graham, for respondent.

SEARLS, C. This action is brought to recover $400, for so much money alleged to have been had and received by the defendants for the use of plaintiff. Plaintiff had judgment for $350, interest, and costs, from which judgment, and from an order denying their motion for a new trial, defendants appeal. On the 2d day of September, 1892, W. N. Snow and Mrs. W. N. Snow, his wife, as parties of the first part, entered into a written agreement with B. C. Wells, the plaintiff and respondent herein, by the terms of which, in consideration of $13,000, they agreed to sell to said Wells a certain tract of land and certain personal property thereon situate, in Fresno county, Cal., payments to be made by said Wells as follows: $400 down, the receipt of which is acknowledged; $4,000 on or before January 1, 1893,—possession to be given to Wells upon said payment of $4,000. The residue of the payments were to be made as follows: $2,600, January 1, 1894; $3,000, January 1, 1895, and $3,000 on January 1, 1896,—with interest on all deferred payments, except that of January 1, 1893, at 8 per cent. per annum. B. C. Wells failed to pay the sum of $4,000 on the 1st of January, 1893, and has never paid or offered to pay any portion of the purchase price of the land except said sum of $400 paid at the date of the contract.

This action is brought upon the theory that the contract was rescinded by agreement of the parties, and hence that the action will lie against defendants for money had and received by them for the use of plaintiff. The answer denied all the allegations of the complaint; set up the agreement to convey, the failure of plaintiff to make payment or to comply with the terms of the contract, and averred their willingness and readiness to comply with all the terms and conditions thereof; set up a counterclaim for $400 on account of goods, wares, and merchandise sold and delivered to plaintiff by the defendants; and, by way of cross complaint, set out the contract, averred the breach thereof by plaintiff, averred their readiness to comply, and averred damages in the sum of $2,000, etc. The cause was tried before the court, without the intervention of a jury. At the trial the only question of any importance litigated related to the issue of the rescission of the contract; and, upon the close of plaintiff's testimony, defendants moved for a judgment of nonsuit, which was denied, and the ruling is assigned as error.

There is no claim of the failure of title, of fraud or mistake, or any other cause entitling plaintiff without the concurrence of defendants to rescind the contract. That the plaintiff was unable to make and failed to make the payment of $4,000 due in January, 1893, is admitted by all the testimony, and that the defendants were in no wise in default is equally clear. The whole case, therefore, turns upon the question as to whether or not there was an agreement or consent on the part of the defendants that the contract should be rescinded. The finding of the court is "that on the 2d day of January, 1893, said plaintiff and said defendants did mutually agree to abandon and rescind said contract, and all of said parties have from hence hitherto treated said contract as abandoned and rescinded; but said $400, nor any part thereof, has ever been returned or repaid to plaintiff by said defendants or any other person." There was some evidence on the part of plaintiff going to sustain the issue as to rescission of the contract. The motion for a nonsuit was therefore properly denied.

The evidence, taken as a whole, upon the question of rescission, is not altogether satisfactory; but, as it involved a substantial conflict, we are not at liberty to interfere with the action of the court below by setting aside the finding.

The newly-discovered evidence, as disclosed by the affidavit of L. E. Walker, is contradicted by the affidavit of the plaintiff, and, if not so contradicted, is cumulative to the testimony adduced at the trial, and hence does not call for a reversal.

The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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109 Cal. 130

BREMNER v. LEAVITT et al. (No. 18,427.)

(Supreme Court of California. Sept. 17, 1895.)

ACCOUNTING BY PARTNERSHIP — PLEADING — DEMURRER.

1. A complaint in an action for a partnership accounting, alleging the nonpayment to the plaintiff of $1,000 which it was agreed the firm should pay him, profits made by defendants by devoting, in violation of their agreement, a large part of their time to other business, and the consequent loss to the firm, money and property advanced by plaintiff personally for use of the firm for which he has not been reimbursed, states a single cause of action.

2. Immaterial matter alleged in a pleading cannot be reached by demurrer.

Department 1. Appeal from Superior court, Lassen county; W. T. Masten, Judge.

Action by C. T. Bremner against B. H. Leavitt, William Bremner, and V. B. Woodson for an accounting and winding up of a copartnership. From a judgment for defendants, plaintiff appeals. Reversed.

Spencer & Raker, for appellant. F. C. Spencer, Goodwin & Goodwin, and Shinn & Shinn, for respondents.

VAN FLEET, J. Defendants Bremner and Woodson demurred to the complaint, and their demurrers were sustained. Plaintiff refused to amend, and a judgment of dismissal was entered against him, from which he appeals.

The demurrers were improperly sustained. The action is for an accounting and winding up of the affairs of a copartnership. The demurrers were upon several grounds, but the only ones that seemed to be insisted upon are that the complaint is uncertain; that several causes of action are improperly united; and that the complaint contains several causes of action, not separately stated; and it was upon the latter ground, as evidenced by the order of the court below, that the complaint was held bad. But the complaint is not amenable to either of the objections made. In our judgment, it states but one cause of action, and is free from uncertainty. It states various different matters and transactions between the several members of the partnership as to which an accounting is asked, but they are all matters relating to and growing out of the partnership relation of the parties, and, taken together, constitute but a single cause of action. While they are separate and independent matters in the sense that they are varied and different in character, they are not separate causes of action, but integral parts of one and the same cause. Respondents have very evidently fallen into confusion as to what constitutes a separate cause of action in such a case. It is alleged, for instance, among other matters for which an accounting is prayed, that at the time of the formation of the partnership it was agreed that the firm should pay to plaintiff the sum of $1,000, with interest, etc., which has not been paid; that the defendants Leavitt & Woodson have failed to devote their time and services to said partnership business as agreed, by reason of which the business of said partnership has suffered loss and damage, and that said defendants have devoted all their time and energies to other enterprises, in which they have made large profits, for which they should be required to account to said partnership; that plaintiff has personally paid debts of said partnership, for which he has not been reimbursed; and that he has furnished personal property to said partnership, for which he has not been paid. These matters, and others of a like nature, are regarded and characterized by respondents as "a complete jumble of causes of action." It is perfectly obvious that they do not constitute separate and distinct causes of action. They are proper matters to be alleged as grounds for an accounting between the partners, but they are all parts of the same general subject-matter, and constitute but one general cause of complaint. It was perfectly competent for the partnership to assume and promise to pay to plaintiff the indebtedness of a thousand dollars, alleged, and in that event it became an obligation of the partnership, for which plaintiff is entitled to an accounting. Herman v. Paris, 81 Cal. 626, 22 Pac. 971. The Code provides that a general partner, who agrees to give his personal attention to the business of the partnership, may not engage in a business which gives him an interest adverse to that of the partnership, or prevents him from giving to the business of the partnership the degree of attention which would be advantageous to it, and that a partner violating this obligation may be called upon to account to the partnership for the profits of such adverse business. Civ. Code, §§ 2435–2438. It was, therefore, proper for plaintiff to allege the violation by defendants of their obligations in this regard as one of the grounds of his action, and upon which he desired an accounting; and the fact that the breach of this obligation by the defendants resulted in damages to the plaintiff does not constitute it a separate cause of action at law for damages, as contended by respondents. Such damages are but an incident of the general cause of action assigned. Partners cannot sue one another at law for any breach of the duties or obligations arising from that relation. This can only be done in chancery by asking a dissolution and accounting, and, if damages accrue from any cause in such proceeding, they must be adjusted by some appropriate method in that tribunal. Stone v. Fouse, 3 Cal. 292. Equity does nothing by halves, but gives full relief in such cases. When it undertakes to adjust the differences between partners, it adjusts them all. "The whole subject-matter in controversy between the parties, which includes all the partnership transactions of each and all the partners, is the subject of the adjudication; and the account and decree must include all these matters, and leave nothing open for future litigation or controversy. Equity will not adjudicate causes piecemeal." Griggs v. Clark, 23 Cal. 427. The same general considerations apply to the other matters alleged. It is not only proper, but necessary, to set forth in such an action all the transactions of the firm and its members sought to be included in the accounting, however varied in their nature, and, taken as a whole, they go to make up and constitute the plaintiff's cause of action. It may be that some of the matters alleged are not relevant or material to the cause of action stated, and do not tend to constitute proper subject-matter for an accounting between the parties. Such matter, however, should be made the subject of a motion to strike out. It does not affect the sufficiency of the complaint, and cannot be reached by demurrer. If it exists, it will not impede the administration of proper relief, since it may be eliminated on the trial, as evidence will not be received upon immaterial matters. The judgment is reversed, and the cause remanded, with directions to the lower court to overrule the demurrers, and permit defendants to answer.

We concur: HARRISON, J.; GAROUTTE, J.

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5 Cal. Unrep. 155

SHARP v. FRANK. (No. 18,359.)

(Supreme Court of California. Sept. 21, 1895.)

FINDINGS BY COURT—INDEFINITENESS.

Where, in an action to quiet title, involving the question whether a conveyance to plaintiff was with intent to delay or defraud creditors (declared in such case by Civ. Code, § 3439, to be void), the jury returned answers to interrogatories, which the court adopted, subject to its findings of fact, such findings to govern in case of conflict with the answers, and the jury found that plaintiff's husband conveyed the property to her to prevent defendant from satisfying his claim against him, that plaintiff knew her husband was insolvent, and that he made the deed to plaintiff with intent to hinder and delay, but not to defraud, defendant; and the court found that the deed to plaintiff was not executed "with a view to conceal his property from defendant or his other creditors, nor improperly to hinder or delay them,"—the findings will be held too indefinite to support a judgment for plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; W. M. Conley, Judge.

Action by Francis W. Sharp against F. A. Frank. Judgment for plaintiff. Defendant appeals. Reversed.

Sayle & Coldwell, for appellant. F. H. Short and W. H. Larew, for respondent.

SEARLS, C. This is an action to quiet the title of plaintiff to an undivided third interest in and to lots 8, 9, and 10, in block 40, situate in the town of Madera, county of Madera, state of California. The cause was tried before a jury, and written answers returned to certain special issues and interrogatories propounded to them, which the court approved and adopted, and, in addition thereto, made and filed certain other findings of fact and its conclusions of law thereupon, upon which a decree was entered quieting the title of plaintiff, and decreeing the defendant to have no right, title, estate, or interest in or to the said lots of land and premises, or in or to any part thereof. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

The plaintiff, a married woman, claims title by deed executed to her by her husband, L. O. Sharp, on the 18th day of October, 1892. Defendant claims title as a judgment creditor of the said L. O. Sharp, and under an execution, levy, sale, certificate of sale, and sheriff's deed of said property, and asserts that the deed executed by L. O. Sharp to his wife, the plaintiff here, was and is void as to him, because the same was made with intent to hinder, delay, and defraud him of his claim as a creditor against L. O. Sharp. Some 40 interrogatories were propounded to the jury, to which answers were returned. The court, having considered the special verdict as rendered by the jury, entered an order that it "does hereby adopt the same, and approve the same, and the same are hereby made the findings of the court, subject only to the findings of fact and conclusions of law hereinafter set forth and specified; and wherein, if in any particular, said answers of said jury vary or differ from findings of the court, the findings of the court shall govern, and said answers are hereby modified to that extent, and to that extent only." The court then proceeded to make additional findings, some of which are in accord with those already found by the jury, others of which conflict to an uncertain extent with those of the jury, and still others are antagonistic to those of the jury. The result of all this constitutes a jumbled mass of uncertainties from which no intelligent legal conclusions can be drawn. To illustrate: The jury found, in substance, that L. O. Sharp conveyed the property to the plaintiff for the purpose of preventing the defendant from satisfying his claim against him; that plaintiff knew her husband was insolvent, and unable to pay his debts; that the deed from L. O. Sharp to the plaintiff was made with intent to hinder and delay, but not to defraud defendant. Upon this question the court found that the deed to plaintiff was not executed by L. O. Sharp "with a view to conceal his property from defendant or his other creditors, nor improperly to hinder or delay them." Every transfer of property "with intent to delay or defraud any creditor or other person of his demands is void against all creditors," etc. Civ. Code, § 3439. What the court below meant by the term "improperly to hinder or delay" is not clear. The findings, taken together, are as indefinite as those held insufficient in Warren v. Robinson, 71 Cal. 380, 12 Pac. 265; Ladd v. Tully, 51 Cal. 277; and Hardenberg v. Hardenberg, 54 Cal. 591. We have no means of determining what the court deemed an improper hindrance or delay of creditors, and hence cannot say how far it tended to modify the finding of the jury that the deed was executed to hinder and delay such creditors. The proper course would have been to set aside and annul such of the findings of the jury as failed to meet the approbation of the court, and then to find upon the issues thus left at large. The judgment and order appealed from should be reversed, and a new trial ordered.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

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5 Cal. Unrep. 153

McCARTY v. OWENS et al. (No. 18,451.)

(Supreme Court of California. Sept. 20, 1895.)

ASSIGNMENT OF CONTRACT — ACTION AGAINST ASSIGNEE.

In an action against the assignee of a paving contract for material furnished, it appeared that the assignment was absolute on its face; that, after the assignment, the assignees kept no account with the assignor; that they furnished all other materials not furnished by plaintiff, paid the bills, and received pay for the work, and stated in a verified complaint to collect an assessment for the work that they became and were, by assignment, contractors to perform the work. *Held*, that plaintiff could recover.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; J. K. Law, Judge.

Action by M. McCarty against F. J. Owens and his assignees for the purchase price of materials furnished. From a judgment for plaintiff, and an order denying them a new trial, defendant assignees appeal. Affirmed.

James A. Loutitt, for appellants. F. H. Gould and James H. & J. E. Budd, for respondent.

BELCHER, C. On September 12, 1892, the defendant F. J. Owens entered into a contract with the superintendent of streets of the city of Stockton to pave a portion of Channel street in that city with bitumen and basalt blocks. On September 22, 1892, Owens assigned his said contract to the defendants Girvin, Baldwin, and Eyre, and the assignment appeared on its face to be absolute. The work under the contract was performed, and Owens superintended it, but Girvin, Baldwin, and Eyre kept the books, furnished the materials, paid the bills, and received the moneys paid on account of the work. They also instituted suits against property owners to collect assessments alleged to be due them for work done under the contract. Plaintiff furnished basalt blocks, bitumen, curbing, tools, labor, etc., used in performing the contract, and in December, 1892, he commenced this action against Owens to recover the value of the same, alleged to be $1,371.63. In April, 1893, by leave of the court, he filed an amended complaint, making Girvin, Baldwin, and Eyre parties defendant, and alleging joint liability on the part of the defendants. The complaint contained eight separate causes of action, briefly stated as follows: (1) For basalt blocks sold to defendants, $365.04; (2) for money loaned to defendants, $118; (3) for money paid for use of defendants, $114.89; (4) for services rendered by plaintiff, $95; (5) for balance on assigned claim for services, $113; (6) for curbing and corners sold to defendants, $369.60; (7) for bitumen sold to defendants, $99.75; (8) for planking and use of tools furnished defendants, $96.35. Judgment was asked against the defendants for the aggregate sum of $1,371.63. Defendant Owens did not appear. The other defendants answered, denying their liability for each and all of the claims set up in the complaint. The case was tried before a jury, and a verdict was returned in favor of plaintiff for $400, on which judgment was entered. The defendants Girvin, Baldwin, and Eyre moved for a new trial, which was denied, and then appealed from the judgment and order.

Appellants contend that the verdict was not justified by the evidence, and hence their motion should have been granted. This contention is based upon the assumed fact that Owens assigned his contract to them merely as security for advances made and to be made by them to him, and that all materials, etc., furnished by plaintiff were furnished to Owens solely on his individual account and responsibility; and in support of their claim that, under such circumstances, they cannot be held liable, they cite the case of Stone v. Owens, 105 Cal. 292, 38 Pac. 726. In the case cited the assignments were expressly made as security for advances made and to be made by the assignee to the assignors, and the parol evidence was positive, without conflict, that the assignee had nothing to do with the work performed under the contracts;

that he neither directly nor indirectly employed or discharged any laborer, or paid for any part of such labor. He paid orders or checks drawn on him by the assignors, but charged the amount so paid to them. That case is not in point here unless the theory of appellants as to the character of the assignment to them is sustained by the evidence, and whether it is or not is the principal question to be considered. As before stated, the assignment to appellants was absolute in form, and it was proved that, after the assignment, they kept no account with Owens. The account appeared on their books as the "Channel Street Contract." They furnished all the materials except that furnished by the plaintiff, paid all the bills, and received all the monys paid on account of the work. And, in one of the suits instituted by them to collect an assessment for work done under the contract, they stated, in their verified complaint, "that on the 22d day of September, 1892, the said F. J. Owens, in writing and for value, transferred and assigned the aforesaid contract, and all his rights and claims thereunder, to these plaintiffs, who then became, hence hitherto have been, and now are, the assignees of said F. J. Owens, and contractors for the doing and performing of said work by assignment, as aforesaid." The facts proved, as above stated, were clearly sufficient to distinguish this case from that of Stone v. Owens, supra; and, while there was a conflict in the evidence, it was, in our opinion, quite sufficient to justify the jury in finding that appellants were liable to the plaintiff for at least as large a sum as that named in the verdict. The judgment should, therefore, not be reversed for want of evidence to support the verdict. Objection is made to some of the instructions given to the jury, but it is based upon the theory that appellants held the contract only as security, and therefore the instructions were misleading and erroneous. As we view the case, we see no error in the instructions complained of. They seem to have stated the law applicable to the questions before the jury very fully and fairly. The judgment and order should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(5 Cal. Unrep. 158)

PEOPLE v. SHORT. (No. 21,196.)

(Supreme Court of California. Sept. 23, 1895.)

CRIMINAL LAW—REVIEW.

Where no brief is filed, a conviction will be affirmed if it appears that the evidence sustains the verdict, and no exception was taken to any ruling of the court.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Orville B. Short was convicted of forgery, and appeals. Affirmed.

Geo. Hayford, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

BELCHER, C. The defendant was charged with the crime of forgery, and on his arraignment pleaded guilty as charged. That plea was subsequently withdrawn, and a plea of not guilty entered. The case was tried, and the only defense interposed was that of insanity. The verdict was: "We, the jury, find the defendant guilty as charged, and so say we all." A motion for new trial was made and denied, and thereupon judgment was entered that the defendant be punished by imprisonment in the state prison for the term of six years. From that judgment the defendant appeals, but no brief has been filed in his behalf or on behalf of the people. We have examined the record, and find in it no ground for a reversal. The evidence was amply sufficient to justify the verdict, and the instructions of the court to the jury were full and fair, and stated the law applicable to the case correctly. It does not appear that any exception was taken to any of the rulings of the court. The judgment should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(109 Cal. 156)

BROWN v. CLINE. (No. 19,571.)

(Supreme Court of California. Sept. 23, 1895.)

ATTACHMENT—JUSTIFICATION—NEW TRIAL.

1. To justify the taking, on an attachment against C., of property transferred by him to plaintiff, by transfer good except as against creditors of C., it must be shown that at the time of the attachment plaintiff in attachment was a creditor of C.; and the papers in the attachment suit are not enough to show this.

2. Defendant not having been granted a new trial on condition that he pay plaintiff's costs within five days, otherwise his motion to be denied, the court cannot, after expiration of such time, payment not having been made, make a final order granting his motion.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by J. Alexander Brown against J. C. Cline. Judgment for plaintiff, and new trial granted to defendant. Plaintiff appeals. Reversed.

C. W. Pendleton and Edison A. Meserve, for appellant. Walter F. Hass and A. C. Brodersen, for respondent.

BELCHER, C. This action was brought to recover the possession or value of certain personal property, with damages, alleged to have been owned by the plaintiff, and to have been wrongfully taken from his possession by the defendant in October, 1893. The answer denied that plaintiff was the owner or in possession of the property described in the complaint, or any part thereof, and alleged that the said property was owned by and in the possession of one W. H. Cooper. The answer further alleged that defendant was the sheriff of Los Angeles county, and that, as such sheriff, he took the said property into his possession as the property of said W. H. Cooper, on October 11, 1893, under a writ of attachment duly issued out of the superior court of Los Angeles county, and to him directed and delivered, in an action commenced in said court against said Cooper; and that he held the said property as such officer under said writ, and not otherwise, up to October 17, 1893, when the same was taken from him by the coroner of the county, in his official capacity, under and in pursuance of the demand of plaintiff, and upon the proceedings had; and that the said coroner and the plaintiff ever since the date last mentioned have been, and now are, in possession of all of said property. And the prayer was for judgment that the plaintiff be compelled to return the said property to defendant, or, if the same could not be returned, then for the value thereof and damages. The case was tried by the court without a jury, and the findings were that on the 11th day of October, 1893, plaintiff was the owner and in possession of the personal property described in the complaint, and that on that day defendant, without plaintiff's consent, and wrongfully, took said personal property from the possession of plaintiff; that defendant was the sheriff of Los Angeles county, and took the property under and by virtue of a writ of attachment, as stated in the answer; and that upon the commencement of this action, and upon proper proceedings had, the coroner of the county took said property from defendant, and held the same until the 20th of October, when he delivered the same to the plaintiff; and that by reason of the loss during such time of the use thereof plaintiff had been damaged in the sum of $125. Judgment was accordingly entered in favor of the plaintiff for the sum of $125 as damages, together with his costs, amounting to $85.55. The judgment was entered March 2, 1894, and on March 10th defendant filed his notice of intention to move for a new trial upon the grounds: First, that the evidence was insufficient to justify the decision of the court; second, that the decision was contrary to law; and, third, error in law occurring at the trial and excepted to by the defendant. The motion was made on a statement of the case, and on June 15, 1894, the court made the following order: "It is ordered that defendant's motion for new trial be, and the same hereby is, granted upon the payment by defendant to plaintiff or his attorneys of the costs taxed herein, to wit, $85.55, within five days after notice hereof. It is ordered that, if said condition be complied with, that thereupon the judgment entered herein shall be vacated, and said cause placed upon the calendar of this court for a new trial; and that, if said condition be not complied with within said five days, then, at the expiration of that time, said motion for a new trial shall be denied." On September 17, 1894, the defendant moved the court "for a final order granting his motion for a new trial," and the same was thereupon granted. From this last order the plaintiff appeals.

1. It was clearly proved at the trial that the plaintiff purchased the property in question of W. H. Cooper in good faith, and paid for it its full value; and the principal question was as to whether or not the transfer was accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, as required by section 3440 of the Civil Code. There was some little conflict in the evidence, but that introduced by the plaintiff was amply sufficient to sustain his theory as to the transaction and to establish his right to recover.

2. The transfer was unquestionably good as against all the world except creditors or a bona fide purchaser; and to justify the taking of the property by defendant it was necessary for him to prove that Maclay, the plaintiff in the attachment suit, was a creditor of Cooper at the time of the attachment. The rule is that, when property is found in the possession of a stranger to the suit, claiming title thereto, it is necessary to show a judgment or prove the debt for which judgment is demanded. And to accomplish that end the papers in the attachment suit are not sufficient. Sexey v. Adkinson, 34 Cal. 346; Banning v. Marleau, 101 Cal. 238, 35 Pac. 772. Here there was no sufficient evidence that Maclay was a creditor of Cooper, and, if a finding that he was such had been made, it would not have been justified by the evidence.

3. The rulings of the court specified in the statement as errors of law are not urged by respondent, and, in our opinion, they were proper, and furnish no ground of complaint.

4. The order of June 15, 1894, granting the defendant's motion for a new trial upon condition that he pay to the plaintiff or his attorneys within five days the sum of $85.55, taxed as costs in the action, was never complied with by defendant. The money was not paid to the plaintiff or to either of his attorneys within five days, or at all. It is claimed, however, that four days after the order was made one of defendant's attorneys paid the money to the county clerk for the use of the plaintiff, and that he was justified in so doing. But the affidavits read at the hearing of the motion for a "final order" on September 17th do not, in our opinion, show that the payment to the county clerk was authorized, or a compliance with the order of June 15th. The case must be treated, there-

fore, as if no payment or attempted payment had been made, and as if at the end of the five days the motion for new trial had been denied. Garoutte v. Haley (Cal.) 38 Pac. 194. This being so, the court had no power to make the order of September 17th. Bank v. Deuprey, 66 Cal. 168, 4 Pac. 1173; Dorland v. Cunningham, 66 Cal. 484, 6 Pac. 135; Greehn v. Marker, 67 Cal. 364, 7 Pac. 383. The order appealed from should be reversed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

109 Cal. 152

HOWLAND v. BOARD OF SUP'RS OF SAN JOAQUIN COUNTY. (No. 18,332.)

(Supreme Court of California. Sept. 23, 1895.)

ISSUE OF COUNTY BONDS — ELECTORS — PROVISION FOR INTEREST AND SINKING FUND.

1. Under Const. art. 11, § 18, providing that no county shall incur liability exceeding a certain amount without the assent of two-thirds of the electors thereof voting at an election to be held for that purpose, it is necessary only that two-thirds of those voting on the question vote to incur the liability, and not that two-thirds of all those voting at the general election, held at the same time, vote for it.

2. Const. art. 11, § 18, providing that a county shall not incur an indebtedness exceeding in any year the income and revenue provided for it for such year, unless before or at the time of incurring it provision be made for collection of an annual tax to pay the interest as it falls due, and to constitute a sinking fund to pay the principal within 20 years, does not require that, at the time of incurring the debt, the tax be levied, but only that it be provided for, and it is enough that the bonds be expressly issued under St. 1891, p. 295, providing for the interest and sinking fund.

Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Proceeding by C. F. Howland against the board of supervisors of San Joaquin county. Judgment for defendant. Petitioner appeals. Affirmed.

Nicol & Orr, for appellant. W. B. Nutter and Marion De Vries, Dist. Atty., for respondent.

GAROUTTE, J. This is an appeal from a judgment of the superior court of San Joaquin county against petitioner, in a proceeding to review the action of the board of supervisors of that county in the matter of contracting a bonded indebtedness of said county, and of issuing the bonds thereof for the purpose of creating a fund for the purchase of land and the erection thereon of suitable buildings and improvements for a county hospital, poorhouse, and farm. Petitioner claims that the board of supervisors exceeded its power, in directing the issuance of said bonds and in contracting said indebtedness, for two reasons:

1. It is insisted that two-thirds of the qualified electors of the county of San Joaquin, voting at the general election, November 8, 1892, did not vote in favor of the issuance of these bonds, and for that reason the proposition to issue was defeated. The returns of the general election show that 6,500 votes were cast thereat; that 3,880 electors voted in favor of the issuance of bonds, and 1,006 voted against their issuance; and it thus clearly appears that, if two-thirds of all the votes cast were necessary to legally justify the board of supervisors in the issuance of the bonds, then the proposition was defeated. But does the law so declare? The foundation of the entire proceeding may be found in article 11, § 18, of the constitution of this state, which provides: "No county * * * shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose." If there had been no general election held at the same time this bond election was held, there would be no question but that two-thirds of the qualified electors of the county voting assented thereto, and the fact that the county, by its board of supervisors, embraced the privilege extended to it by the legislature, by the act of 1891, and held the election upon the day and at the same place as the general election, we think wholly immaterial. The constitution provides that the voting upon the proposition must be done at an election held for that purpose, and, if there was not an election held upon this day for the purpose of allowing the qualified electors of San Joaquin county an opportunity to express their opinions upon this proposition, then it would be impossible to submit the question to the electors at a general election. This cannot be true, and it is quite evident that there was an election held for the purpose of submitting the proposition to the qualified electors of San Joaquin county. At that election 3,880 votes were cast in favor of the issuance of the bonds, and 1,006 votes against such issuance. It follows that two-thirds of the qualified electors of the county, voting at an election held for the purpose, assented to the incurring of the indebtedness and the issuance of the bonds, and that the constitutional provision in this regard is satisfied. If additional argument were necessary to sustain a construction already quite plain, it may be suggested that the election held upon this day, as far as the bond question is concerned, was a special election. The election was called by proclamation of the board of supervisors of San Joaquin county, for a single, definite purpose, and, ex necessitate, was a special election, and the votes cast for and against the issuance of bonds were all the votes cast at that election. As already suggested, the fact that the legislature granted the county the right to use the machinery of the state in conducting the election

if it so desired, and that it embraced the right granted, in no way changes the legal aspect of the case. There is no authority cited, and we know of none, opposed to this conclusion.

2. It is insisted that the entire proceeding is void, upon the ground that the board of supervisors, neither at the time of incurring said indebtedness, nor at any time prior thereto, made any provision for the collection of an annual tax sufficient to pay the interest on said indebtedness as it falls due, or to constitute a sinking fund for the payment of the principal within 20 years from the time when the indebtedness was contracted. The section of the constitution, a part of which we have already quoted in speaking as to this question of indebtedness, provides: "Nor unless before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void." This provision of the constitution does not require that, at the time of the sale or issuance of bonds or the incurring of the bonded indebtedness, a sinking fund or interest tax be levied. It only requires that before or at such time provision must be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal. These bonds were issued by express terms under the provisions of the act of the legislature found in St. 1891, p. 295. The notices so prescribed, and the bonds themselves upon their face so recite. That statute fully and completely provides for the payment of the interest upon these bonds, and also for the creation of a sinking fund to extinguish the original indebtedness. See Id., pp. 303, 304, subds. c–e. We conclude there is nothing in this point.

For the foregoing reasons the judgment is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

(109 Cal. 170)

MILLET v. BRADBURY et al. (No. 19,563.)

(Supreme Court of California. Sept. 25, 1895.)

MUTUAL ACCOUNT—LIMITATIONS.

Within Code Civ. Proc. § 344, declaring that in an action to recover a balance due on a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall accrue from the time of the last item, there is not a mutual account where defendant's testator owed plaintiff for services, and testator had intrusted to plaintiff money to be expended for testator at his direction, some of which was still in plaintiff's hands at testator's death, as plaintiff could not apply it on testator's debt to him, and plaintiff was not indebted on account thereof, but merely held it in trust.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Mrs. N. M. Millet against Simona M. Bradbury and others, executors of Lewis L. Bradbury, deceased. From a judgment for plaintiff for part only of her claim, she appeals. Affirmed.

Davis & Hill and Thos. R. Owen, for appellant. Bicknell & Trask, for respondents.

HARRISON, J. The plaintiff presented to the defendants, as the executors of the last will and testament of L. L. Bradbury, deceased, a claim in the following form: "To balance due this claimant upon an open, mutual, current, and unsettled account, and upon reciprocal demands existing between the decedent and this claimant up to the time of the death of said decedent, the same having arisen out of and being upon said account and reciprocal demands, and on this claimant's side particularly for and on account of work, labor, and personal services of a domestic, confidential, and fiduciary character, of the greatest difficulty, importance, and value to the decedent, his family, property, and estate, the last item of said open and mutual account, and of said reciprocal demands, having accrued and become due and payable on the 14th day of July, A. D. 1892; said balance being $36,000." Upon their refusal to allow her claim she brought this action to establish the same. The defendants, in their answer, denied the allegations of her complaint, and also pleaded the statute of limitations. Prior to the trial of the cause the plaintiff, upon the demand of the defendants, furnished them with a bill of particulars, or copy of the account sued upon, from which it appeared that her claim consisted of items for work, labor, and services rendered the deceased in each year from 1873 until his death, in July, 1892; that no compensation had been agreed upon between them for said services, but that the reasonable value thereof amounted to $47,000; that during that period the deceased had made various payments upon said claim, the last of which was made in the year 1887, and that the aggregate amount of the said payments was $10,900. In the copy of the account furnished the defendants by the plaintiff was the statement that during the time covered thereby "the decedent delivered to and intrusted with plaintiff various sums of money, to be by her expended for his use and benefit from time to time, and as directed by him, in connection therewith, at or after the intrusting thereof by him with her; all of which moneys were from time to time, prior to the death of said decedent, laid out and expended by plaintiff for his use and benefit, under his directions, save and except $130." At the trial the court, upon the objection of the defendants, excluded any evidence of services rendered by the plaintiff at any time prior to two years before the death of Bradbury. Judgment was rendered in favor of the plaintiff for $1,000, from which she has appealed.

The bill of particulars which was furnished to the defendants is to be regarded as an amplification of the complaint, and for the purpose of determining the plaintiff's right of recovery, or the admissibility of evidence that may be offered in support of her claim, is to be regarded as if it had been incorporated into the complaint as originally filed. It is claimed by the appellant that the account of the moneys that had been deposited with her by Bradbury to be disbursed by her according to his directions, of which there remained $130 in her hands at the time of his death, had the effect, by virtue of the provisions of section 344, Code Civ. Proc., to take her claim out of the statute of limitations. That section is as follows: "In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item approved in the account on either side." The reference in the section to "an action brought to recover a balance due upon a mutual, open and current account" contemplates that the transactions between the parties are susceptible of being reduced to a single account, in which all the items on one side may be grouped in opposition to those on the other side, and treated as payments or offsets, and a recovery had for the balance. "A balance due upon an account" implies an account between the two parties, in which the amount of the items upon one side of the account are deducted from the amount of the items upon the other side, and the balance thus ascertained. The term "account" involves the idea of debit and credit, and the balance of an account is the result of the debit and credit sides of the account which constitutes a debt or claim, for which the party in whose favor it exists has the right of recovery. "It has uniformly been held that distinct and different items of charge in an open and mutual account do not constitute separate claims, but that the claim or debt is found in the balance of the account, and that it is the balance only that constitutes the claim of the party to whom it is due." Hodge v. Manley, 25 Vt. 210. It is immaterial whether the account of these transactions is kept by one or by both of the parties, nor is the form in which the account is kept material. "The particular mode of keeping the account, whether on book or loose scraps of paper, or without any written charges, or whether it is all kept in one shape or in different forms, as in the present case, is unimportant. If all the items in the expectation of the parties have reference to and are to be adjusted in one accounting, it may be considered as one transaction, so far as the statute of limitations is concerned." Abbott v. Keith, 11 Vt. 525. It is, however, essential that the items upon the two sides of the account shall have resulted from mutual dealings between the parties, and constitute reciprocal demands between them. The "reciprocal demands" named in the section is only a synonym or equivalent of the "mutual account" named in the first part of the section. Green v. Disbrow, 79 N. Y. 1. "Mutual accounts are made up of matters of set-off. There must be a mutual credit, founded on a subsisting debt on the other side, or an implied agreement for a set-off of mutual debts." Norton v. Larco, 30 Cal. 130. The account is not mutual unless the parties have dealt with each other in the same relation, and unless the items upon the different sides of the account are capable of being set off against each other. The demands must be reciprocal; that is, they must be of such a character that each party has an immediate right of action against the other. "Where there are mutual accounts between two persons, it is always the understanding that the account upon one side shall offset that upon the other; and in law the debt due from one to the other is only the balance left after the application in reduction of the accounts on the opposite side. In any form of action the recovery can only be for the balance. The very theory upon which this statute is based is that the credits are mutual, and that the account is permitted to run with the view of ultimate adjustment by a settlement and payment of the balance; and this theory is recognized in the statute, as it mentions an action 'brought to recover a balance due' upon an account." Green v. Disbrow, supra. This limitation of the right of recovery to the balance of the account implies the right of the plaintiff to apply the items upon the defendant's side of the account in reduction or extinguishment of the amount upon his own side; and such application can be made only when the transactions between the parties have been had in the same capacity. If the accounts between them do not affect them in the same relation,—as, for example, if upon one side of the account the party is individually liable, while the transactions upon the other side of the account have been had in his representative capacity, as executor, guardian, or trustee,—the demands are not reciprocal. The theory upon which a "mutual account" is taken out of the statute is that the obligations on the one side are in law applied as payments or offsets to those on the other; but, if a transaction between the parties does not create a debt or claim which may be so applied, such transaction cannot be regarded as a payment or offset to a debt, or be the foundation of a mutual account or reciprocal demand. The right to demand an article of property that has been deposited with another, and the right to demand a debt due from the depositor, are not reciprocal. If the depositor has the right to demand the property itself, the other is merely a bailee or depositary, and the foundation of an account is wanting. There can be no debt unless the consideration for which the debt is claimed to exist has ceased to be the property of the claimant, and has become that of the other. Unless the one with whom property has been deposited has thereby become its proprietor, there is no debt for the property so deposited, whether the same be money or merchandise. One cannot be a creditor for money which is his own, and of which he still retains the right of disposal. By section 20 of the bankrupt act of the United States (14 Stat. 526), providing for proving claims in bankruptcy, it is declared that "in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid." In Libby v. Hopkins, 104 U. S. 303, Hopkins, at the time of going into bankruptcy, was indebted to the plaintiffs upon an open account for merchandise, and also upon a mortgage debt. He was also accustomed to deposit moneys with the plaintiffs, against which he would draw in favor of his creditors. Prior to going into bankruptcy, Hopkins had transmitted to the plaintiffs a certain sum of money, with directions to apply it upon his mortgage debt. But instead of doing so, they, without any authority from him, applied it to his credit upon their open merchandise account against him. In an action between the plaintiffs and the assignee of the bankrupt concerning their respective rights to the money thus remitted to the plaintiffs, and applied by them, the court held that the merchandise account of the plaintiffs against Hopkins, and the moneys remitted to them by Hopkins, were not mutual debts which could be set off against each other under the foregoing section of the bankrupt act; saying: "To authorize a set-off, there must be mutual credits or mutual debts. The remitting of certain money assets by Hopkins to the plaintiffs, to be applied by them according to his directions, did not make them his debtors, but his trustees; so that there were in the case no mutual credits or debts. The indebtedness was all on the side of Hopkins. The plaintiffs owed him nothing. They held his money in trust, to apply it as directed by him."

In view of these principles, it must be held that the respective claims of the plaintiff and Bradbury did not constitute a mutual account, and that the respective demands or claims of the one against the other were not reciprocal. Bradbury was her debtor for the services rendered by her, and was at all times liable to an action by her for the amount of her claim. On the other hand, she was at no time his debtor, or liable to an action by him for the money which he had deposited with her, until after a previous demand by him and refusal on her part. Schroeder v. Jahns, 27 Cal. 274. The money was deposited by him upon an express trust, and the terms of the trust constituted a contract between them, which measured the extent of their relative liability. Either party could have terminated the trust at any time; but, so long as the trust continued, Bradbury had exclusive power to direct the disposition of the money, and her power over the same was limited to following his directions. The rules applicable in the case of an involuntary trust, or where money has come into the hands of one who, by his own agreement, or by operation of law, has become liable to pay it to another, have no application here. In such a case an action may be brought without any previous demand. It is otherwise, however, where money is held under a trust created by an agreement between the parties. Bradbury could at any time have demanded that the plaintiff pay over to him the money in her hands, and her refusal to do so would have been a conversion, for which he could have sued her in tort, or he could have elected to treat her as liable in contract for the money. But this right of election was never available to her. She never had the right to apply the money deposited with her in payment of her claim against him (Civ. Code, § 2229), and, if she had done so, it would have constituted a tort or conversion by her, for which he would have had an immediate right of action; and in such action it would have been no defense that he was indebted to her for services. For the purpose of determining whether the account was mutual, it is immaterial that at the death of Bradbury she had in her hands any of this money that had been deposited by him. If the account was mutual, it was so by reason of its own nature, rather than by the fact of Bradbury's death. If the plaintiff had died, the money in her hands would not have constituted a part of her estate, and Bradbury could have recovered it in a direct action against her executor, without the necessity of presenting a claim against her estate. Lathrop v. Bampton, 31 Cal. 25. If Bradbury had died insolvent, the money in her hands would have formed a part of his estate, irrespective of her claim against the estate. The death of Bradbury did not give to the plaintiff any rights in regard to the money that she did not have prior thereto. As she did not in his lifetime have the right to apply the money in payment of her claim for services, she did not upon his death become entitled to make such application, and the demand against her which passed to his executors is the same in character as was held by Bradbury in his lifetime, and is not a demand reciprocal to that of the plaintiff.

The court did not err in refusing to allow the plaintiff to amend the bill of particulars. The amendment proposed was not in any material respect different from that which had already been given to the defendants, and the plaintiff's attorney stated at the time of making the motion that under the proposed amendment he expected to show that the money, when placed in her possession, was understood between Bradbury and her to be his money, and that it was to be expended for his use and benefit. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

109 Cal. 133

HOPKINS et al. v. WARNER et al. (No. 18,321.)

(Supreme Court of California. Sept. 17, 1895.)

ASSUMPTION OF MORTGAGE DEBT BY SUBSEQUENT GRANTEE—DEFICIENCY JUDGMENT—FINDINGS.

1. Under Civ. Code, § 2854, giving a creditor the right, on maturity of the debt, to the benefit of any security given to a surety of the debt, a deficiency judgment may be rendered against a mortgagor's grantee who agreed "to hold the grantor harmless" against the mortgage.

2. Where findings covering all the issues in a cause are made, an additional finding that all the allegations in the complaint are true and denials of the answer untrue, except as "herein otherwise found," is surplusage.

3. A judgment and findings may be incorporated in the same instrument.

Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by Sarah Hopkins and others against H. C. Warner and others, mortgagors, and J. T. Bonestell and others, their grantees, for foreclosure of the mortgage and a deficiency judgment. From a judgment for plaintiffs, the grantees appeal. Affirmed.

Fox, Kellogg & Gray, for appellants. Frank H. Shortt, for respondents.

HARRISON, J. The defendant Warner executed to the plaintiffs a mortgage upon certain lands in the county of Fresno, to secure his promissory note for the sum of $4,500, and subsequently conveyed the mortgaged lands to the appellants. In their complaint for the foreclosure of this mortgage the plaintiffs allege that the appellants, in consideration of the conveyance to them, assumed and agreed to pay the mortgage debt, and ask for judgment against them, as well as Warner, for any deficiency in the proceeds of sale. Judgment was rendered in their favor in accordance with the prayer of their complaint, and the grantees of Warner have appealed.

At the trial the following instrument, executed by the appellants to Warner, was introduced in evidence: "In consideration of the transfer this day made to us by H. C. Warner, of Fresno, California, of certain real estate, * * * we agree to hold the said Warner harmless as against any and all the mortgages existing upon the real estate this day transferred to us, which mortgages are four in number, one of $4,500 to the Hopkins; * * * and the mortgages are to be settled at such time and in such manner as the undersigned or their survivors or survivor may determine, provided that the said Warner shall at all times be held harmless as to the same." It was admitted that the mortgage under foreclosure is the one specified above in the instrument. The plaintiffs are not seeking by an action at law, or under the provisions of section 1559, Civ. Code, to recover judgment against the appellants upon the promise made by them to Warner; and the cases cited by the appellants to the effect that an action at law cannot be maintained by a third party upon a promise made by one person to another, from which such third person may derive a benefit, are inapplicable. The right of the plaintiffs to maintain this action against the appellants springs from the well-known rule in equity that a creditor is entitled to the benefit of any obligations or securities given by his debtor to one who has become a surety of such debtor for the payment of the debt. Sheld. Subr. § 85; Jones, Mortg. § 755; Pom. Eq. Jur. § 1206; Keller v. Ashford, 133 U. S. 622, 10 Sup. Ct. 494; Crowell v. Currier, 27 N. J. Eq. 154; Williams v. Naftzger, 103 Cal. 438, 37 Pac. 411. This rule in equity does not depend upon the character of the liability of the principal debtor to the creditor, or upon the existence of any relation between the creditor and the surety for the principal debtor, but is founded wholly upon the right of the creditor to avail himself of whatever rights the surety has as against the principal debtor. It has been formulated in section 2854 of the Civil Code, as follows: "A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction." It is under the application of this principle that in the foreclosure of a mortgage a judgment for a deficiency may be rendered against a grantee of the mortgagor who has assumed the payment of the mortgage debt. Williams v. Naftzger, supra. By the purchase of the mortgaged premises and the agreement on the part of the purchaser to discharge the mortgage debt, there results as between the mortgagor and his grantee a substitution of the liability to the mortgagee, by which the grantee becomes the principal debtor to the mortgagee, and the liability of the mortgagor is merely that of a surety for his grantee. This agreement of the grantee to discharge the mortgage debt is an obligation in the hands of the mortgagor, which the mortgagee may enforce for his own benefit when he seeks to obtain satisfaction of the mortgage debt, to the same extent that it could be enforced by the mortgagor. The mortgagee, in his action to foreclose the mortgage, may proceed against the mortgagor alone for any deficiency in the proceeds of sale, or he may avail himself of his right to proceed against the mortgagor and his grantee in the same action. If he proceeds against the mortgagor alone, and a judgment is docketed against him for any deficiency, the latter has a right of action over against his grantee upon his agreement to assume the mortgage debt. Under the rule for the foreclosure of mortgages in this state, there can be no personal liability upon the mortgage debt, except for a deficiency therein after the sale of the mortgaged premises, and prior to such sale the mortgagor will have no right of action upon this agreement of his grantee; but to avoid circuity of action, and to protect the mortgagor, as the intermediate party, from being compelled to pay the debt, and then to seek redress from his grantee who has assumed the mortgage debt, equity permits the mortgagee to bring all the parties who are liable for the debt, whether principally or ultimately, before the court, and have their rights adjusted in a single suit. In such an action the mortgagee represents the mortgagor for the purpose of enforcing this obligation of the purchaser to him, and his right to enforce this obligation has the same extent and is subject to the same limitations as would be that of the mortgagor in a separate action against his grantee. It is not necessary that there should be a formal promise on the part of the grantee to pay the mortgage debt, in order to render him liable therefor, if his intention to assume the debt appears from a consideration of the entire instrument. The obligation may be made orally or in a separate instrument. It may be implied from the transaction of the parties, or it may be shown by the circumstances under which the purchase was made, as well as by the language used in the agreement. Jones, Mortg. § 748; Canfield v. Shear, 49 Mich. 313, 13 N. W. 605; Heid v. Vreeland, 30 N. J. Eq. 591.

The terms used by the parties to the agreement in the present case indicate clearly an intention on the part of the appellants to assume the mortgage debt to the plaintiffs. The provision in the agreement that "the mortgages are to be settled at such time and in such manner" as the appellants might determine is to be read in connection with the subsequent proviso, and cannot be construed as giving to the appellants the right to determine the manner and select the time at which they will settle the plaintiffs' mortgage, irrespective of their agreement that "the said Warner shall at all times be held harmless as to the same." The word "settled," as used in this instrument, is equivalent to "paid" (Pinkerton v. Bailey, 8 Wend. 600; Stilwell v. Coope, 4 Denio, 225; Moore v. Hyman, 13 Ired. 272), and, while the appellants might not be required to pay the mortgage debt until it should be demanded by the plaintiffs, yet, by delaying to settle the debt until after the commencement of the action to foreclose the mortgage, they lost the right to select the time and manner of its settlement, which they had reserved in their agreement with Warner, and their liability to pay the debt became equal to that of Warner. The commencement of the action to foreclose the mortgage rendered their agreement to save him harmless a binding obligation, which the plaintiffs, as his representatives, and for their own benefit, are entitled to enforce. It must be borne in mind that, unless there shall be a deficiency in the proceeds of sale, there will be no liability on the part of Warner, and consequently none on the part of the appellants, and that this cannot be known until after a sale under the judgment. If there shall be a deficiency, it will then be docketed against the appellants as well as against Warner, and the appellants will not hold him harmless against it unless they can at that time be compelled to release him from its effect. The docketing of a judgment for this deficiency against them at that time is the protection which is given to Warner by the above rule in equity, and affords an opportunity to the appellants to discharge their obligation to Warner without increasing its burden upon them.

The appellants object to the sufficiency of the findings to support the judgment, upon the ground that, after making findings upon all the issues in the case, the court has also found "that each and all the allegations and averments in plaintiffs' complaint contained are true and correct, except as hereinbefore otherwise found, and that all the denials of the answer of the defendants who have appeared herein are untrue, except as hereinbefore otherwise found." The appellants have not, however, pointed out any issue upon which the court has failed to make a finding, nor do they contend that the findings do not cover all the issues in the case. This additional finding does not render the other findings defective, but is to be regarded merely as surplusage.

The judgment is not rendered ineffective by reason of being contained in the same document with the findings. There is no rule which requires the findings and the judgment to be incorporated in separate documents. The judgment and order are affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

109 Cal. 140

CAPITAL GAS CO. v. YOUNG, City Auditor.

(No. 18,380.)

(Supreme Court of California. Sept. 18, 1895.)

CONTRACTS OF CITY—GAS SUPPLY.

Gas companies, under Civ. Code, § 629, are required, under penalty, to furnish gas upon demand. The city charter of Sacramento (section 211) provides that no officer of the city shall be interested in the sale of any article to the city, and declares that such sales shall be void. *Held*, that a city whose mayor was president of the gas company was liable for the value of gas supplied under an implied contract.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Application for writ of mandamus by the Capital Gas Company against J. D. Young, auditor of the city of Sacramento. From a judgment awarding the writ, the respondent below appeals. Affirmed.

J. Frank Brown and Clinton L. White, for appellant. A. L. Hart, for respondent.

SEARLS, C. The Capital Gas Company, a corporation organized and existing under the laws of the state of California, is, and for more than 12 years last past has been, engaged in the business of furnishing gas to the residents of the city of Sacramento (a municipal corporation), and to consumers generally, for profit, and has had shares of stock issued to and held by divers persons; and C. H. Cummings is, and for more than one year last past has been, the duly-appointed and acting secretary of said corporation. The said corporation has during a period of more than 12 years last past been engaged in said business, under and pursuant to certain franchises duly granted to it by said city of Sacramento. On the 11th day of January, 1882, the board of trustees of said Capital Gas Company, by resolution regularly passed, fixed the price to be paid by consumers thereof at $3 for each 1,000 cubic feet. J. D. Young, the appellant herein, is, and for more than three years last past has been, the duly elected and qualified auditor of said city of Sacramento; and under the provisions of the charter thereof, duly adopted, it is the duty of said auditor to draw and sign all warrants upon the treasury for claims against said city which have been allowed by the board of trustees thereof. The fire department is, and for more than one year prior to 1894 was, one of the departments of the municipal government of the city of Sacramento. At all the times herein mentioned, B. U. Steinman was, and still is, the holder and owner of stock in said Capital Gas Company, and was, and still is, the president of said company, and since the first Monday in January, 1894, has been, and still is, the duly-elected and acting mayor of said city of Sacramento. Between the 1st day of February, 1894, and the 1st day of March, 1894, the fire department of the city of Sacramento used and consumed 8,600 cubic feet of gas, furnished and distributed by the Capital Gas Company, which gas, according to the rate fixed as aforesaid, was of the value of $25.80; and thereafter, and on the 1st of March, 1894, the said gas company presented its bill therefor in said amount, duly itemized and verified, to the board of trustees of said city, which bill was allowed by said board for said sum of $25.80, and presented to the auditor aforesaid, who rejected the same, and returned it to the board as provided by the charter. Thereafter the same bill was again allowed and approved by the board of trustees and by B. U. Steinman, the mayor, in due form, and was again presented to the auditor, who refused to audit the same or to draw his warrant therefor on the treasurer of said city in favor of the said gas company. Said sum of $25.80 is still due and owing from the said city to said gas company. The gas so furnished was not furnished under any express contract, nor was it furnished pursuant to any contract entered into before the election of said mayor, except that it was so furnished pursuant to the franchises of the said gas company and the law applicable to said gas company.

Section 211 of the charter of the city of Sacramento provides as follows: "No member of the board of trustees, and no officer of or employee of the city, shall be or become directly or indirectly interested in or with the performance of any contract, work or business, or in the sale of any article, the expense, price or consideration of which is payable from the city treasury, or in the purchase or lease of any real estate or property belonging to or taken by the city, or which shall be sold for taxes or assessments, or by virtue of legal process at the suit of the city. Any member of the board or any officer or employee of this city violating the provisions of this section, or who shall be directly or indirectly interested in any franchise, right or privilege granted by the city while he is such member, officer or employee, unless the same shall devolve upon him by law, shall forfeit his office, and be forever disqualified from holding any position in the service of the city; and all contracts made, or rights or franchises granted, in violation of this section shall be absolutely void."

Upon the facts as found by the court, of which the foregoing is a condensed statement, the court below adjudged that an alternative writ of mandate theretofore issued in the cause be made peremptory, requiring the appellant herein, as auditor, to issue his warrant upon the treasury of the city of Sacramento, and upon the proper fund therein, for the amount of the demand, viz. for $25.80. The defendant, auditor as aforesaid, appeals from the judgment, and the cause comes up on the judgment roll.

The officers of a municipal corporation, like those of private corporations, are agents of the corporate body. It is a cardinal doctrine of the law of agency that, "whenever an agent is invested with authority to use any discretion in the exercise of the powers conferred upon him, it is an implied condition that this discretion shall be used in good faith for the benefit of the principal, and in accordance with the true purpose of the agent's appointment. To this extent every agency which is not a purely ministerial one involves a fiduciary relation between the parties." Mor. Priv. Corp. § 516. It is in consonance with this principle that officers of a corporation may not, under any circumstances, use their official position for their own benefit, or for the benefit of any one except the corporation itself, and they may not represent the corporation in any contract or transaction in which they are personally interested in obtaining an advantage at the expense of the corporation. In such cases it is said the corporation would not have the benefit of their unbiased judgment, as self-interest would prompt them to prefer their own advantage to that of the company. San Diego v. San Diego & L. A. R. Co., 44 Cal. 106; Shakespear v. Smith, 77 Cal. 638, 20 Pac. 294; Finch v. Railway Co., 87 Cal. 597, 25 Pac. 765; Wickersham v. Crittenden, 93 Cal. 29, 28 Pac. 788; Capron v. Hitchcock, 98 Cal. 427, 33 Pac. 431; Dill. Mun. Corp. § 444. The rule embodied in the foregoing decisions, and which has the support of a host of others which might be mentioned, is not an arbitrary one. In other words, it is founded in reason, and is not to be indiscriminately applied irrespective of the circumstances of the case. Mor. Priv. Corp. § 521.

It would seem that the circumstances of the present case bring it within the exceptions for the following reasons: (1) The authority to transact the business of the municipal corporation of the city of Sacramento, to procure supplies therefor, and to audit and allow claims against the city, is vested in the board of trustees; and B. U. Steinman, as mayor of the city, has not, so far as appears from the record, any authority in the premises. (2) The gas furnished to the city was not supplied under or pursuant to any express contract with the respondent corporation, of which Steinman is president, and the right to recover the reasonable value thereof is based upon the implied promise which the law raises. (3) Under section 629 of the Civil Code, the respondent was bound, upon proper demand, to furnish gas to the city, and, upon refusal so to do, was liable to a penalty of $50 as liquidated damages, and $5 a day as liquidated damages for each day such refusal or neglect continues thereafter. Under the operation of this law, the gas company was not a free agent with power to contract or refuse to do so, but it became its duty upon demand to furnish gas to the city, irrespective of the status of its president. This duty to furnish gas to the city devolved upon the respondent, not by virtue of any contract, but by operation of law; and hence the laws governing ordinary contracts resting in the volition of the parties thereto has no application. Where the law affixes a penalty for the nonperformance of an act, its performance should not be adjudged illegal, or subject the party performing to the implication of having violated a duty. Had the city of Sacramento been in need of the land of its mayor pursuant to some public use, and had it, by proceedings for the condemnation thereof, under the law of eminent domain, succeeded to the title, the proceeding would have been so far an adversary one that there would have been no liability on the part of such mayor for a violation of section 211 of the city charter, hereinbefore quoted. The case at bar does not differ essentially in principle from the one supposed. Section 211 of the city charter, which inhibits its officers from being interested in any contracts or sales to the city involving the payment of money from its treasury, or from being interested in any franchise, right, or privilege granted by the city while they are in office, is, except as to the penalty imposed thereby, in substance a declaration of the common law as it previously existed, and is founded in wisdom and justice. It is intended as a shield to the city against the selfishness and greed of officials, but was not intended and may not be used as a medium by which the city can take the property of others without their consent, under the form of law, and then refuse to pay therefor its reasonable worth, because an officer of the city is interested in such property. We hold that section 211 of the city charter has no application to a case like the present, where the gas company is required by positive law to furnish gas to the city upon demand, and, having furnished the commodity, has presented its bill for the reasonable value thereof, although the mayor of the city owns stock in the gas company and is president thereof. The city, having received and used the gas pursuant to a right which it enjoyed independent of the volition of respondent, is, in equity and conscience, bound to pay the reasonable value thereof. The judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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109 Cal. 146

KELLER v. HEWITT et al. (No. 18,325.)

(Supreme Court of California. Sept. 19, 1895.)

TEACHERS' CERTIFICATES — MANDAMUS TO BOARD OF EDUCATION.

1. Pol. Code, § 1771, provides that the board of education shall prescribe rules for the examination of teachers, and examine applicants, and prescribe a standard of proficiency. *Held* that, after the board has determined that the applicant is in every way competent to teach, it has no right to refuse to issue a certificate.

2. By Pol. Code, § 1768, the county superintendent of schools is made a member of the board of education. *Held*, that it was not necessary to make said superintendent a separate party defendant to a petition for mandamus to compel the board to issue a teacher's certificate.

Department 1. Appeal from superior court, Sutter county; E. A. Davis, Judge.

Petition by Augustine Keller for writ of mandamus to compel A. H. Hewitt and others, constituting the board of education of Sutter county, to issue to him a teacher's certificate. A demurrer to the petition was sustained, and petitioner appeals. Reversed.

W. H. Carlin and M. E. Sanborn, for appellant. W. T. Phipps, for respondents.

VAN FLEET, J. Appellant made application to respondents, as the county board of education of Sutter county, for a grammar grade certificate as a teacher in the public schools of the county, and upon examination by said board for the purpose, in accordance with its rules, was awarded a percentage of proficiency upon all of the studies, subjects, and matters included in his examination above that required by law and the rules of the board to entitle him to a certificate of the grade applied for; and the board found and decided that petitioner was of good moral character, and in every way fit and competent to receive such certificate. But, notwithstanding this finding and that nothing further remained to be performed by appellant to entitle him thereto, the board arbitrarily and without cause refused to issue such certificate to appellant. After a formal demand for the issuance of the certificate, and its continued refusal, appellant applied to the superior court of the county for a writ of mandate against the board, requiring the issuance to him of such certificate, setting forth with great fullness and detail in his affidavit or petition the facts of which the foregoing is a brief summary. The superior court sustained a demurrer to the petition, and, upon a failure to amend, entered judgment against the petitioner, from which he appeals.

We think the ruling of the court below was clearly erroneous. The theory upon which that court proceeded in sustaining the demurrer, and that now contended for by respondent, is that the law vests in the board of education the absolute power and discretion to determine in any instance whether a certificate shall issue to an applicant, irrespective of the question of his fitness as shown by his examination, and that its determination in the premises is final, and not subject to review by the courts. This view of the law cannot in our judgment be sustained. It was never intended to vest in the board of education any such absolute power in the premises. The law gives the board large discretionary powers unquestionably, but there are limits beyond which their discretion does not go, and where rights arise which it is not within their discretion to refuse. They have power to prescribe and enforce rules for the examination of teachers, and to examine applicants, and prescribe a standard of proficiency which the person examined must reach to entitle him to a certificate (Pol. Code, § 1771); and, no doubt, in the exercise of these functions, the board is vested with such discretionary judgment that their action could not be reviewed, as, for instance, in determining the degree of proficiency and fitness shown by an applicant upon any matter involved in his examination, and perhaps in prescribing the standard of proficiency and subjects of examination. In such matters it may be safely assumed that their function being largely, if not wholly, discretionary, and involving an exercise of judgment, their determination would be held final. But, having established such rules and fixed such standard, and having examined an applicant under those rules, and determined that they have been complied with, and in all respects the prescribed standard of proficiency reached, it was not intended that they should, nevertheless, have the arbitrary power to say that in such a case a certificate shall not issue. When, under the law and their rules, the question of an applicant's fitness to receive a certificate has been determined in his favor, the limit of the board's discretionary functions in the premises has been reached, and a plain legal duty results. The applicant thereupon becomes entitled to a certificate, and the board rests under a corresponding obligation to grant it. It is such a case that is made by the petition. All of the prescribed requirements of the board have been met and compiled with by petitioner, and the possession of all the necessary qualifications determined in his favor. Taking the facts alleged to be true, as we must, the petition, in our judgment, clearly states a case for relief which can be reached by mandate. And this view in no sense trenches upon the general doctrine contended for by respondents, that mandamus will not lie to control or direct mere discretion or judgment. Respondents devote much space and cite many authorities in support of that rule. Its discussion was a work of supererogation. There is no question of its general correctness, although it has its limitations and exceptions (Wood v. Strother, 76 Cal. 545, 18 Pac. 766; Raisch v. Board of Ed., 81 Cal. 542, 22 Pac. 890); but it is wholly beside the question, since the act here sought to be compelled is not a discretionary act, but a purely ministerial duty, resulting from the antecedent acts of the board. It is a case not distinguishable from that which would arise should a superior court, which is given the power to examine and admit applicants to the bar, proceed to examine an applicant, and as a result determine and announce that it found the applicant possessed of the requisite age, character, and fitness under the law to entitle him to admission, yet should refuse without cause to admit him. Would it be contended for a moment that such refusal was within the discretion of the court, and that the admission of the applicant could not be enforced by mandate? We apprehend not, and yet that is exactly this case. The court in the case supposed would have exhausted its discretionary powers, and have reached a point where nothing remained but to grant the right to which the party had shown himself entitled. The principle involved is aptly illustrated by the case of Sansom v. Mercer, 68 Tex. 488, 5 S. W. 62. That was a case arising under a statute of Texas providing that the territorial limits of a city could be diminished by a vote of the people at an election to be called by the mayor, upon application made to him by petition, signed by a certain number of electors. Before making a call for such election, the mayor was required to determine two things: First, that there was an excess of territory over the limit prescribed by the act; and, second, that at least 50 electors had signed the petition. Application was made to the mayor under the act to call an election, which he refused, and mandamus was sought to compel him to make the call. It was urged that, his function involving the exercise of judgment upon his part in passing upon the matters submitted to him, he could not be required to act in a particular way. It is said by the court: "It is well settled that, if the duty an officer is called upon to perform requires the exercise of an act of judgment on his part, his decision is not subject to be reviewed by a proceeding for a writ of mandamus. Ewing v. Cohen, 63 Tex. 483; Bledsoe v. Railroad Co., 40 Tex. 554; Arberry v. Beavers, 6 Tex. 457; Commissioners v. Smith, 5 Tex. 471; Cullem v. Latimer, 4 Tex. 329. And it is apparent that, in a proceeding to procure an order for an election under the statute before cited, the mayor is required to determine two facts in order to justify him in making the order for the election: (1) That there is a surplus of territory over the limit prescribed by the statute; and (2) that at least 50 qualified voters of that territory have signed the petition. If there be any controversy as to the existence of these facts, his function is discretionary, and he cannot be compelled to order the election. But taking the facts of the petition to be true, as the demurrer admits, the surplus territory exists, and more than the requisite number of voters have signed the application. In such a case the discretion of the mayor ceases. The act to be done is purely ministerial. His duty becomes absolute, and he can be compelled to perform it. The fact that preliminary to his action he must know that there is an excess of territory beyond the statutory requirements, and that the requisite number of voters have signed the petition, does not invest him with the discretion to refuse to order the election when, as a matter of fact, there is no controversy as to the excess, or as to the number and qualifications of the signers." Many other cases support a like view, but we deem it unnecessary to multiply them. The case of Bailey v. Ewart, 52 Iowa, 111, 2 N. W. 1009, largely relied upon by respondents as supporting their view, we do not regard as in point or as in any way in conflict with the principles above announced. It is apparent from the reading of that case that the certificate was there refused because the applicant was not found qualified; and it was properly held, under the general rule above stated, that this question was a discretionary one, and could not be reviewed. A very different question would have been presented had the applicant been found competent, and the certificate then refused. Had the court reached the conclusion it did under such a state of facts, the case would have presented some analogy to the one before us. For these reasons the general demurrer should have been overruled.

Nor do we think there is anything in the special ground of demurrer that there is a defect of parties defendant, in that the county superintendent, in his official capacity as such, should have been made a party defendant. Under the statute, the county superintendent is made a member of the board of education (Pol. Code, § 1768); and it is only in the latter capacity that he has any function to perform in the premises counted upon. It was only by reason of his being a constituent part of the board, therefore, that it was necessary to make him a party at all, and, as such, he is made a defendant. It is true that the constitution commits to county superintendents and county boards of education control of the examination of teachers, and the granting of certificates within their respective jurisdictions; but it has left it to the legislature to provide the machinery for putting this power in motion, and prescribe the mode and manner of its exercise and the limitations of the power vested. This the legislature has done, and has seen fit to prescribe that the functions of the superintendent in this regard, except in certain respects not here involved, are to be performed as a member of the board of education. In his separate capacity of superintendent, therefore, the latter was neither a necessary nor a proper party to the proceeding.

It follows that the judgment should be reversed, and the cause remanded, with directions to the lower court to overrule the demurrer. It is so ordered.

We concur: GAROUTTE, J.; HARRISON, J.

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109 Cal. 178

CORBETT et al. v. CHAMBERS et al.

(No. 19,417.)

(Supreme Court of California. Sept. 25, 1895.)

MECHANIC'S LIEN CLAIM — SUFFICIENCY—FILING.

1. The provision in Code Civ. Proc. § 1187, requiring the claim filed by a mechanic's lien claimant to state "the name of the owner or reputed owner, if known," means the owner or reputed owner at time the claim is filed.

2. Objections to a mechanic's lien claim that the verification states that the facts stated therein are true, instead of that the claim is true, and that a certain person is the owner of the "premises" instead of the "building," are frivolous.

3. An objection that a mechanic's lien claim was not made or filed by the claimant should be overruled when it appears that the claimant signed the claim, and gave it to another to file, and it was indorsed by the recorder as filed by the claimant.

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by W. C. Corbett and others against W. D. Chambers and others for foreclosure of mechanic's lien. From a judgment for defendants, plaintiffs appeal. Reversed.

J. W. Goodwin and Henry J. Stevens, for appellants. Z. Montgomery & Son and F. W. Ewing, for respondents.

HARRISON, J. Action for the foreclosure of four mechanics' liens upon certain property in the county of San Diego. When the notices of lien were offered in evidence the defendants objected to their sufficiency, and they were excluded by the court, and judgment rendered in favor of the defendants. Plaintiffs have appealed.

The complaint alleges "that from about the 1st day of January, 1892, to about the 1st day of May, 1892, W. D. Chambers was the owner of the real property hereinafter described; that, as these plaintiffs are informed and believed, ever since about the 1st day of May, 1892, said property has stood in the name of F. W. Ewing, and that said F. W. Ewing has been the owner thereof." The notices of lien are substantially in the same form, and contain the following statements: "That F. W. Ewing is the name of the owner or reputed owner of said premises; that W. D. Chambers is the name of the person by whom this claimant was employed to work on said premises." One of the objections which the defendants made to the introduction of these notices, and the one which has been chiefly argued in their brief, is that the notices should state the name of the owner at the time the claimant made his contract with Chambers, and should also state that the person for whom the labor was performed had some contractual relation with the person named in the notice as the owner of the building, whereas the notices herein merely state the name of the owner at the time of filing the claim of lien, and do not purport to state the name of the owner at the time the contract was made, and that they fail to show any contractual or other relation between the owner and Chambers. The steps which are requisite to the enforcement of a mechanic's lien are entirely of statutory creation, and the same rule which makes it essential that all statutory requirements be complied with in order to perfect the lien renders it unnecessary to take any other step than is thus required. In order, therefore, to determine whether a notice of lien is sufficient, it is only necessary to compare its terms with the terms of the statute which provide for the notice. Section 1187, Code Civ. Proc., requires the claimant to file for record with the county recorder "a claim containing a statement of his demand, after deducting all just credits and off sets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials." The requirements that are made by the statutes in many other states differ from those required in this state, and, as it is only necessary to consider the requirements of the above section, it is unprofitable to consider what decisions may have been made under different statutes. In the absence of any qualifying term, a statute must be interpreted according to the natural import of its language. There is no limitation upon the term "owner," as used in the above section of the Code, nor does it refer to the owner with whom the contract for the improvement was made, or to the owner at any other time than at the date of filing the claim. To hold that the notice must state the name of the "owner" who originally entered into the contract under which the work was done would be to require something of the claimant which the statute has not required; and to hold that a statement of the name of the owner at the time of filing his claim is insufficient would be to deprive him of a lien when he has fully complied with the requirements of the statute. The object of requiring the claim to be filed in order to perfect the lien is to give notice of the lien to those interested in the property upon which it is claimed; and, as the owner at the time of filing the claim is the party to be affected thereby, rather than one who has parted with the property subsequent to the making of the original contract, it is reasonable to suppose that the legislature intended the name of the owner at the time the claim is filed, rather than that of any previous owner.

The present mechanic's lien law is an evolution from prior statutes upon the same subject, resulting from the desire of the legislature to adjust the respective rights of lien claimants with those of the owners of property improved by their labor and material. An examination of these statutes confirms the conclusion that the "owner" whose name is to be given in the claim of lien is the owner at the time of filing the claim. The act of 1850, § 2 (St. 1850, p. 212), required the claimant to give a notice in writing to the "owner" of the building on which his labor or materials had been expended. By the act of 1855, § 3 (St. 1855, p. 157), the claimant was required to file his claim in the recorder's office, and within five days thereafter serve a copy thereof on the owner of the building, or his agent in case the owner resided out of the county; and, if he had no agent, to post it on the building charged with the lien. In 1858 (St. 1858, p. 225) this act was amended by authorizing the copy of the notice to be left at the residence of the owner, or deposited in the post office, directed to him, instead of being posted upon the building. In the act of 1862, § 5 (St. 1862, p. 385), the claimant was required to give a notice of the nature and extent of his claim to the "employer" of the original contractor. The statute was again revised in 1868, and the act of that year (St. 1868, p. 589) contains substantially the present provisions of the Code on this subject. Instead of requiring the notice to be given to the "employer" of the original contractor, as was required by the act of 1862, this act brings the "owner" into connection with the claimant, as did the statutes prior to 1862, and, instead of requiring that the notice of claim be personally served upon him, authorizes it to be filed for record with the county recorder. By the act of 1862 the notice was to be given to the "employer" of the orginal contractor, irrespective of any interest he might then have in the property; and the restoration of the term "owner" in 1868 indicates that the legislature deemed that notice to the employer might not be sufficient if such employer was not also the owner. As the main object of giving personal notice of the claim to the owner of the building is to affect him with notice of the lien, and afford him an opportunity of protecting himself against the same in his dealings with the original contractor, it must be assumed that when the legislature substituted the recording of the claim, with the name of the owner therein, for the personal notice previously required to be given to him, it intended the owner of the property who would be affected by the lien, rather than a prior owner, who had authorized the improvement, and who, by an intervening sale, had ceased to have any interest in the property, or in any lien thereon. Another object of having the notice made a matter of public record is for the protection of those who may deal with the owner of the property. By Pol. Code, § 4236 (16), the county recorder is required to keep "an index of notices of mechanics' liens, labelled 'Mechanics' Liens,' each page divided into three columns, headed, respectively, 'Parties Claiming Liens,' 'Against Whom Claimed,' 'Notices When and Where Recorded.'" The same provision is found in section 125 of the several county government acts that have been passed. It is by this index that a subsequent dealer with the property is to be guided in ascertaining whether there are any incumbrances upon the owner's title, and it is apparent that this index would afford no notice to subsequent purchasers or incumbrancers if the owner whose name is to be stated in the claim is one who at some previous time had been the owner, but who had, long prior to filing the claim, parted with all interest in the property. As the claim of lien which is to be filed with the county recorder is not the enforcement of the lien, or any step for its enforcement, but merely one of the acts to be performed in perfecting the lien, it is apparent that it is not essential that this notice shall contain a statement of all the facts essential to establishing the lien, or anything more than is required by the statute. The office of filing the statement is to give notice of the claim, and not to serve as evidence of the lien. The statute does not require the claimant to state in his notice that the person to whom he furnished the materials, or for whom he performed labor upon the building, had any contract with the owner, or with the person whose name is given as the owner. The only notice that the claimant is required to give is the name of the person with whom he dealt or contracted. He may not know the name of the owner, and if he is ignorant of his name he is not required to state it. Lumber Co. v. Newkirk, 80 Cal. 275, 22 Pac. 231. The person with whom he dealt may be unknown to the owner. He may be a subcontractor with whom the owner had no contractual relation, and the statute provides that the laborer may have a lien, irrespective of the existence of a contract on the part of the owner. In the action to enforce the lien, however, the claimant must state in his complaint all the facts essential to a recovery, and show that the person with whom he dealt had authority from the owner, either express or implied, to create a lien upon his property. If the owner who contracted for the improvement has in the meantime parted with all interest in the property, whether before or after filing the notice, the claimant cannot enforce his lien in an action against him alone, but must make as a defendant the owner at the time of bringing the suit. The statute is a remedial statute, adopted in obedience to the requirements of the constitution (article 20, § 15), and is to be liberally construed in furtherance of the purposes for which it was authorized. The persons for whose benefit the statute is enacted are not presumed to be versed in the niceties of pleading, and the notices which, under its provisions, they are authorized to give, have regard to substance rather than form. The terms of the section clearly indicate that it was not the intention of the legislature that in the claim of lien which he files for record the claimant shall state the name of the real owner, at the risk of losing his lien if it shall turn out that he was in error. The provision therein that the claimant shall give the "name of the owner, or reputed owner, if known," implies that, if he does not know the name of the owner, he may state this fact, and perfect his lien without naming an owner (Lumber Co. v. Newkirk, supra); and also that, if in good faith he gives the name of a reputed owner, he shall not lose his lien if he shall afterwards ascertain that some other person was the owner. See Leiegne v. Schwarzler, 67 How. Prac. 130. Under this view of the object of the section, it must be held that the claimant does not fail in perfecting his lien if, as in the present case, he states the name of the owner, or reputed owner, in the alternative. As he is not required to ascertain at his peril the name of the true owner, and as it is sufficient if he gives the name of the reputed owner, the sufficiency of the notice is not impaired by the same person being designated as owner or reputed owner. In either case it is only the opinion of the claimant upon matters that are not presumptively within his knowledge, but which he has formed from external information; and in that respect the notice which he is to file differs from a pleading in which a fact essential to a recovery must be definitely averred. The object of this statement in his claim is, as we have seen, to designate the person against whom he seeks to establish the lien, as well as to protect others in their dealings with the property. The purpose of this investigation is to point out the individual who is to be affected thereby, rather than the attribute of ownership; and, if the individual against whose property the lien is claimed is specified, he receives all the notice which is intended by the statute, irrespective of whether he is designated as owner or reputed owner. See Reed v. Norton, 90 Cal. 596, 26 Pac. 767, and 27 Pac. 426.

Many other objections were made by the respondents to the introduction of the notice, but they have not been presented in their brief. The court sustained the objections as a whole, without specifying those which it deemed valid. We have, however, examined the record with reference to all of the objections, but do not deem that any of them require further consideration. The objection that in the verification of one of the claims it is stated "that the facts stated therein are true," instead of stating that the claim is true, as well as the objection to another of the notices that it stated that Ewing was the owner of the "premises," instead of stating that he was the owner of the "building," are frivolous. The only objection to the claim of the plaintiff Wellington was that it had not been filed in the recorder's office, or made by the claimant. Wellington, however, testified that he had signed the claim, and given it to Lee to be recorded; and upon this testimony, in connection with the indorsement upon the claim, the objection should have been overruled. The judgment is reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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109 Cal. 221

BALFOUR v. FRESNO CANAL & IRRIGATION CO. (No. 18,437.)

(Supreme Court of California. Sept. 27, 1895.)

IRRIGATION — CONTRACTS — CONSTRUCTION—PAROL EVIDENCE.

A contract providing that for $1,000 down and a yearly rental defendant should furnish plaintiff from "defendant's main canal, or from a branch thereof," a certain amount of water for irrigation, defendant to "place a suitable box or gate in the bank of said main canal, or a branch thereof, at the most convenient point for the conveyance of the water to said land," as soon as plaintiff should commence construction of a ditch, which it was provided he should build "from said box or gate to said land, at his own risk, cost, and expense," for the purpose of taking the water on his land, plaintiff to pay annually to defendant $100, "the first payment to be made the first Monday in September, after the water has been brought upon the said land," is so ambiguous as to whether the yearly payment was to commence the September after plaintiff took the water upon the land through the ditch to be constructed by him, or the September after defendant had brought the water to the land ready for plaintiff, that parol evidence of the surrounding circumstances and the intent of the parties is admissible to aid in the construction.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Robert Balfour against the Fresno Canal & Irrigation Company. Judgment for defendant. Plaintiff appeals. Reversed.

L. L. Cory, for appellant. Geo. E. Church, for respondent.

VAN FLEET, J. The parties hereto, in November, 1889, entered into four several contracts, whereby defendant sold and conveyed to plaintiff certain water rights or privileges for the irrigation of a section of land in Fresno county. The contracts were identical in terms, except that each referred to a different quarter section. So far as necessary to be stated, the stipulations were that the defendant, for the consideration of $1,000 paid down and a yearly rental hereinafter mentioned, agreed to furnish to plaintiff from "defendant's main canal, or from a branch thereof," the quantity of water contracted for; that the defendant should "place a suitable box or gate in the bank of said main canal, or a branch thereof, at the most convenient point for the conveyance of the water to said land," as soon as the plaintiff should commence the construction of a ditch, which it was provided he should build "from said box or gate to said land, at his own risk, cost, and expense," for the purpose of taking said water upon his land. It is then provided that plaintiff and his successors, etc., will pay annually to the defendant for a designated period the sum of $100, "the first payment to be made the first Monday in September, after the water has been brought upon the said land." And it is provided that, in case of default in such payment in any year for a space of 30 days after it becomes due, the agreement shall become void at the option of the canal company. Under these contracts defendant, prior to September, 1891, carried its canal to a point accessible to plaintiff's land, and in fact partly upon the line of said land, but plaintiff has not constructed, or commenced to construct, any ditch to take the water from said canal upon his land, nor has he ever otherwise taken or used said water. In due time after the completion of its canal, as aforesaid, the defendant made demand upon the plaintiff for the payment of rent under each of said contracts for the year 1891, which plaintiff refused; and plaintiff likewise refused a demand for said rent claimed by defendant for the year 1892. Instead, plaintiff brought this action to have it decreed that there is nothing due from him to the defendant under said contracts, and to enjoin defendant from attempting to terminate or annul plaintiff's rights thereunder. Defendant filed a cross complaint, alleging its full compliance with the terms of the contracts, and that the two annual payments of rent for the years 1891 and 1892 were due and unpaid, and asked a decree enforcing the payment of the same. The court found that defendant had fully performed the contracts on its part, and rendered a decree in favor of defendant for the amount claimed, and from said decree, and an order denying a new trial, plaintiff appeals.

The whole controversy turns upon the question as to when, under the contracts, plaintiff's obligation to make the annual payments of rent provided for commences, and the solution of this question depends upon the construction to be given that particular clause which provides that the first annual payment is to be made "the first Monday in September, after the water has been brought upon said land." Plaintiff contends that this language, while somewhat ambiguous and uncertain, was used and intended to refer to the taking of the water upon the land from defendant's canal, by the plaintiff, through the medium of the ditch to be constructed by him, and that no annual payment is to become due until such actual taking by plaintiff; while defendant's contention is that the clause plainly has reference to the bringing of the water to the land by the water company, and is in no degree ambiguous; and that, when defendant completed the construction of its canal, and carried the water to said land at an accessible point, from whence it could be conducted upon the land by means of the ditch to be constructed by the plaintiff, the condition upon which depended defendant's right to the annual rent was fully complied with, and that defendant is entitled to said rent, regardless of whether plaintiff was then ready to take or use the water upon his land. In support of the construction contended for by him, plaintiff introduced evidence at the trial tending to show that during the negotiations between the plaintiff and the officers of the defendant, which ended in the execution of the contracts, plaintiff for some time refused to take the said water rights, because he was making no use of the land which required water, and he did not desire to enter into the contracts, and be compelled to pay rent for water that he then had no use for, and so stated to defendant; that the latter was anxious to have plaintiff purchase said water rights, and he was assured by the president of defendant, with whom the negotiation was had, that, if plaintiff would take the contracts, and pay a thousand dollars each, which price was somewhat higher than that for which similar rights had been sold to others, he should not be required to pay rent until such time as he should take the water upon his land for use; that it was with this understanding that plaintiff entered into said contracts, and that this was what the parties intended to express by the language used. The evidence further tended to show that the language above quoted was inserted in writing in a blank left in the printed form of contract used by the water company, and that the clause as there inserted differed from that found in the other water-right contracts made by the company; the provision usually inserted being that the rent should be paid after the 1st of September of a certain year, without reference to when the water was brought on the land; while some of them provided that rent should be paid after the water was brought to the land; but that the contracts sued upon were the only ones providing that the rent should not be paid until the water was brought upon the land. This evidence was admitted by the court against defendant's objection that it was incompetent, as tending to vary the terms of the writing, and because all prior negotiations were deemed merged in the written contract, and could not be shown by parol. The court subsequently adopted this view, and struck the evidence out, and it is upon this ruling that the question involved arises.

If the language of the contract is, as defendant contends, plain and unambiguous, and susceptible of but one construction, then the objection was good, and the evidence properly excluded. If, however, the language employed be fairly susceptible of either one of the two interpretations contended for, without doing violence to its usual and ordinary import, or some established rule of construction, then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining. This is not allowing parol evidence for the purpose of varying or altering the contract, or of putting a different sense and construction upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intention of the parties. "The true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps a corollary, to the general rule above stated, that when any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself." Sandford v. Railroad Co., 37 N. J. Law, 1, 3. For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown. Code Civ. Proc. §§ 1860, 1861; City of Atlanta v. Schmeltzer (Ga.) 10 S. E. 543, 545; Keller v. Webb, 125 Mass. 88; Long v. Long, 44 Mo. App. 141; Swett v. Shumway, 102 Mass. 365. In our judgment, the contracts in question are so far ambiguous, in the particular under consideration, as to fall within the principles here announced, and that the excluded evidence was of a character admissible to explain and fix the intention of the parties in the employment of the language used. It may be that, standing alone, the contracts would receive the construction urged by defendant. Irrigation Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275. The language is, perhaps, not so essentially different from that under consideration in the case just cited as, in the absence of any extrinsic facts tending to show a contrary intention, to call for a different construction. But at the same time it is likewise, we think, perfectly susceptible of the construction contended for by plaintiff, if such was the meaning intended by the parties, and that without doing violence to the ordinary sense or meaning of the language employed, or importing any new term into the contract. Nor does such construction make the contract appear so unreasonable or improbable as to preclude it. In determining the meaning of the parties in the particular clause, we will look at every part of the instrument. "It is a true and important rule of construction that the sense and meaning of the parties to any particular instrument should be collected ex antecedentibus et consequentibus; that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done." Broome, Leg. Max. 442. Applying this rule, and regarding the different provisions of the contract in the light of the circumstances surrounding the parties, as disclosed by the evidence, the construction sought to be established by plaintiff is neither unreasonable nor necessarily inconsistent with the general purpose intended to be accomplished. Plaintiff paid $1,000 in cash for each of the rights acquired by him under the contracts. Defendant was to take the water to the land, or furnish it at a convenient point from where it could be taken out by plaintiff. The contracts do not, in terms, require defendant to take the water upon the land, but only to a point where it shall be accessible or convenient; but it does in express terms provide for the water being taken upon the land by plaintiff himself. The evidence tended to show that defendant was very anxious to sell these rights to plaintiff. Possibly it was in need of the $4,000 it would receive in cash payments, or had other special reason for desiring to make the sale. It is not at all unreasonable and may well be that, under the circumstances and in consideration of making the sale for the price asked, the defendant was willing to forego the annual rent until the water should be actually taken upon the land by plaintiff. If such was the intent sought to be expressed, the contract should be so construed, so long as the language used may fairly include it. And without regard to the sense in which the language was used by the defendant, the grantor, if it is shown that it supposed, or had reason to suppose, that the plaintiff, its grantee, understood it in this sense, and if the sense and meaning contended for by plaintiff be a proper, although not a necessary, one, and is more favorable to him, in either case that construction should be adopted. Code Civ. Proc. § 1864; Civ. Code, § 1649. We conclude, therefore, that the court below should have retained the offered evidence, and considered it in determining the proper construction to be given the provision in question, and that its exclusion was an error for which a reversal must be had. Judgment and order denying new trial reversed, and cause remanded.

We concur: HARRISON, J.; GAROUTTE, J.

5 Cal. Unrep. 131

SCOTT v. RHODES et al. (No. 19,537.)

(Supreme Court of California. Sept. 4, 1895.)

ESTOPPEL BY RECORD — EJECTMENT — PLEADING AND PROOF.

1. One claiming under a grant by a certain name is conclusively bound by a judicial determination and definition of what land was meant by that name.

2. Recovery cannot be had in ejectment for land not specified in the complaint.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

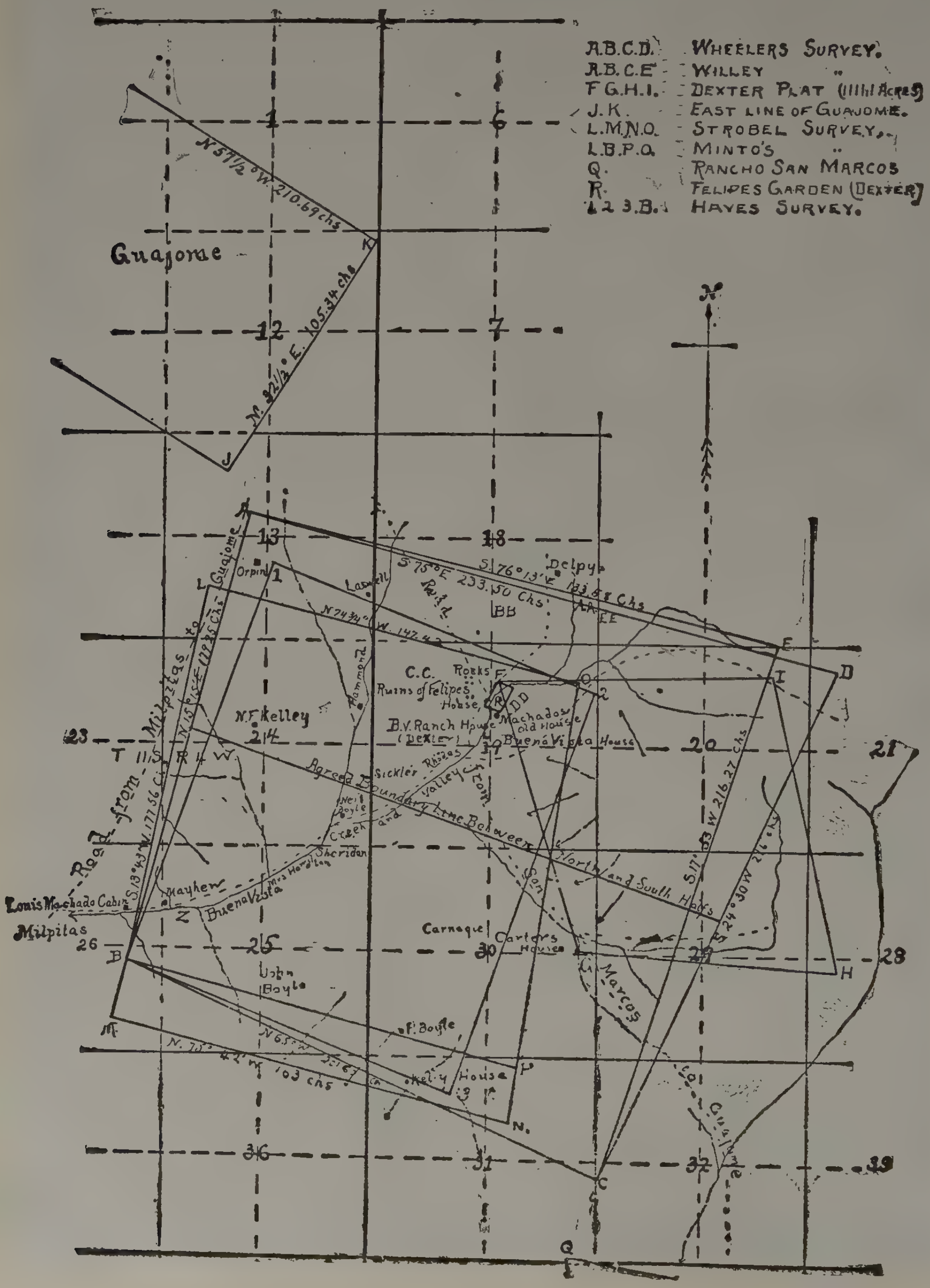
Ejectment by Maria A. Scott against A. G. Rhodes and others. From a judgment for defendants for costs, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Hunsaker & Stevens, Chalmers Scott, and E. Parker, for appellant. J. O. W. Paine, and C. H. Rippey, for respondents.

VANCLIEF, C. Action of ejectment to recover possession of the north half of a tract of land situate in the county of San Diego, described in the complaint by the name "Rancho Buena Vista," and not otherwise. The complaint is in the most general form, alleging plaintiff's ownership and possession of the north half of said tract, and that defendants ejected her therefrom, and withhold from her the possession thereof. The defendants denied plaintiff's alleged ownership and possession, and further denied that they ever entered upon or ejected plaintiff from the land described in the complaint, or that they ever withheld the possession thereof from the plaintiff. The cause was tried by the court without a jury, and the court found that plaintiff was the owner and entitled to the possession of the land described in her complaint as "the north half of the Rancho Buena Vista," but further found that neither of the defendants ever entered upon or ejected the plaintiff from said north half, or any part thereof, or ever withheld the possession of the same, or any part thereof, from the plaintiff; and as a conclusion of law found "that the plaintiff should take nothing by this action, and that the defendants are entitled to judgment against the plaintiff for their costs," and rendered judgment accordingly. The plaintiff appeals from the judgment, and from an order denying her motion for a new trial.

The principal question for decision is one of fact: Did the defendants, or any one of them, oust or eject the plaintiff from any part of the land described in her complaint as the "north half of Rancho Buena Vista," or withhold from her the possession of any part thereof? The evidence shows with reasonable certainty what lands the defendants entered upon and withheld from the plaintiff. Each one of them, as pre-emptor or homestead claimant, separately entered upon a small, defined tract of what he claimed to be government land, outside and west of the Rancho Buena Vista; so that the controversy ultimately relates only to the location of the western boundary line of the Rancho Buena Vista. The plaintiff derived her title from a Mexican grant, made by Gov. Pio Pico to an Indian named Felipe in the year 1845, and confirmed by the United States board of land commissioners for this state, and by the United States district court. The petition of Felipe for the grant describes the land as a "small piece of land called 'Buena Vista,' * * * which piece of land consists of half a league in length and one-half in breadth, on which I maintain some little stock that serve for the maintenance of myself and family." After reciting this petition, Gov. Pico made the grant in the following words: "After having previously made the necessary investigation according to law and regulations, in the exercise of the powers vested in me, in the name of the Mexican nation, I have concluded to grant him the mentioned land, declaring it his property by the present letters patent and under the following conditions: First. * * * Second. He will solicit of the respective judge to give him juridical possession in virtue of this document, by whom the boundaries are to be marked, putting the necessary landmarks. Third. The land granted is of an extent of half a square league, and the same he actually occupies. The judge who shall give the possession will cause it to be measured according to ordinance, leaving the surplus that may result to the benefit of the nation for convenient purposes." The judge who gave juridical possession reported the measurements and boundaries of the possession given as follows: "As we stood at one of the boundaries of the garden of the Indian Felipe, the line was drawn east, and there were measured and counted two thousand five hundred varas, which terminated at the boundary of Don Lorenzo Soto, where the party interested was ordered to place his landmark. From this place the line was drawn in a south course. There were measured and counted two thousand five hundred varas, which ended at a small peak, where stand two rocks joined together. Here the party interested was ordered to place his landmark. From this point the line was drawn, course west, and there were measured and counted two thousand five hundred varas, which ended at a small red hill, where the party interested was ordered to place his landmark. From this point the line was drawn, course north. There were measured and counted two thousand five hundred varas, which ended upon a hill where there stands a large rock, and the party in interest was ordered to place his landmark." In the order of confirmation by the United States land commission, the grant is described as follows: "The lands of which confirmation is hereby made are known by the name of 'Buena Vista,' and are bounded and described as follows, to wit: Commencing at the northwest corner of the garden of the Indian Felipe, and running east two thousand and five hundred varas to the boundary line of Lorenzo Soto's; thence running south two thousand five hundred varas to a small peak, where stand two rocks, joined together; thence running west two thousand five hundred varas to a small red hill; thence running north two thousand five hundred varas to the place of beginning, on a hill, where there is a rock,—containing in all one-half of a square league. Reference for further description is had to the original grant and to the translation of the original record of judicial possession, both of which documents are on file as evidence in the cause." In the judgment of the United States district court, affirming that of land commission, the grant is described as follows: "And it is further ordered, adjudged, and decreed that the claim of the appellee is a good and valid claim, and that the said claim be, and the same is hereby, confirmed to the extent of one-half of a square league of land, a little more or less, being the same land which is situated in the county of San Diego, known by the name of 'Buena Vista,' and bounded and described as follows: Commencing at the northwest corner of the garden of the Indian Felipe, and running east two thousand five hundred varas to the boundary line of Lorenzo Soto's; thence running south two thousand five hundred varas to a small peak, where stand two rocks, joined together; thence running west two thousand and five hundred varas to a small red hill; thence running north two thousand five hundred varas to the place of beginning, on a hill, where there is a rock,—containing in all one-half of a square league. Reference for further description to be had to the original grant and to the translation of the original record of judicial possession." The grant has been surveyed by five different United States deputy surveyors,—first, by J. C. Hayes, in 1857; second, by Max Strobel, in 1867; third, by William Minto, in 1881; fourth, by W. G. Wheeler, in 1884; fifth, by H. I. Willey, in 1889. All these surveys have been set aside by the interior department, and a sixth survey ordered, which had not been executed at the time of the trial of this case. The plaintiff claims that the survey by Wheeler is correct, but would be satisfied with that by Willey. By these two surveys the western and southern boundaries are identical, and include the land claimed by each defendant.

In the following diagram the quadrangle A, B, C, D, represents the Wheeler survey; that of A, B, C, E, the Willey survey; and that of F, G, H, I, drawn by me, is intended to represent, proximately, the boundaries of the grant according to courses and distances as stated in the order of confirmation by the United States land commission, and also in the judgment of the United States district court, without regard to landmarks, except that of the northwest corner of Felipe's garden as the point of commencement; it being agreed by counsel that the garden is correct-


A.B.C.D. WHEELERS SURVEY.
A.B.C.E WILLEY "
F G.H.I. DEXTER PLAT (1111 ACRES)
J.K. EAST LINE OF GUAJOME.
L.M.N.O. STROBEL SURVEY.
L.B.P.Q. MINTO'S "
Q. RANCHO SAN MARCOS
R. FELIPES GARDEN (DEXTER)
1 2 3.B. HAYES SURVEY.
Guajome
N 57½° W. 210.69 chs
N. 32½° E. 105.34 chs
K
J
1
6
12
7
13
18
N
Orpin
Laswell
Guajome
Road
S 75° E 233.50 Chs
S. 76° 13' E 133.58 Chs
Delpy
BB
AA
EE
N 74¾° W. 142.42
Hammond
C.C.
Rocks
Ruins of Felipes House
R
DD
Machados old House
B.V. Ranch House (Dexter)
Buena Vista House
N.F. Kelley
24
23
T 11 S. R 4 W.
20
21
Road from Milpitas to Guajome
N. 15° 15' E. 129.35 Chs
S. 13° 43' W. 177.56 Ch
Agreed Boundary Line Between North and South Hal's
Sickler
Rhodes
Valley
Neil Boyle
Creek and
Sheridan
Mrs Hamilton
Buena Vista
Mayhew
Louis Machado Cabin
Milpitas
Z
26
B
25
30
Carnegue
Carter's House
29
28
S. 17° 53' W 216.27 Chs
S 24° 30' W 216 chs
H
San Marcos
John Boyle
P. Boyle
M
N. 75° 42' W 103 chs
N 65° ... 167
Kelly House
3
P
N.
36
31
32
33
C
Los Guajome
Q
A
L
O
2
F
E
I
D
G

ly located. The quadrangle F, J, K, I, represents a private survey made for defendants, which they claim to be a correct survey of the land granted.

No scale of distances upon which the map was drawn appears in the transcript except by inference. Mr. Chalmers Scott, the husband of the plaintiff, testified that he was a civil engineer and an attorney at law, and in explaining the map, among other things, said: "Plaintiff claims point A as the northwest corner of the ranch, point B as the southwest corner, point C as the southeast corner, and point E as the northeast corner, although point E is not so far east as we would be entitled to go, in my opinion. This would make the north line of the ranch (reduced to Mexican or Spanish varas) 5,028.92 varas, the east line 5,132.63 varas, the south line 4,784.47 varas, and the west line 4,246.9 varas, in length. This is according to the Willey survey. By the Wheeler survey the north line is 5,541.54 varas, and the east line 5,126.22 varas, in length; the south and west lines being identical with the Willey survey." This however, does not quite agree with the lengths of the lines as expressed in chains on the map, assuming that a Mexican vara is equal to 33 inches English measure, as it is understood to be in this state; and, further assuming that all the lines of the map were drawn upon the same scale, the length of the north line (A, E) of the Willey survey, as expressed in chains on the map, must be a gross error, for though it is nearly one-eighth of an inch longer than the south line of the same survey, it purports to be 68 chains shorter than the south line. Mr. Chalmers also testified that the broken lines on the map show the location of the section and quarter-section lines projected from adjoining government surveys. If this is true, the map must be on a scale of two inches for a mile; and this agrees very nearly with the measurements by chain as written on the map, except in case of the north line (A, E) of the Willey survey, which should be about 230 chains instead of 133.58.

The burden of proving that defendants had ousted the plaintiff from, or withheld from her the possession of some part of the grant, as properly located, was on the plaintiff; but I think she failed to sustain it. The grant in this case is not of a specific quantity within exterior boundaries inclosing more than the specific quantity granted. In her complaint the plaintiff has described the demanded premises only by a name; but in proving her title she proved a judicial determination and definition of what land was meant by that name, by which determination and definition she is conclusively bound. In the judicial proceedings before the United States land commission and in the United States district court, to which her predecessor in interest was a party, the Mexican grant under which she claims was construed to be a grant of a specific tract of land described by courses, distances, monuments, and quantity; and there is no dispute as to the location of the monument named as the point of commencement of the judicial description, to wit, "the northeast corner of Felipe's garden." Thence running east 2,500 varas to the boundary of the land of Lorenzo Soto, which boundary is described by the witnesses as a ridge, and not otherwise; and its location by witnesses for plaintiff is consistent with the call for distance on the west course. "Thence running south 2,500 varas to a small peak, where stand two rocks, joined together." The witnesses for defendants testified that they found the small peak and the two rocks called for at the corner marked K on the diagram, whereas plaintiff's witnesses testified that the peak and rocks called for are about a mile further south, at the corner C on the diagram, and that the rocks and peak at K do not answer the call. On this point the evidence was conflicting; but, since point K answers the call for distance and quantity, and approximates that for course, I think the preponderance of evidence on this question is in favor of the defendants. Thence west 2,500 varas "to a small red hill." Defendants' witnesses professed to have found the "small red hill" at point J on the diagram, while plaintiff's witnesses located it two miles further west as point B. It was not denied that there was a small hill of a reddish color at point J, but plaintiff's witnesses claimed that it was not so red as that at point B; and, on the other hand, witnesses for defendants claimed that the hill at B was not a small hill, but was a large hill. Considering the great excess over the calls for distance and quantity in extending the south line west to B, I think the evidence fully justified its termination at point J. Thence runs the fourth and last course north 2,500 varas "to the place of beginning on a hill where there is a rock,—containing in all one-half of a square league." Plaintiff's witnesses locate this closing point at A, nearly a mile and a half from the northwest corner of Felipe's garden, which must be accepted as the place of beginning, though it is not on a hill, and no rock answering the call was found within a thousand feet of it, and though the hill on which point A is located has upon it a vast number of rocks scattered over a large area of ground, as testified by the witnesses; since to dispute that one of the boundaries of that garden is the place of beginning from which the first course ran east is to dispute the record of the grant, and to dispute that the northwest corner of the garden is the place of beginning is to dispute the record of the judgment of the United States land commission, and of the United States district court, confirming the grant, by which judgments, as before remarked, the plaintiff is conclusively bound.

Other objections to the location and extent of the west line by the Willey survey are: (1) That it does not close the survey by nearly a mile and a half; (2) to close the survey by running from point A to the garden would make the grant quintangular, instead of a quadrangle, as called for; (3) it incloses more than three times as much land as called for; and (4) the west line is nearly a mile longer than called for. I think it clear that the evidence justified a finding by the lower court that the west boundary line of the grant is not further west than a north and south line intersecting the northwest corner of Felipe's garden; and, as there is no evidence tending to prove that any one of the defendants ever entered upon or ejected the plaintiff from any land east of said north and south line, the court was also justified in finding, as it did, that none of the defendants ever entered upon or ousted the plaintiff from the premises described in the complaint, or withheld the possession of any part thereof from the plaintiff.

The plaintiff contends, however, that she was in actual possession of land west of the said north and south line, from which the defendants ejected her, and which she is entitled to recover in this action, even though it is not within the boundaries of the Rancho Buena Vista as properly located. For two sufficient reasons this point cannot be sustained: (1) She sued for and described in her complaint only the Rancho Buena Vista; she tendered no issue as to any other land; there was no issue as to any other land tried; and therefore she cannot recover any other land in this action. (2) The evidence does not tend to prove that any one of the defendants entered upon any land while she was in the actual possession thereof, or upon any land within any inclosure. I think the order and judgment appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment appealed from are affirmed.

DE COUTS v. LAFKIN et al. (No. 19,536.)

(Supreme Court of California. Sept. 4, 1895.)

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action of ejectment by Ysidora B. De Couts against James Lafkin and others. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

Hunsaker, Britt & Goodrich, Hunsaker & Stevens, Chalmers Scott, and E. Parker, for appellant. J. O. W. Paine and C. H. Rippey, for respondents.

PER CURIAM. This is an action to recover possession of land situate in the county of San Diego, and described as "the south half of Rancho Buena Vista." The case in every respect is like that of Scott v. Rhodes (No. 19,537, just decided) 41 Pac. 878. Upon the authority of that decision, the judgment and order appealed from must be affirmed, and it is so ordered.

(109 Cal. 197)

BANK OF UKIAH v. GIBSON et al. (No. 15,662.)

(Supreme Court of California. Sept. 25, 1895.)

CHATTEL MORTGAGES—VALIDITY—BONA FIDE PURCHASER.

1. A chattel mortgage of property other than that which Civ. Code, § 2955, provides may be mortgaged, is nevertheless valid as against the mortgagor, or a purchaser from him with notice of the mortgage, though there was no delivery of the mortgaged property.

2. Such mortgage is also valid as against a purchaser of the mortgaged property without notice of the mortgage, where such purchaser gave her notes for the price, and the notes are still unpaid in the hand of her vendor, who, with notice of the mortgage, purchased the property from the mortgagor. McFarland, J., dissenting.

In bank. Appeal from superior court, Mendocino county; R. W. Crump, Judge.

Action by the Bank of Ukiah, a corporation, against E. S. Gibson, T. J. Weldon, and Mrs. M. C. Drew, to foreclose two mortgages. From so much of the judgment as denied foreclosure as to part of the property included in the mortgage, plaintiff appeals. For former report, see 39 Pac. 1069. Reversed.

J. A. Cooper, for appellant. J. M. Mannon, T. L. Carothers, J. W. Oates, J. Q. White, and J. H. Seawell, for respondents.

GAROUTTE, J. Plaintiff brought this action to foreclose two mortgages given by defendant Gibson, one upon certain real estate, and the other upon certain sheep and neat cattle. One Weldon purchased the cattle and sheep of Gibson, the owner, subsequent to the date of the mortgage, and prior to the commencement of the foreclosure proceedings, and thereafter sold the sheep to Mrs. M. C. Drew. These vendees are made defendants. The court entered a decree foreclosing the mortgage as to the real estate and the neat cattle, but denied a foreclosure as to the sheep, and plaintiff now appeals from that portion of the judgment denying a foreclosure as to the sheep. This appeal is before us upon a judgment roll without a bill of exceptions.

At the time Gibson gave the chattel mortgage to plaintiff upon the sheep and cattle he retained possession of the property, and, although this mortgage was made, executed, verified, and acknowledged as required by law pertaining to chattel mortgages, still sheep and cattle at the date thereof were not among the articles of personal property which could be mortgaged under section 2955 of the Civil Code. But as to the mortgagor, Gibson, the fact that this kind of personal property was not enumerated in said section 2955 is wholly immaterial, for, as between the parties, a chattel mortgage upon any character of personal property is valid. Tregear v. Water Co., 76 Cal. 537, 18 Pac. 658; Works v. Merritt, 105 Cal. 467, 38 Pac. 1109. The merits of this appeal rest upon the sufficiency of the findings to support the judgment, and we think the consideration of a single question demands a reversal of the judgment, and a new trial of the case. The court found as a fact that Weldon purchased this personal property from the owner, Gibson, with full knowledge of the chattel mortgage to the plaintiff bank, and as to Weldon there can be no question but that he failed to get any title, either to the sheep or cattle, which would defeat plaintiff's mortgage. It follows that, as to the neat cattle which remained in his possession, the judgment of the trial court was correct. But let us examine the situation of the defendant Mrs. Drew, who purchased the sheep from Weldon, and took actual possession thereof. The court made a finding of fact to the effect that she had no knowledge of plaintiff's mortgage, and further found that she gave her promissory note in the sum of $7,300 to Weldon in payment for the sheep, and that said note was payable one day after date, but has never been paid, and that Weldon is still the holder and owner thereof. This state of facts is fatal to her claim of title, for upon such facts she was not a bona fide purchaser for a valuable consideration. While it may be said that she was a bona fide purchaser in a limited sense,—that is, she was free from fraud, and bought without notice, —still she parted with no valuable consideration. She has lost nothing by the transaction, and is in no worse position than though Weldon had made her a present of the sheep. The consideration for her contract having failed, she has a complete defense to any recovery upon the note by Weldon. If the note had been negotiated, and was in the hands of an innocent third party, the case would assume an entirely different form, for an irrevocable obligation would then be outstanding against her; but such is not the fact, as disclosed by this record. Mr. Pomeroy, in his work upon Equity Jurisdiction (section 751), says: "It is further settled that there must be actual payment before any notice, or, what in law is tantamount to actual payment, a transfer of property or things in action, or an absolute change of the purchaser's legal position for the worse, or the assumption by him of some new, irrevocable, legal obligation. It follows, therefore, that his own promise, contract, bond, covenant, bond and mortgage, or other non-negotiable security for the price, will not render the party a bona fide purchaser, nor entitle him to protection; for upon failure of the consideration he can be relieved from such obligations in equity, even if not at law." See, also, Eversdon v. Mayhew, 65 Cal. 167, 3 Pac. 641. For the foregoing reasons, the judgment is reversed, and the cause remanded.

We concur: HARRISON, J.; VAN FLEET, J.; TEMPLE, J.; HENSHAW, J.

McFARLAND, J. I dissent. The mortgage of the sheep was fraudulent and void except as between the parties thereto, under section 3440 of the Civil Code, because it "was not accompanied by an immediate delivery, and followed by an actual and continued change of possession." Sections 2955–2972 apply only to mortgages of the kinds of personal property therein enumerated, and of which, as therein expressly provided, constructive notice may be given by recordation. A mortgage of any other kind of personal property is simply the "lien" mentioned in section 3440, and comes within the same category as the fraudulent sale or "transfer of personal property" declared in that section to be void. Under the statute the retention of the possession of the property by the vendor or mortgagor is itself an inherent fraud; and third persons should not be driven into a contest of the issue of "notice." If that issue can be raised in every case where the statutory fraud has been committed, the provision of the Code might as well be abolished. In White v. Cole, 24 Wend. 123, the court say: "Again, it is said the plaintiff had notice of the lien by mortgage. This is an objection of a very ancient date, one which has been often made, but never without being overruled. The obvious consequence of listening to it would be to furnish a ready expedient for the protection of fraud of the kind now alleged in all cases." Moreover, Mrs. Drew had no notice of the mortgage; and, in my opinion, she was a subsequent purchaser in good faith, within the meaning of section 3440. She purchased from one who had both the legal title and the possession. The doctrine that such a purchase is not valid because not for cash in hand paid does not, in my judgment, apply to a case where the original sale or mortgage sought to be shielded is itself expressly pronounced fraudulent by the statute. In the passage quoted from Pomeroy on Equity Jurisdiction the author is dealing principally with the question of priority under the recordation laws, and with cases where the original transfer was perfectly legitimate, and not in any sense fraudulent. The purchase by Mrs. Drew may have been a very advantageous one to her, and, in order to protect her credit, pledged by her note, she may have been compelled to forego other advantageous business opportunities. Why, therefore, was she not a purchaser in good faith, under section 3440, which has not even the provision "for value," or "for a valuable consideration," as against one whose claim is expressly declared fraudulent? Most of the business transactions of the country are upon the basis of credit. Suppose she had sold the sheep on credit for mutton to wholesale dealers, who had sold them on credit to retail butchers, who had sold them by leg and loin on credit to family customers, by whom they had been eaten, could the appellant have followed down the line, and recovered against any one through whom the sheep or the meat had passed? The rule that a subsequent purchaser has protection only when he has made actual present payment is applicable, in my opinion, only in cases of conveyances of land, where failure to change possession is not declared a fraud, or to mortgages of personal property without change of possession, which are specially provided for by statute. I think the judgment should be affirmed.

BANK OF UKIAH v. GIBSON et al. (No. 15,663.)

(Supreme Court of California. Oct. 1, 1895.)

In bank. Appeal from superior court, Mendocino county; R. W. Crump, Judge.

Action by the Bank of Ukiah against E. S. Gibson and others. From so much of the judgment as is in favor of defendant Drew, plaintiff appeals. Reversed.

J. A. Cooper, for appellant. J. M. Mannon, T. L. Carothers, J. W. Oates, J. Q. White, and J. H. Seawell, for respondents.

PER CURIAM. This is an action in claim and delivery to recover the neat cattle and sheep described in the mortgage to foreclose which the action was brought. Bank v. Gibson (No. 15,662, filed September 25, 1895) 41 Pac. 1008. Plaintiff recovered the neat cattle described in its complaint, and defendant Drew had judgment in her favor for the sheep, wool, etc. Plaintiff appeals from so much of the judgment as is in favor of said defendant Drew. That portion of the judgment appealed from is reversed, for the reasons given in, and upon the authority of, Bank v. Gibson, supra.

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109 Cal. 186

DAVIS v. WARD et al. (No. 18,376.)

(Supreme Court of California. Sept. 25, 1895.)

MORTGAGES—ERRONEOUS DESCRIPTION—RECORD—BONA FIDE PURCHASERS.

1. The record of a mortgage which, by mistake, fails to describe the land intended to be mortgaged, is not constructive notice to a purchaser of such land, as Civ. Code, §§ 1213, 1214, made the record of a mortgage constructive notice only of "the contents thereof." Erickson v. Rafferty, 79 Ill. 209, distinguished.

2. In an action to reform a mortgage so as to include land not described therein, the defense of a bona fide purchaser of such land is not established by showing payment of a small part of the purchase money, the giving of notes secured by mortgage on land, and the transfer of the notes and mortgage by the vendor, without showing that the transferee of the notes or mortgage paid value therefor.

Department 2. Appeal from superior court, Tulare county; W. W. Cross, Judge.

Action by John T. Davis against Henry I. Ward and others to reform and foreclose a mortgage. There was judgment in favor of defendants, and plaintiff appeals. Affirmed as to defendant Fleming. Reversed as to the other defendants.

J. A. Hannah, for appellant. Bradley & Farnsworth, for respondents.

McFARLAND, J. This action was brought to have reformed (and foreclosed) a certain mortgage, executed October 8, 1891, by the defendant Ward to one Vancil, and duly recorded April 8, 1892, and by Vancil assigned to plaintiff. Brown, Fleming, and the Visalia Savings Bank were made defendants as claiming some interest in the mortgaged premises. It is averred in the complaint that the mortgage was intended to be of the S. W. ¼ of the S. E. ¼ of section 13, and the N. W. ¼ of the N. E. ¼, section 24, in township 18 S., range 25 E., M. D. B. & M., but that by mutual mistake of the parties the mortgage was made to describe the lands as situated in range 24; and the prayer is to have the mortgage reformed so as to describe the premises as being in range 25. Ward made default. Brown and Fleming answered, setting up that after the execution of said mortgage said Ward had sold and conveyed to Brown about one-half of the said land in range 25, and the remainder to Fleming; and that they were bona fide purchasers for a valuable consideration and without notice of the mistake in said mortgage. (The description in the mortgage would have corresponded with lands bought by Brown and Fleming if the range had been 25 instead of 24.) The bank set up that it was the assignee and holder of two negotiable promissory notes given by Brown to Ward, and also assignee of a mortgage given by Brown to Ward upon the said land purchased by Brown from Ward as aforesaid to secure said notes; and that it purchased said notes and mortgage for value, and without notice, etc. The court granted a nonsuit as to Fleming, Brown, and the bank, and rendered judgment in their favor. From this judgment, and from an order denying his motion for a new trial, plaintiff appeals.

Appellant contends that purchase in good faith without notice, etc., is an affirmative defense, and that, therefore, the granting of the nonsuit was erroneous. But appellant put Brown and Fleming on the stand as his witnesses, and it was proved affirmatively by their testimony that they had no notice nor information of any kind in reference to the said mortgage by Ward to Vancil. It was also proven that Fleming was a purchaser for value, and that he had made full payment of the purchase money at the time of his purchase. The only question, therefore, as far as notice is involved, is whether or not they had constructive notice; and this question must, beyond doubt, be answered in the negative. They were concerned only with the land which they purchased, and were chargeable with constructive notice of whatever the record showed as to that land; and the record showed an unincumbered title to that land in Ward. If it was their duty to have known of the record of the mortgage to Vancil, an examination of that record would merely have shown that the mortgage there recorded was upon land six miles away from the land purchased by them; and the record of that mortgage was constructive notice only of "the contents thereof." Sections 1213, 1214, Civ. Code. It was not constructive notice of any mistake. Chamberlain v. Bell, 7 Cal. 293; Frost v. Beekman, 1 Johns. Ch. 288; Sanger v. Craigue, 10 Vt. 555; 5 Lawson, Rights, Rem. & Prac. § 2279; Pom. Eq. Jur. § 654. The case of Erickson v. Rafferty, 79 Ill. 209, cited by appellant, is not in point. There the subsequent purchaser in that case was so circumstanced as to be put on inquiry, and had been informed that there was a mortgage on the land. So far, therefore, as respondent Fleming is concerned the nonsuit was properly granted as to him, for it was shown that he was a purchaser without notice, and had paid the purchase money in full. But the turn which the case took left Brown and the bank in a different position.

The authorities leave somewhat doubtful the point whether one setting up the defense of subsequent purchase in good faith without notice must show that he had no notice (Pearce v. Foreman, 29 Ark. 568); but the general rule clearly is that he must affirmatively show a purchase for value, and that the purchase money had been paid before notice. There might, perhaps, be peculiar circumstances—such as investments for improvement of the property, etc., so that a purchaser could not be put in statu quo—which would take a purchase made wholly or partly upon credit out of the rule; but the general rule is as above stated. Eversdon v. Mayhew, 65 Cal. 167, 3 Pac. 641; Scott v. Umbarger, 41 Cal. 419; Land Co. v. Morgan, 95 Cal. 552, 30 Pac. 1102; Isenhoot v. Chamberlain, 59 Cal. 639; Boone v. Chiles, 10 Pet. 210; Wells v. Morrow, 38 Ala. 128; Jewett v. Palmer, 7 Johns. Ch. 68. In Eversdon v. Mayhew, supra, this court, speaking of one claiming protection as a bona fide purchaser, declares that he must aver and prove "the payment of the purchase money in good faith, and without notice actual or constructive, prior to and down to the time of its payment; for, if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser." In Jewett v. Palmer, supra, Chancellor Kent says: "A plea of a purchase for a valuable consideration, without notice, must be with the money actually paid; or else, according to Lord Hardwicke, you are not hurt. The averment must be, not only that the purchaser had not notice, at or before the execution of the deeds, but that the purchase money was paid before notice. * * * Even if the purchase money be secured to be paid, yet, if it be not in fact paid before notice, the plea of a purchase for a valuable consideration will be overruled." There are numerous cases to the same effect, in addition to those above cited. Now, in the case at bar, while the evidence did show that Brown purchased without notice, it also showed that the purchase price was something over $1,300, and that Brown had actually paid only about $200, and had given his promissory note to Ward for the balance of the purchase money, with a mortgage on the land which he purchased from Ward as security for the note. Nothing had been paid when this suit was commenced except "about $200," and no circumstance is shown that would take the case out of the rule above stated. He made the purchase about October 14, 1892, and says he heard of the mortgage about two months afterwards; and this present action was brought within three months after his purchase, and when he had notice of the commencement of the action he had paid only $200 of the purchase money.

As to the bank, there is no evidence whatever of the condition or validity of its claim; no evidence at all upon the subject. The bank joined with Brown in an answer, in which it is alleged that Brown made two promissory notes to the order of Ward, each for $573, and executed to him a mortgage upon the land in question to secure said notes; that Ward assigned said notes and mortgage to the bank; and that the bank took said assignment without notice of the mistake in the mortgage to Vancil. There is, also, we think, a sufficient averment in said answer that the bank purchased said notes and mortgage for a valuable consideration. If these averments had been proven, the case would have assumed a very different aspect. If the notes and mortgage were actually assigned to the bank for value, paid to Ward by the bank before any notice, then Brown's defense to the notes of failure of consideration was cut off, and the defense of both Brown and the bank to this action would be complete; for, in that event, the notes would have been payment. Partridge v. Chapman, 81 Ill. 137; Freeman v. Deming, 3 Sandf. Ch. 327; Baldwin v. Sager, 70 Ill. 503; Pom. Eq. Jur. § 751, and notes. But there is no proof whatever that these averments were true. Therefore, as the case stood at the time of the nonsuit, the evidence merely showed that Brown had paid only a small part of the purchase money. No other facts material to the subject were shown. Under these circumstances he was entitled to protection only to the extent that he was—to use the expression of Lord Hardwicke—"hurt." The rule, therefore, applies "that where a part only of the price or consideration has been paid before notice, either the defendant should be entitled to the position and protection of a bona fide purchaser pro tanto, or that the plaintiff should be permitted to enforce his claim to the whole land only upon condition of his doing equity by refunding to the defendant the amount already paid before receiving the notice." Pom. Eq. Jur. § 750. In Land Co. v. Morgan, 95 Cal. 552, 30 Pac. 1102, Beatty, C. J., speaking for the court in bank, said: "The authorities cited in appellant's brief amply sustain the proposition that notice before payment is equivalent to notice before purchase, and that, when there has been a partial payment before notice to a second vendee of the orginal vendor's lien, he is affected pro tanto as to the residue." Of course, the principle is as applicable to an unrecorded mortgage as to a vendor's lien. See, also, Burton v. Reagan, 75 Ind. 77. The judgment and order denying a new trial should be affirmed as to respondent Fleming, but the order granting a nonsuit in favor of respondent Brown and the bank was erroneous, and as to them the judgment must be reversed, and a new trial granted. The new trial should be conducted in accordance with the views hereinbefore expressed, and the parties should be allowed to make proper amendments to their pleadings if they so desire.

The judgment and order appealed from are affirmed as to the respondent George A. Fleming, and as to the respondents Thomas Brown and the Visalia Savings Bank the judgment and order are reversed, and the cause remanded for a new trial.

We concur: TEMPLE, J.; HENSHAW, J.

109 Cal. 203

HALL v. SUSSKIND. (No. 19,527.)

(Supreme Court of California. Sept. 25, 1895.)

ABATEMENT—ANOTHER ACTION PENDING.

An action to recover damages for conversion will not abate because of the pendency of an action theretofore brought by defendant against an officer who held under a writ of attachment the property alleged to have been converted, in which action plaintiff intervened and asserted his right to the property, as the issues in the two actions are different.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by A. I. Hall, assignee in insolvency of L. M. Wagner, against Henry Susskind. There was a judgment in favor of plaintiff, and defendant appeals. Affirmed.

Wells & Lee, for appellant. Graff & Latham, for respondent.

SEARLS, C. This is an action to recover from the defendant the sum of $60,000 as damages for the value of certain property, to wit, diamonds, watches, and jewelry, alleged to have belonged to the estate of L. M. Wagner, an insolvent, and to have been, through a conspiracy between defendant, L. M. Wagner, the insolvent, and J. B. Wagner, her husband, secreted and concealed to prevent its coming into possession of plaintiff, as assignee, and which was taken possession of, converted, and in part sold by defendant. That the portion of said property sold by defendant was of the value of $30,000, etc. Defendant answered, denying many of the allegations of the complaint, and, as a further and separate defense, pleaded the pendency of another action in the superior court between the same parties for the same cause of action, etc., stating the facts in apt language. The court tried the issues made by the plea in abatement, and filed its written findings thereon, from which it appears, in addition to the facts of the insolvency of L. M. Wagner, her voluntary application for a discharge, the election and qualification of the plaintiff herein as assignee, the assignment of the estate to him by the clerk, etc., that, prior to the insolvent's petition being filed, a portion of her estate, consisting of diamonds, watches, and jewelry, was secreted so as to prevent its coming into the possession of the plaintiff, as assignee; that the defendant herein, knowing that such goods had been secreted, and the purpose thereof, and to prevent their coming to the assignee, received and took possession of said concealed property, and, after selling a portion thereof, retained possession of the remainder in his store in Los Angeles until the 26th day of July, 1893, when it was taken possession of by J. C. Cline, sheriff of the county of Los Angeles, under a writ of attachment in an action by M. Wunsch et al. v. L. M. Wagner, the insolvent, as her property. H. Susskind, the defendant herein, thereupon brought an action in claim and delivery in the superior court against the sheriff to recover as his own the goods so attached. Thereupon the plaintiff in this action intervened in said action, and claimed possession of the goods so attached as the assignee in insolvency of said L. M. Wagner, to whose estate he claimed the goods belonged, and he was adjudged to be entitled to the possession thereof as such assignee, as against both the plaintiff and defendant therein. It was also found that the goods attached were of the value of $20,000. Thereupon Henry Susskind, the plaintiff in said action in claim and delivery, moved the court for a new trial in said cause, and such motion is still pending, undecided, and undetermined. The judgment on the findings in this action upon the plea in abatement was that "this action should abate so far as it involves any property formerly belonging to L. M. Wagner, concealed by the said Henry Susskind, and held by him in his possession in the store on South Spring street, on the 26th day of July, 1893, and on that day taken possession of by the said J. C. Cline, as sheriff of said county, by virtue of a writ of attachment then in his hands against the said L. M. Wagner; and that as to any other property of said L. M. Wagner taken by the said Henry Susskind, and sold by him, prior to the said 26th day of July, 1893, and not then in his possession, the action proceed to trial." Defendant Henry Susskind appeals from the judgment on his plea in abatement.

"The law abhors multiplicity of actions, and therefore, whenever it appears on record that the plaintiff has sued out two writs against the same defendant for the same thing, the second writ shall abate; for if it were allowed that a man should be twice arrested, or twice attached by his goods for the same thing, by the same reason he might suffer in infinitum." Bac. Abr. tit. "Abatement," subd. M. The same author says: "When a writ is brought for two things, and it appears the plaintiff cannot have any other action for the one of them, the writ shall stand for the part that is good." In order that a plea in abatement by reason of the pendency of another action may be effectual, it must appear that such former action is between the same parties and for the same subject-matter, or, in other words, that it is of such a character that, had a judgment been rendered therein on the merits, such judgment could be pleaded in bar of the second action. A judgment in personam "is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceedings, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding." Code Civ. Proc. § 1908, subd. 2. "A fact or matter in issue is that upon which plaintiff proceeds by his action, and which the defendant controverts in his pleading, while collateral facts are such as are offered in evidence to establish the matters or fact in issue." Garwood v. Garwood, 29 Cal. 522. The rule is restricted to facts directly in issue, and does not embrace facts which may be in controversy, but rest in evidence, and are merely collateral. Freem. Judgm. § 257. The question is not, simply, were given facts controverted at the former trial? but, were they in issue? If they were not, they do not come within the rule. King v. Chase, 15 N. H. 16; Roberts v. Robeson, 27 Ind. 454; Jackson v. Lodge, 36 Cal. 28; Gray v. Dougherty, 25 Cal. 272; Caperton v. Schmidt, 26 Cal. 493. That the judgment of a court of competent jurisdiction directly upon the same point is, as a plea, a bar, or, as evidence, conclusive between the same parties upon the same matter directly in question, is a proposition so thoroughly established as to need no argument.

The question in the present case is, were the issues in the action for claim and delivery, the pendency of which is pleaded here, the same, and between the same parties, as this action? The action of claim and delivery is a possessory action. It is the lineal descendant of one of the early remedies given by the common law, instituted for the purpose of recovering possession of chattels, and known as "replevin." The scope of its application has been greatly enlarged in modern times, but the essential object of the action remains the same, viz. to enforce plaintiff's right to the present possession of chattels as against a defendant who unlawfully detains them, and under our law to recover their value, if possession cannot be had, together with damages for the detention. The investigation is confined to the property mentioned in the complaint. Other property cannot be brought into the controversy by answer. Lovensohn v. Ward, 45 Cal. 8. In the present case Henry Susskind, the defendant and appellant here, commenced an action as plaintiff in claim and delivery against J. C. Cline, as sheriff, to recover possession of certain jewelry, etc., taken by the sheriff as the property of L. M. Wagner. His cause of action—that is to say, the ground upon which he sought to maintain his action—was his right to the immediate possession of the property as against the detention thereof by defendant. When the plaintiff A. I. Hall, as assignee in insolvency of L. M. Wagner, intervened in that action, it was to enforce his own claim as such assignee to the possession of the property in dispute. By so doing he could not enlarge the scope of the inquiry by extending it to property not involved in that action, or to wrongful acts of the plaintiff therein in relation to other property. As evidence of his right to possession, intervener could show the ownership of his assignor, the insolvent, her fraudulent, and therefore void, attempt to transfer it to Susskind, the plaintiff; but all these things were admissible only as evidence and in support of his ownership and right to possession, and were collateral to the question of the wrongful detention of the property by Cline as sheriff, in whose possession it was at the commencement of the action. In the present action, Hall, as assignee, sues to recover damages for the fraudulent concealment and conversion by defendant of the property of the insolvent, L. M. Wagner. His cause of action upon which he counts is a different one from that upon which he waged his contention as an intervener in the former action against the sheriff, and incidentally against defendant, Susskind, as a party to that action. Had the plaintiff here instituted that action, Susskind would not have been a necessary party to it; and it was only by virtue of his having brought it, and by reason of plaintiff, Hall, having intervened, that he became a party.

Roberts v. Robeson, 27 Ind. 454, was in most respects similar to this case. That was a suit involving the validity of an assignment for the benefit of creditors, which was alleged to be void for fraud. It was attempted to conclude the assignee by pleading the record of a suit brought by him against the sheriff to recover the possession of certain property which was included in the assignment, and which had been seized by the sheriff under process against the assignor. Judgment had gone against the assignee, and it was held that the record was only conclusive as to the particular property involved in the suit against the sheriff. The court said: "That judgment was conclusive as to Roberts against any claim he could set up by virtue of the assignment to the property involved in that action. But as to any other property covered by the assignment the judgment could have no force. The question the jury passed upon was, simply, the title to the property involved in that suit, and although they (the jury) may have treated the assignment as void, it could only be established in that case as to the property involved." King v. Chase, 15 N. H. 9, is to like effect. The reasoning in those cases does not combat the theory that a judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar; or, as evidence, conclusive between the same parties, upon the same matter, etc.; but points to the broad distinction which exists between that which is in issue in a case and that which, though not a part of the issue, is controverted; or, in other words, the distinction between evidentiary facts going to establish the issue and the ultimate facts involved in the issue itself. The former may have been controverted, yet the result is not conclusive as to them; while as to the latter the judgment is conclusive if they were determined or might have been determined.

In the present case the unlawful seizure gave the plaintiff a separate and distinct cause of action against Cline, the sheriff, to enforce which he intervened in the action between Susskind and said Cline. In that action the issues were as to intervener's right to the property as against Susskind and Cline, and the detention thereof by the latter. All the other facts were but evidentiary to those ultimate facts involved in the issue, and, however much such evidentiary facts may have been controverted at the trial, the result did not crystallize them as a part of the issues in the case. It is true, the plaintiff here, according to the allegations of the complaint, had at the same time a cause of action against Susskind for the fraudulent purchase or procuring of the same and other like property from his assignor in insolvency. He could not include his action for damages as to that in the replevin suit for two reasons: (1) Because, under the doctrine enunciated in Lovensohn v. Ward, supra, he could not inject this new matter into the action of replevin. (2) Because, under section 427 of the Code of Civil Procedure, a cause of action to recover specific personal property, with or without damages for withholding thereof, cannot be united with a cause of action for injury to property; and for the further reason that the separate cause of action against Susskind did not affect Sheriff Cline. A party may not split up a single cause of action, and maintain separate actions thereon, but every wrong furnishes a cause of action. All damages arising from a single wrong, though at different times, make but one cause of action. Bendernagle v. Cocks, 19 Wend. 207. But wrongs perpetrated at different times by the the same or by different persons furnish separate causes of action. In this last sense plaintiff's cause of action against the defendant was distinct from that against him and Sheriff Cline, enforced in the action in which he intervened. As a matter of course his recovery in the intervention suit diminishes by so much his right to recover in this action, just as would have occurred had the defendant herein voluntarily delivered to him and had he accepted the same property.

When the sheriff seized a portion of the goods to which the plaintiff here was or claimed to be entitled, it gave to plaintiff a cause of action against such sheriff for the goods thus unlawfully taken, but did not entitle him to intervene in that action except to recover the goods thus taken. Had the sheriff taken possession of all the property claimed by the assignee under the alleged fraudulent transfer by Wagner to Susskind, and had the plaintiff here under such circumstances intervened and claimed a part only thereof, he would have been concluded by the judgment in intervention from recovering the residue in another action. If A. is the owner of two horses, which are wrongfully taken from him by B., who transfers one of them to C., it would hardly, we think, be contended that a recovery from C. of the horse held by him would be a bar to a recovery of the other horse held by B. Yet in principle the case supposed would not differ from the one at bar. It is only where a claim is founded upon one entire contract, or upon one single or continuous tortious act, that it cannot be divided into distinct demands, and be made the subject of separate actions. The taking of a portion of the property, claimed by the plaintiff as assignee, by the sheriff, constituted a separate tortious act, giving to plaintiff a right of action, which was waged by him as an intervener in the action against the sheriff, and did not conclude him in this action against the original tort feasor, Susskind, brought to recover as to the residue of the property. In the first action the parties were not the same as in the present one, and Hall, the assignee, was not entitled therein, as an intervener, to introduce the evidence necessary to sustain the present action. This being so, it follows that the court below did not err in its rendition of judgment on the plea of the pendency of another action between the same parties for the same cause of action; and the judgment appealed from should be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

109 Cal. 165

VAN SANDT v. ALVIS et al. (No. 18,396.)

(Supreme Court of California. Sept. 25, 1895.)

HOMESTEAD—MORTGAGES—RENEWAL.

Where the owner of a homestead which is subject to a mortgage given by him to secure the purchase money, in order to procure an extension of time to pay the debt, gives new notes therefor and a new mortgage on the land, the new notes and mortgage did not create a new incumbrance, but simply changed the form of the old incumbrances, and the lien on the homestead is not defeated by the fact that the mortgagors did not join in the new mortgage.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by Mary E. Van Sandt, as executrix of the last will and testament of A. A. Van Sandt, deceased, against C. P. Alvis and another, to foreclose a mortgage. From so much of the decree as enforces the lien of the mortgage against the homestead, defendants appeal. Affirmed.

F. T. Baldwin and Nicol & Orr, for appellants. James H. & J. E. Budd, for respondent.

SEARLS, C. This is an action to foreclose a mortgage upon the homestead of the defendants. Plaintiff had a decree of foreclosure, adjudging his claim to the extent of $2,495.28 to be a lien upon the homestead, and a personal judgment against defendant C. P. Alvis for the residue of indebtedness found due to plaintiff. Defendants appeal from so much of the decree as relates to the lien upon their homestead. The appeal was taken within 60 days after judgment, and the record contains a bill of exceptions. The facts as admitted by the pleadings and found by the court may be summarized as follows: A. A. Van Sandt, plaintiff's testator, was the owner of certain lands situate in the county of San Joaquin, state of California, which on the 1st day of October, 1883, he sold and conveyed to the defendant C. P. Alvis for the sum of $5,000, receiving in payment therefor $1,000 in cash and four promissory notes for $1,000 each, payable at one, two, three, and four years, with interest at 8½ per cent. per annum, and, if not paid, the interest to be added to the principal, and draw like interest; and, to secure the payment of said several promissory notes, said Alvis executed to his grantor, said Van Sandt, a mortgage upon the land so conveyed to him, which mortgage was duly recorded. Thereafter, and on the 29th day of June, 1886, defendant C. P. Alvis made and recorded a declaration of homestead in due form upon the land so conveyed to and mortgaged by him. The defendant Caroline Alvis was and is the wife of C. P. Alvis. A. A. Van Sandt died on the 19th day of January, 1887, leaving a last will and testament, and plaintiff is the duly appointed and qualified executrix thereof. On the 1st of September, 1888, defendant C. P. Alvis, not having paid the promissory notes aforesaid, and being unable to pay the same, applied to the plaintiff herein for an extension of time to pay the same, and agreed that, if the time was extended, he would pay the same; and thereupon said C. P. Alvis made his promissory note for $4,000, payable to plaintiff as administratrix (executrix), or her order, on or before four years, with interest at 8½ per cent. per annum, and conditioned as in the former notes, and providing that, if the interest was not paid annually, the whole sum should become due at the option of plaintiff; and, to secure the payment thereof, said C. P. Alvis executed to plaintiff a mortgage upon the same premises covered by the first mortgage, and theretofore included in the homestead. Plaintiff accepted and recorded the new mortgage, received the promissory note, satisfied the former mortgage of record, and delivered to said defendant the four old promissory notes. Defendant Caroline Alvis, the wife of the other defendant, had full knowledge of all the facts, acts, and representations of her husband in procuring an extension of the time of payment of said first notes, and consented thereto, but did not unite with her husband in the execution of the mortgage of 1888 upon the homestead. The interest not having been paid upon the last-mentioned note, plaintiff elected to consider the whole amount due, and instituted this action in 1891, at which time three of the original promissory notes of 1883 were barred by the statute of limitations as against Caroline Alvis; and the court so found, and decreed the fourth note, which was not thus barred, to be a lien upon and secured by the mortgage upon the homestead.

From the foregoing statement of facts it appears that no new indebtedness was sought to be created or secured by a lien upon the homestead. The indebtedness on account of the purchase price of the homestead, which was secured by the original mortgage thereon, was in part about to become barred by the statute of limitations, and was at the request of the defendant C. P. Alvis extended at the same rate of interest, and a new mortgage executed upon the same property. As to the first mortgage, which was executed by C. P. Alvis at the date of his purchase of the premises to secure a portion of the purchase price thereof, no homestead could thereafter be carved out of the property, so as to impair the rights of the mortgagee. Montgomery v. Tutt, 11 Cal. 190; Civ. Code, § 1241 (4). The first mortgage was, therefore, a valid lien upon the premises prior in time and superior to the homestead claim. Section 1242 of the Civil Code provides that: "The homestead of a married person cannot be conveyed or incumbered, unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife;" and "a homestead can be abandoned only by a declaration of abandonment, or a grant thereof executed and acknowledged: (1) By the husband and wife, if the claimant is married; (2) by the claimant, if unmarried." Civ. Code, § 1243. So far, then, as the creation of a lien upon the homestead is involved, it can only be accomplished by the joint action of the spouses. And a valid and subsisting lien upon the homestead of married persons cannot be extended so as to defeat the plea of the statute of limitations by the husband alone. Barber v. Babel, 36 Cal. 11.

The question in the case at bar relates, not to the power of the husband to incumber the homestead without the joint action of the wife, but is this: Was the execution of the new note and mortgage the creation of a new incumbrance, or simply a change of the form of the old incumbrance? Swift v. Kraemer, 13 Cal. 530, was a case in which one Revalk, an unmarried man, owned a lot of land upon which there were two mortgages, one of which, for $1,500, was held by Kraemer. Revalk married in 1857, and thereafter executed another mortgage, in which his wife did not join, upon the property previously covered by the two mortgages, and which in the interim had become a homestead of Revalk and wife. Kraemer had paid off one of the prior mortgages, and satisfied the other, which constituted (except as to $500) the consideration of the last mortgage. The release of the old mortgages and the execution of the new one were on the same day. The court said: "But, as to the debts secured by the original mortgage to Leck and Fontacelli and Kraemer, we regard the cancellation of the old mortgages and the substitution of the new as contemporaneous acts. It was not creating a new incumbrance, but simply changing the form of the old. A court of equity, looking to the substance of such a transaction, would not permit a release, intended to be effectual only by force of and for the purpose of giving effect to the last mortgage, to be set up, even if the last mortgage was inoperative. It would not permit Revalk to take Kraemer and Eisenhardt's money and apply it in extinguishment of a prior incumbrance, and then claim that the property should neither be bound by the new mortgage or the old," etc.,—citing Dillon v. Byrne, 5 Cal. 455; Birrell v. Schie, 9 Cal. 106; Carr v. Caldwell, 10 Cal. 380. See, also, Tolman v. Smith, 85 Cal. 280, 24 Pac. 743. The case of Barber v. Babel, 36 Cal. 11, was one upon all fours with the case at bar, except that there the original note and mortgage were barred by the statute of limitations at the time of suit brought to foreclose, and the court held that as the original mortgage was barred, and as the wife had not joined in the execution of the second mortgage, no recovery could be had. Sawyer, C. J., in his opinion, at page 23 of the report, refers to and quotes from Swift v. Kraemer with apparent approval, and places the decision upon such bar of the first note and mortgage and the invalidity of the second mortgage.

It is very evident in the case at bar the first mortgage was only released to give effect to the second one, and in a court of equity the defendants should not be heard to say that the second mortgage is void by reason of not being executed by the wife, and at the same time to successfully contend that the release of the first mortgage extinguished it. The complaint states the whole facts of the transaction, sets out both the mortgages, and asks that they be decreed to constitute but one security. Under such circumstances, the court below was justified in holding as it did in substance: (1) That the second mortgage upon the homestead was void as against the wife by reason of her not having joined in such mortgage; (2) that the first mortgage, having been satisfied only for the purpose of giving effect to the second one, will in equity be deemed to be and remain in force until the demand secured thereby is barred, etc.; (3) that one of the notes secured by the first mortgage not being barred at the date of suit brought, a foreclosure upon the homestead could be decreed as to that note only. That part of the judgment appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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109 Cal. 192

MARYSVILLE ELECTRIC LIGHT & POWER CO. v. JOHNSON. (No. 18,351.)

(Supreme Court of California. Sept. 25, 1895.)

SUBSCRIPTION TO CORPORATION—LIABILITY.

1. A corporation formed for the "purpose of producing electricity and power" cannot maintain an action on a subscription to a corporation to be formed "for the purpose of furnishing the incandescent system of electric lighting."

2. If the subscribers present for the purpose of organizing the corporation are the agents of an absent subscriber, their authority extends only to the formation of such a corporation as has been agreed upon.

Commissioners' decision. Department 2. Appeal from superior court, Yuba county; John C. Gray, Judge.

Action by the Marysville Electric Light & Power Company against F. W. Johnson on a subscription to stock. Defendant had judgment, and plaintiff appeals. Affirmed.

C. A. Webb and Wm. G. Murphy, for appellant. W. H. Carlin, for respondent.

SEARLS, C. This is an action by the plaintiff, a corporation, to recover from the defendant $1,000, upon his agreement to take stock in a corporation thereafter to be formed. The agreement was executed by defendant and some 36 others on the 25th day of March, 1890, and is in the words and figures following: "For the purpose of forming a corporation to have for its object the furnishing of the incandescent system of electric lighting to those who may desire the same, and to provide the funds for the purchase of the necessary plant, we, the undersigned, hereby subscribe for stock to the amount set opposite to our respective names. Amounts to be due and payable upon the formation of the company and the issuance of the stock." Then follows the list of names signing the agreement, with the amounts by them severally subscribed, among which is the name of defendant, who subscribed $1,000. On or about the 29th day of March, 1890, the subscribers to the agreement, or a portion of them, met and organized the corporation, plaintiff herein, under the laws of the state of California. The second section of the articles of incorporation defines the objects of the corporation, as follows: "That the purposes for which it is formed are producing electricity for light and power." Defendant did not participate in the formation of the corporation, consent thereto, or in any way waive any of his rights under the agreement.

The facts are simple, and involve the single proposition as to the liability of defendant to pay $1,000 to a corporation formed for the purpose of "producing electricity for light and power," under his agreement to pay said sum "for the purpose of forming a corporation to have for its object the furnishing of the incandescent system of electric lighting to those who may desire the same, and to provide the funds for the purchase of the necessary plant." That the agreement in question was valid and binding upon the parties, and sufficient in law to authorize the plaintiff, if organized as a corporation in consonance therewith, to maintain an action to recover the sum agreed to be paid, is well settled. Water Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; Power Co. v. Johnson, 93 Cal. 538, 29 Pac. 126; Railroad Co. v. Hildreth, 53 Cal. 123; Water Co. v. West, 94 Cal. 399, 29 Pac. 785. Morawetz, in his work on Private Corporations, at section 52, in discussing the contract of membership, says: "An offer or contract to become a shareholder in a corporation, or to subscribe for shares thereafter, does not become binding, or create a liability, until all conditions precedent, upon which the offer or contract is made, have been performed,"—citing Railroad Co. v. Curtiss, 80 N. Y. 219; Ferry Co. v. Balch, 8 Gray, 310; Goff v. Winchester College, 6 Bush, 443; Edinboro' Academy v. Robinson, 37 Pa. St. 210,—and adds: "It is plain that no liability is incurred unless the corporation which is organized is the specific corporation which was contemplated at the time of the agreement." Hotel Co. v. Coyle, 35 Me. 405; Manufacturing Co. v. Fox, 12 Vt. 304; Manufacturing Co. v. Schafer, 57 Cal. 396. Defendant subscribed for stock to the amount of $1,000 "for the purpose of forming a corporation having for its object the furnishing of the incandescent system of electric lighting, * * * and to provide the funds for the necessary plant." The formation of a corporation for such purpose was a condition precedent to the right of plaintiff to recover. Until it has done so, it is not perceived upon what theory it can compel payment. If plaintiff can add the element of a power company to its attributes, upon the same principle it may adopt any other function, and still hold the defendant liable. An individual may be quite willing to contribute his money and assume the responsibilities of a stockholder in a corporation to furnish light, and at the same time decline to embark in an enterprise to furnish power, or to engage in other and distinct branches of business. It is sufficient to say that defendant only agreed to pay his money for stock in a corporation for lighting purposes, and that he cannot, under his contract, without his consent, be compelled to pay money towards the formation of a corporation for an additional and distinct purpose.

Appellant contends that, for the purposes of the organization of the corporation, the subscribers present were the agents for those subscribers who were absent, and, in support of the proposition, cites West v. Crawford, 80 Cal. 19, 27 Pac. 1123. The answer to this contention is that, if the subscribers with defendant are to be deemed his agents in the formation of a corporation, the extent of their authority as such agents only went to the formation of such a corporation as had been agreed upon; and, when they went beyond the bounds thus set, they exceeded, as against the nonconsenting defendant, their authority, and their acts, as to him, were void.

This conclusion reached, it follows that the plaintiff is not entitled to recover, and that other questions involved need not be considered. The judgment appealed from should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(113 Cal. 221)

BLOOD v. LA SERENA LAND & WATER CO. (No. 19,510.)[1]

(Supreme Court of California. Sept. 27, 1895.)

UNAUTHORIZED MORTGAGE BY CORPORATION — RATIFICATION—AMENDING PLEADING— DISCRETION OF COURT.

1. Where land was purchased for a corporation by its officers without authority, and a mortgage executed for the purchase price, and the corporation, after learning of the transaction, took possession of the land, surveyed and platted it, took its rents and profits, sold some of it, and exercised ownership over it, subject to the mortgage, the corporation, was bound by the purchase and mortgage.

2. Under an allegation that a contract was made by defendant, it may be shown that it was made by ratification of the unauthorized acts of its officers.

3. Where, on a trial to foreclose a mortgage for the purchase price of land, defendant corporation discovered that its officer who had purchased the land for it was also the agent of the vendor, but did not move to amend its answer so as to set up the fraud until six months after the trial, the refusal of the court to permit it to do so was not an abuse of discretion.

4. Civ. Code, § 2314, provides that "a ratification may be rescinded when made * * * with an imperfect knowledge of the material facts of the transaction ratified." *Held*, that a corporation cannot rescind a ratification on the ground that its agent in conducting a sale was also the agent of the other party, where it did not appear that the corporation was ignorant of the dual relation of the agent, or that its agent was vested with any discretion in effecting the sale.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by James A. Blood against La Se

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[1] Rehearing granted.

rena Land & Water Company to foreclose a mortgage. There was judgment for plaintiff, and defendant appeals. Affirmed.

Thos. McNulta and Chapman & Hendricks, for appellant. R. B. Canfield and J. W. Taggart, for respondent.

BRITT, C. Foreclosure of mortgage. Defendant is a corporation. The complaint (filed May 24, 1892) was in the usual form, alleging, with other matters, that defendant made its promissory note to plaintiff on August 30, 1887, for the sum of $52,500, besides interest, due one year from date, and at the same time, to secure payment of the note, executed to plaintiff a mortgage of certain lands in Santa Barbara county. The note and mortgage were subscribed with the name of the defendant by its president and secretary, and both bore the impress of a seal purporting to be that of the corporation. The only defense made by the answer was that the defendant never authorized the execution of the note and mortgage. Defendant filed a cross complaint, stating, among other things, that about September 1, 1887, plaintiff conveyed to defendant by deed the premises described in the mortgage, and that, as part of the consideration therefor, said note and mortgage were delivered to plaintiff without the authority or consent of defendant, and that it was not privy to the purchase of the land; that defendant never appropriated to itself the use of the land or the profits thereof; that defendant's board of directors, at a meeting held May 26, 1892, passed a resolution reciting that the purchase of said land (called the "Blood Ranch") and the execution of said note and mortgage were never authorized by the defendant, and directing the president of the company to make in its name, and tender to plaintiff, a reconveyance of the land, excepting a small parcel previously conveyed by defendant, in conjunction with plaintiff, to one Thompson; that such a deed was so made and tendered to plaintiff on May 31, 1892, and by him rejected. Upon this cross complaint defendant prayed that the note and mortgage be declared void. The court sustained a demurrer to the cross complaint, and the correctness of its action in that regard is not impugned. We state the matters there alleged merely to illustrate the subsequent history of the case.

It is disclosed by the record that the plaintiff was the owner of the land (about 350 acres) in the year 1887, and authorized his nephew, also named James A. Blood, a real-estate broker, to make sale of the same at the price of $105,000, agreeing to pay him a commission of $5,000, contingent upon his effecting a sale. The broker associated several other persons with himself, and they formed in August, 1887, the defendant corporation, for the purpose of buying plaintiff's land. Said broker conducted the negotiation with plaintiff on behalf of the promoters of the corporation, and the terms of the purchase were substantially settled before August 29, 1887, at which time officers of the corporation were elected, said broker becoming its secretary and a member of its board of directors. Plaintiff executed a deed of the land to defendant, and at the same time received (but from whose hands does not clearly appear) the said note and mortgage as security for the deferred or second payment of one-half the agreed purchase price, the first payment being made partly in cash (about $37,500), paid by the subscribers to defendant's stock, and partly in such stock itself. There was no resolution of defendant's board of directors authorizing the purchase of the land or the issuance of the note and mortgage, nor was the seal affixed thereto ever adopted as the corporate seal by any direct action of the board for that purpose. Plaintiff's deed to defendant bore the same date as the mortgage,—August 30, 1887; but they were not in fact exchanged until about September 15th, following. Shortly afterwards the defendant took possession of the land, and its board of directors, by resolution, authorized the survey and subdivision of the same into lots, blocks, and streets, and fixed prices at which subdivisions might be sold. The board also ordered the letting of parcels of the land for temporary purposes, and in September, 1888, passed a resolution directing the execution of a deed to plaintiff of 8¼ acres thereof, at the price of $3,750; and in February, 1890, in the same manner authorized the conveyance of a parcel (apparently about 15 acres) to one Thompson. Deeds were executed pursuant to such resolutions. In the conveyance to Thompson plaintiff joined. The defendant caused portions of the land to be cultivated, and took the proceeds of the crops grown thereon in the year 1888. It also caused to be cut some trees growing on the land, and, through its board of directors and officers, exercised many other acts of ownership not necessary to be detailed. All the proceeds of said sales of land, as well as the net receipts from sales of crop, were paid over by defendant to plaintiff on the note in suit. In April, 1889, the board of directors passed a resolution reciting that, "owing to the great depression in real estate, it is impossible to sell our La Serena property [covered by the mortgage], either in whole or part"; and requesting plaintiff to accept the proceeds of the ranch in lieu of interest on the company's indebtedness to him, and to assume the management of the ranch. Such proposal was acceded to by plaintiff, and was carried into effect. The trial was had in November, 1892; the evidence closing on the 23d day of that month. Said real-estate broker was a witness, and, incidentally to the main purposes of his examination, gave testimony of his agency to sell the land, and of his interest in effecting the sale. On May 12, 1893, the court announced orally its decision in favor of plaintiff; and on May 25th following, before the findings were signed, defendant applied for leave to amend its answer by adding a defense thereto based on the circumstances of the dual agency of the broker and his interest in making the sale, which matters, it was alleged, were unknown to the subscribers for the company's stock. It was stated in an affidavit accompanying the motion for leave to amend that knowledge of the facts averred in the proposed amendment was first obtained by defendant from said testimony of the broker at the trial. Such amendment contained no allegations looking to a rescission of the contract, nor any reference to the offer to reconvey the land to plaintiff, as in the cross complaint to which a demurrer had been sustained. The court refused leave to amend, and judgment passed for plaintiff, with provision for execution generally in case of deficiency after sale of the premises.

1. For the purposes of the decision, it may be assumed, in accordance with the contention of appellant, that the corporation was not originally privy to the purchase of the land from plaintiff, and that the instruments in suit purporting to be its obligations were originally executed without its authority. But it is manifest—leaving out of view for the moment the effect of the broker's double agency—that the corporation adopted as its own the whole transaction with plaintiff, of which the execution of the note and mortgage was an inseparable part. Defendant, acting through its board of directors and officers, and they having full knowledge of the terms of the mortgage, took possession of the land, surveyed and platted it, cultivated it, took its rents and profits, sold and conveyed some of it, and offered to sell the remainder, and in all respects conducted itself as the absolute owner thereof, subject only to the incumbrance of the mortgage. The facts that the proceeds of sale of portions of the land and of produce grown thereon were all paid over to plaintiff for application on the indebtedness in question, and that after April 23, 1889, the entire profits of the land were delivered to him in lieu of interest, cut no figure in the case, so far as we see, except to show defendant's knowledge of the debt and recognition of its liability thereon. With the assent of defendant, signified in the manner we have stated, the title to plaintiff's land passed to defendant, and the contract of sale thus became fully executed. Obviously, defendant could not take the land in virtue of the contract made in its name, and repudiate the obligation to pay therefor imposed by the same contract. Civ. Code, §§ 1589, 2311. The principle declared in section 2310 of the same Code, illustrated by Salfield v. Reclamation Co., 94 Cal. 546, 29 Pac. 1105, and invoked by appellant, has no application to this case. Borel v. Rollins, 30 Cal. 419; Rogers v. Land Co., 134 N. Y. 211, 32 N. E. 27; Gribble v. Brewing Co., 100 Cal. 72, 34 Pac. 527, and cases cited; Fraser v. Bridge Co., 103 Cal. 79, 36 Pac. 1037; 1 Mor. Corp. §§ 548, 549. Appellant argues that the ratification or adoption of the contract by defendant cannot be considered, because not alleged in the complaint; but we understand the rule to be that it is sufficient in such cases to aver that the contract was made by defendant without describing the processes by which it was made. Goetz v. Goldbaum (Cal.) 37 Pac. 646.

2. That a broker cannot represent both parties to a contract of sale in which discretion, judgment, and skill are to be exercised by him, unless they have knowledge of his double capacity, and consent to be so represented, and that a party led unwittingly into a contract by means of such double agency may avoid the contract by methods suitable to the circumstances of the case, are propositions not to be denied. Empire State Ins. Co. v. American Cent. Ins. Co., 138 N.Y. 446, 34 N. E. 200, and cases cited; Cassard v. Hinmann, 6 Bosw. 8. Cf. Hunsaker v. Sturgis, 29 Cal. 142; Davis v. Rock Creek Co., 55 Cal. 359. In this case the real-estate broker, as a promoter of the corporation, occupied a relation of trust to the subscribers for the stock and to the corporation itself. Burbank v. Dennis, 101 Cal. 100, 35 Pac. 444. If he failed to disclose to his associates his agency for the plaintiff and his interest in effecting the sale, and if he was charged with any duty in their behalf beyond merely communicating to plaintiff their determination in the matter reached, independently of his suggestion or influence, then his conduct in negotiating the purchase as their agent also was a fraud upon them. Civ. Code, §§ 2230–2234. But fraud as a defense to an action on contract is "new matter" which must be pleaded, and cannot be given in evidence under a mere denial of the execution of the contract. Boone, Code Pl. §§ 66, 67, 148; Gushee v. Leavitt, 5 Cal. 160; Capuro v. Insurance Co., 39 Cal. 123; Wetherly v. Straus, 93 Cal. 283, 28 Pac. 1045. In the present instance defendant made no attempt at defense on the ground that fraud had infected the transaction with plaintiff until more than six months after the trial, where the facts constituting the alleged fraud were divulged, and after the court had ordered judgment for plaintiff. We are therefore of opinion that, even if defendant had once the right to assail the contract because of the agency of said broker to sell as well as to purchase the land, the right was waived by failure to assert it; and that, under the circumstances appearing, the court did not abuse its discretion in refusing to allow an amendment to the answer setting up the alleged fraud.

3. But it is said that the fact that the broker represented both parties to the transaction for the sale of the land was a matter unknown to defendant at the time of its proceedings evincive of adoption and ratification of the contract with plaintiff, and hence the effect of those proceedings as confirmatory of

the contract is nullified. Civ. Code, § 2314. That section provides that "a ratification may be rescinded when made without such consent as is required in a contract, or with an imperfect knowledge of the material facts of the transaction ratified, but not otherwise." Now, if it were conceded, as we do not concede, that defendant could obtain a rescission without some appropriate pleading showing the ground therefor, and that it had taken the steps necessary to give it the right to rescind, yet we think the evidence before us does not bring defendant's case within the scope of said section 2314. It does not show but that all the promoters of the corporation, and the corporation itself, after it was organized, had full knowledge of the broker's relation to the plaintiff and interest in bringing about a sale; or that the price and terms of sale were not fixed by those connected with him in the purchase without his intervention, so that he had no discretion to exercise for their benefit, and was a mere mouthpiece to communicate to plaintiff the result of their deliberations. See Empire State Ins. Co. v. American Cent. Ins. Co., 138 N. Y. 449, 34 N. E. 200. Since defendant seeks to avoid the effect of an active affirmance of the contract with plaintiff during a period of several years, we think it had the burden of proof to show, at least, ignorance or imperfect knowledge of matters which might have influenced its conduct, and we also think that it failed to sustain such burden; this aside from the question of the necessity to plead the alleged defense. We find no substantial error in the record. The judgment and order should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

109 Cal. 242

TAHOE ICE CO. v. UNION ICE CO. (No. 18,381.)

(Supreme Court of California. Sept. 27, 1895.)

CONTRACT—BREACH—DAMAGES—EVIDENCE.

1. Where there is a substantial conflict in the evidence, the verdict will not be disturbed on appeal.

2. On a breach by a vendee in the third year of a contract for the purchase of an annual ice crop of a specified number of tons for five years from January 1st, at a fixed price per ton, the vendor, in December of that year, commenced an action against him for the breach. *Held*, the damages for failure to take the fourth year's crop was the difference between the contract price and the value of the ice sold and left unsold.

3. Where a vendor, on a breach by a vendee in the third year of a contract for the purchase of the annual ice crop for five years, sues for damages for the years subsequent to the breach, evidence of the harvesting and quality of the crop for those years is admissible.

4. A vendor, on a breach by a vendee in the third year of a contract for the purchase of the annual ice crop for five years, may recover loss of profits for the years subsequent to that of the breach, without specially pleading them.

Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by the Tahoe Ice Company against the Union Ice Company for breach of contract. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Wilson & Wilson, T. C. Coogan, and P. F. Simonds, for appellant. Knight & Heggerty and T. S. Ford, for respondent.

McFARLAND, J. This action was brought to recover $45,982.99, damages for alleged breaches of a certain written contract between the parties. The jury returned a verdict in favor of plaintiff, and assessed the damage at $23,123.72, for which amount judgment was rendered. Defendant appeals from the judgment, and from an order denying a motion for a new trial.

The respondent and appellant are both corporations; and, for several years prior to the commencement of this action, they had both been engaged in the ice business. The respondent harvested and stored ice near Truckee, in Nevada county, where it had its ponds, ice houses, etc. The appellant was engaged in selling ice, at wholesale and retail, at numerous places throughout California, Arizona, and New Mexico, and had its principal place of business at San Francisco. On the 2d day of January, 1889, the respondent and appellant entered into a written contract by which respondent sold to appellant all of respondent's crops of ice, to the extent of 14,000 tons per annum, for five years; commencing on January 1, 1889, and ending on January 1, 1894. And appellant contracted to pay for said ice for said five years $2.25 per ton. It was provided therein "that, in the event of any breach of contract by either party or neglect to comply with terms of this agreement, then the same may be terminated by either party upon its giving reasonable notice in writing to the other party." And the clause of the contract which is chiefly important in this litigation is the following: "It is further agreed by said Tahoe Ice Company that all ice sold and to be delivered to said Union Ice Company under this agreement shall be good, merchantable ice, and suitable for the general trade at the points of delivery from the cars." The parties seem to have carried out the contract in a manner satisfactory to both for the first three years; but in the third year (1892) the appellant, about April of that year, commenced complaining to respondent that the ice was not of as good quality as that provided for in the contract. However, appellant continued to receive the ice until the 14th day of June, 1892; but on that day it served a written notice upon respondent that, on account of the latter's alleged breach of the said contract, the appellant had elected to, and thereby did, terminate the contract; and afterwards appellant refused to receive any more ice.

This action was commenced on December 17, 1892. The damages claimed were: (1) A certain amount of money due for ice delivered and received before said notice; (2) ice wasted by the refusal of appellant to take or pay for any more ice after said notice; (3) the difference between the price which appellant was to have paid for the ice of the crop of 1892 left in the ice houses and the amount which it brought at public auction after notice of the sale to appellant; and (4) the difference between what respondent should have received from appellant for the ice crop of 1893 and its actual value during that year. There was scarcely any conflict of evidence as to the amounts of the several items of damages above stated; and the verdict of the jury, so far as the sum of money assessed as damages is concerned, was clearly justified by the evidence, provided respondent was entitled to recover at all.

But appellant contends that respondent was not entitled to recover at all, because the ice furnished by respondent in 1893 was not "good, merchantable ice, and suitable for the general trade at the points of delivery from the cars"; and nearly all of its testimony was directed to that point. There is some discussion by appellant as to the proper construction of this clause of the contract; that is, as to the places at which the ice was to be "good, merchantable," etc.; but we do not understand respondent to differ with appellant on that point. The ice was loaded on the cars at Truckee, as required and requested by appellant; but it was to be good, merchantable, and suitable for the trade "at the points of delivery from the cars." In the rulings of the court upon the admissibility of evidence as to the character of the ice, we see no error. Therefore, the question whether the ice was of the character required by the contract was a pure question of fact for the jury. Upon that question a great many witnesses testified. Their testimony was, in a great measure, conflicting; but without stating the evidence here, which would be a useless task, it is sufficient to say that there was a mass of testimony to the point that the ice was good, merchantable, and suitable for the trade at the points of delivery from the cars. It appeared incidentally that, at the time when appellant commenced to complain, a new competing ice company, called the "National," had come into existence, and had reduced the price of ice; and it is suggested by counsel for respondent that this reduction in the price of ice was the main reason why appellant desired to terminate the contract; but, apart from that suggestion, the evidence upon the direct subject of the character of the ice was amply sufficient to justify the verdict, and brings the case fully within the rule which governs in cases where there is a substantial conflict of evidence.

It is contended by appellant that respondent was not entitled to recover anything for profits which would have accrued to it on the ice crop of the last year covered by the contract (1893), because such profits are merely speculative, conjectural, etc. The rule, no doubt, is that profits too remote, contingent, and speculative to be brought within any safe or reasonable estimate of damages cannot be allowed; as, for instance, profits too much depending upon fluctuations of markets and business, supposed successful speculations by the vendor with moneys that would have been realized out of the contract had it been performed, a good bargain of resale by the vendee of the thing bought if it had been delivered, etc. But such was not the kind of profit sought by and awarded to respondent; it was "a direct and natural result which the law will presume to follow the breach of the contract." Burrell v. Salt Co., 14 Mich. 34, and cases there cited. The case at bar is identical in principle, upon this point, with Hale v. Trout, 35 Cal. 229, where Sawyer, C. J., reviews the subject very elaborately. In that case there was a contract by which plaintiff agreed to manufacture upon defendants' premises, and deliver to defendants, 2,000,000 feet of "merchantable and clean sawed lumber," a certain amount of the lumber to be delivered each month, so that the contract would run through two or three years; and defendants agreed to pay therefor $10 per thousand. The plaintiff had delivered to defendants, according to the contract, about 320,000 feet, a part of which had not been paid for when defendants notified plaintiff that they would not receive or pay for any more lumber, because, as they claimed, the lumber delivered was not merchantable, etc. The action was brought "to recover the price of the lumber delivered but not paid for, and damages for breach of the contract by the defendants in declaring the contract at an end, and refusing to receive any more lumber under it." The court below refused to allow any prospective damages, and the judgment was reversed. The court held that the plaintiff was entitled "to recover, firstly, the contract price for the lumber actually delivered and received under the contract; and, secondly, upon the breach, to recover the entire damages resulting from the breach on the part of defendants in putting an end to and refusing to receive any more lumber under the contract." The opinion of the court in that case, and the many authorities therein cited, furnish answers to the arguments of appellant in the case at bar, and the court say: "The foregoing cases show that he [plaintiff] may so sue and recover the whole damage sustained in consequence of the breach without waiting for the time of performance to elapse, or repeating an offer to perform from month to month as the time of delivery arrives, and that the rule of damages upon the breach is the clear profit which the plaintiff would have made;

that is to say, the difference between the contract price and what it would have cost the plaintiff to manufacture and deliver the lumber according to the terms of the contract." The rule of damages thus stated was correct in that case, because there the plaintiff never owned the lumber, but merely manufactured it out of the timber of the defendants. In the case at bar the respondent harvested the crop of 1893, and at the time of the trial had sold some of it at the highest market price to other persons, and had the residue of the crop on hand; and the court instructed the jury, as to the crop of 1893, that if the ice was merchantable, etc., "then the measure of damages for said year is the difference between the contract price and the value of the ice sold and left unsold." This instruction was correct, and as favorable to appellant as it could have hoped for. Civ. Code, § 3311.

Appellant was not injured by the introduction of evidence showing the harvesting, quality, etc., of the ice crop of 1893. A large part of it had been harvested when the action was commenced; and it had all been harvested, and all the facts had occurred, long before the trial, which took place in the latter part of May in that year. If respondent had not harvested any crop for 1893, its damages would have been the same, although proof of them might not have been made with quite as much certainty. Respondent did nothing to increase the damages or make them more onerous to appellant.

Appellant contends that, as to the profit for 1893, the complaint is insufficient, and that evidence was erroneously admitted on that subject, because such profit was in the nature of special damages which were not specially pleaded. This contention cannot be maintained. Loss of profits which, like those claimed in the case at bar, are the direct and natural results of a contract, and which the law implies from such breach, are recoverable without special allegations. Burrell v. Salt Co., 14 Mich. 34; O'Connell v. Hotel Co., 90 Cal. 515, 519, 27 Pac. 373; Ennis v. Publishing Co., 44 Minn. 105, 46 N. W. 314; Shaw v. Hoffman, 21 Mich. 157; Masterton v. Mayor, etc., of Brooklyn, 7 Hill, 61; Laraway v. Perkins, 10 N. Y. 371.

We see no material errors in the instructions to the jury or in rulings upon admissibility of evidence. The exceptions to these rulings are covered by the general views above expressed. The court told the jury that certain things were "admitted." This expression should be avoided in charges to juries when there is any doubt on the subject; but in the case at bar we can see no injury to appellant from the use of the expression, for there was no doubt as to the matters to which it referred. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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109 Cal. 228

SMITH et al. v. GREEN. (No. 18,413.)

(Supreme Court of California. Sept. 27, 1895.)

WATER RIGHTS—ABANDONMENT—EASEMENT BY PRESCRIPTION.

1. The open, notorious, exclusive, and adverse use of water from a stream for a period of five years establishes title in the user.

2. Upon abandonment by a mere appropriator of the use of the water of a certain stream, such waters became subject to a new appropriation.

3. An executed parol license to use the waters of a certain stream is irrevocable.

Department 2. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by Minerva Smith and another to restrain O. V. Green from diverting more than half of the waters of a certain water course. From a judgment for plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Geo. H. Maxwell and L. F. Coburn, for appellant. James F. Farraher and Gillis & Tapscott, for respondents.

McFARLAND, J. This action was brought to restrain defendant from diverting more than one-half of the waters of a certain water course, called "Crystal Creek." Judgment went for plaintiffs, from which judgment, and from an order denying a motion for a new trial, the defendant appeals. The appellant claims under one David H. Lowery, and the respondents under one Joseph F. Lowery, a brother of said David. The facts found by the court are (briefly) these: In the year 1852 said David Lowery settled upon said Crystal creek, which runs from the west down towards the east. At that time it ran through unsurveyed United States public lands, and there was no way of getting paper title to said lands. There was what was called the "possessory law" of California, and under this David marked out a piece of land, or "claim," and had it regularly recorded with the county recorder of Siskiyou county. This claim embraced 160 acres, and Crystal creek ran, from west to east, nearly through the center of the claim. He built a dwelling house on the north side of, and near the bank of, the creek; and in 1853 he built a short flume and ditch to a point about 50 yards above his upper line, and therein diverted the waters of the said creek to his house for domestic use and stock, and for irrigating and dairy purposes. In the latter part of 1853 he went back to his former home, in Illinois, and induced his brother Joseph to come with his family to California, and settle beside him on Crystal creek; and Joseph arrived there in February, 1854. It was then and there agreed between David and Joseph that the latter should take up a claim immediately east, below and adjoining David's claim, embracing 160 acres lying on both sides of the creek; that they should divide the two claims by a line running east and west through the centers of the claims; that Joseph should build his dwelling house on the said original claim of David, on the south side of the creek, and opposite to the house of David; and that they should divide the waters of Crystal creek equally between them. The brothers immediately proceeded to carrry out and execute said agreement. Joseph located a claim of 160 acres immediately below the original claim of David, and they divided the two claims by a division line running east and west through the middle of the two claims, upon which they afterwards built a fence. Joseph built his house at the place designated on the upper or original David claim, at a point on the south side of the creek opposite the house of David. They divided the waters of the creek equally by running a flume from the flume of David to the house of Joseph, and, later on, by dividing the waters equally in ditches taken out lower down on the stream for irrigating purposes. Joseph occupied his half of said two claims, with one-half of all the waters of the creek, from February, 1854, until March, 1871. Joseph's half conformed very closely with what was afterwards designated in the United States surveys as the "N. ½ of S. E. ¼ of section 17, and the N. ½ of the S. W. ¼ of section 16, T. 42 N., R. 9 W., M. D. M.," which Joseph subsequently purchased from the state, as hereinafter stated. During that time he used half of the said waters for irrigation, domestic purposes, for stock, and for churning and dairy purposes; and the court finds "that during all that time [from 1854 to 1871] he used the one-half of the waters of said creek under an open and notorious claim of right; that said use was hostile, continuous, uninterrrupted, and exclusive, and was under a claim of right, and was well known to, and acquiesced in by, the parties occupying and claiming the premises now claimed and held by defendant, to wit, the premises of said David H. Lowery, as hereinabove described; and that during the whole of said time no one in any manner interfered with the said claim, or with the use as aforesaid of said waters." David occupied his half of the land until 1862, using and claiming only one half of the water, while Joseph used and claimed the other half. About January, 1859, Joseph located his half of said land as state school lands, and a certificate of location was issued to him by the state for said lands, and about the same time David located a part of his half as school lands, and received a certificate of location; and all payments required by law were made on all of said locations on or prior to the year 1865. In November, 1859, one Cotton obtained a money judgment in the district court against said David Lowery; and in November, 1861, by virtue of an execution issued on said judgment, the sheriff sold a tract of land, the description of which included David's half of the premises as above described, to one Churchill, and gave him a certificate of sale. No water rights were mentioned in the certificate, and the premises sold "were bounded on the south by the premises of Joseph F. Lowery, and for a considerable portion of the distance the line ran along the center of said Crystal creek." There is no evidence that any deed, or evidence of title other than said certificate, was ever given to Churchill. In the spring of 1865, Churchill executed a quitclaim deed of said premises to the appellant, Green, at which time appellant went into possession, and has since remained in possession. He afterwards acquired a United States patent to adjoining land, not being part of said Joseph's premises. In March, 1871, said Joseph Lowery conveyed all his said land and water rights, and his said certificates of location, to John Henry Smith, who then went into possession thereof, and remained in possession until his death, which occurred September 2, 1890. It was found that about the year 1865 or 1866 said Joseph "changed the upper place of diversion by taking down said flume, and running a flume up the said creek, a distance of about 350 yards above, into which he diverted said water by means of a dam and ditch and flume, and, while he remained on the said place (and, after him, said John H. Smith), continued to divert said waters at said point, and by means of said dam, ditch, and flume, and also by means of ditches further down said stream, and east of the public road, up to the time of the death of said Smith, viz. September 2, 1890; that said use was the full one-half of the waters of said creek, and was continuous, open, notorious, and under claim of right, and with the full knowledge and acquiescence of defendant and his predecessors at said place; that, for three or four years before the death of John H. Smith, defendant needed some more water than he had prior thereto, by reason of having sown a large amount of alfalfa grass, and, during the irrigating seasons of said years, defendant, at times, repaired his dam, and turned down to his place more than one-half of said waters, but he never claimed of said Smith the right to more than one-half of said waters, and Smith would turn said waters back and down to his place, and asserted his right to one-half of said waters; and that said diversions of said waters were for but a very short period, and were never of all of said waters of said creek flowing at said point." Up to a short time before the commencement of this action, there was just about enough of water in said creek to supply the needs of the two farms. They are similar in character and soil, and require about the same amount of water for irrigation, and both require artificial irrigation for successful cultivation. The court finds "that on or about the 14th day of June, 1891, defendant diverted all the waters of said Crystal creek from plaintiffs, and thereby deprived them of all the waters for household and domestic purposes, and for watering stock and irrigating purposes, and that he continued during all the balance of the irrigating season of

1891 to divert, at times, all, and the rest of the time the larger portion, of the waters of said creek claimed by plaintiffs," and that said diversion was to the damage of respondents in the sum of $500. And it is further found that appellant threatens to continue said diversions, and that the continuance of such diversions would cause great and irreparable damage, etc., to respondents, who are the successors in interest of said John H. Smith, deceased. The court found that respondents are entitled to one-half of the waters of said stream, and rendered judgment for an injunction, etc., as prayed for.

The foregoing are the material facts of the case, and it is apparent that, upon these facts, the judgment is a just and equitable one. It is exactly in accordance with the intent and executed purpose of the two pioneer brothers, upon whose acts the rights of the present contesting parties are based. It should stand, therefore, unless there be some inexorable legal, technical obstacle in the way of its affirmance.

It is argued that Joseph Lowery acquired no right to the waters of Crystal creek, because there was no written instrument to him from David, and a parol grant of an easement is void. The general rule, no doubt, is that one who rests his claim to an easement on a verbal contract alone, unexecuted and unaccompanied by any other facts, has no rights thereto which he can enforce. But there are many cases where a mere parol license which has been executed, and where investments have been made upon the faith of it, has been held irrevocable (Gould, Waters, §§ 323, 324, and cases there cited); and, if the case at bar is to be determined alone upon the law governing parol grants, the rights of respondents, under the facts found, would be established by that law. But, really, whatever rights David Lowery had to the land or the water in 1853–54, like all rights on the public domain in early days, depended upon possession, and ceased with the relinquishment of possession without intent to resume. His right as an appropriator depended upon continued use, and, upon abandonment of the use of any part of the water, that part was subject to new appropriation. Therefore, when David relinquished his possession of one-half the land and water, and possession thereof was taken by Joseph, who continuously thereafter kept such possession, there was no interest left in David to be conveyed seven years afterwards by execution sale. The possessory title was then in Joseph, to which had been added his state certificate for the land. Furthermore, under any view of the law, respondents and their predecessors have, and since 1859 had, a perfect title to the water by prescription.

Appellant argues quite strenuously that some of the material findings of fact are not supported by the evidence. It would be useless to give here the evidence in detail; but, in our opinion, there is no warrant for us to hold that there is no evidence to justify the findings which are attacked.

Quite a number of questions are argued by appellant, with much learning and ability, which we do not deem it necessary to discuss. The above general view of the case is all that we deem needful for its determination. It should be said, perhaps, that while appellant's criticism of the complaint, considering the latter as a work of art, has some foundation, still we think that for the purposes of a pleading it is sufficient. The original complaint would look more like the handiwork of an accomplished pleader if it contained the averment that respondents were entitled to the use of the waters involved, instead of the averment that they are the "owners of" said waters, but the context clearly shows what was meant. Moreover, the amendment to the complaint seems to obviate this partially defective averment. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(109 Cal. 29)

FUDICKAR v. EAST RIVERSIDE IRR. DIST. (No. 19,519.)

(Supreme Court of California. Sept. 5, 1895.)

PLEADINGS—QUIETING TITLE—WHEN LIES—PROPERTY—CONVEYANCE BY CORPORATION —DESCRIPTION.

1. Defects in a complaint not going to the gist of the action are cured by judgment.

2. Where the complaint in an action to quiet title contains a general allegation of ownership, and also sets out an abstract of title, merely for purposes of description, the former will control.

3. When a water right consisting of a continuous flow of water and the canal or pipe line through which it passes are owned by the same person, a finding that the canal or pipe line is real property is a sufficient finding that the water right, being appurtenant thereto, was real property, to quiet title to which an action would lie.

4. Under Civ. Code, § 654, declaring property to be that of which there may be ownership; section 802, allowing a right of way to be held and granted; and section 1044, making all property transferable,—a right of way for conducting water over land is transferable.

5. A deed of property of a corporation by its president to a partnership of which he is a member, which recites that a full board of the directors of the corporation ordered the conveyance, is not void on its face as against public policy.

6. One who claims under a deed without a seal, executed by the president of a corporation to himself, must show that it was executed under a resolution of the directors, entered on the records of the corporation, or ratified by such a resolution.

7. One claiming under a quitclaim deed without seal executed by the president of a corporation to himself need not prove that it was executed under a resolution of the directors, entered on the records, or ratified by such a resolution, unless actual fraud be shown.

8. A contract by which a director obtains from a corporation its property or an advantage to himself is voidable only at the instance of the corporation or its stockholders.

9. A description in a deed which may be made certain by evidence of the facts referred to therein is not void for uncertainty.

Department 1. Appeal from superior court, San Bernardino county; G. E. Otis, Judge.

Action by Harriet S. Fudickar against the East Riverside irrigation district to quiet title. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

Chas. R. Gray, for appellant. R. H. F. Variel and Goodcell & Leonard, for respondent.

VAN FLEET, J. This is an action to quiet plaintiff's title to a certain water right, and to certain rights in a pipe line and canal used for the carrying of the same. No demurrer was interposed to the complaint, but the defendant answered, disclaiming any title or interest or adverse claim in or to the alleged water right, asserting absolute title in defendant to the pipe line and canal, and denying any interest therein in plaintiff. The pleadings were not verified. The plaintiff had judgment as prayed for, and the defendant appeals from the judgment, and from an order denying its motion for a new trial. The appellant contends (1) that the complaint fails to state a cause of action; (2) that the findings do not support the judgment; (3) that the evidence is insufficient to justify the findings; and (4) that certain rulings of the court were erroneous.

1. No demurrer having been interposed to the complaint, mere defects in the manner of stating the facts relied on cannot now be considered. If a cause of action be stated, though defectively, the complaint must be sustained, notwithstanding any ambiguity or uncertainty that may exist therein; and, in aid of the judgment, the complaint must now receive as favorable an interpretation as its general scope will warrant. Tested by these rules, we think the complaint sufficient. It is certainly not a model of good pleading, and might have been obnoxious to a special demurrer; but, taking all the allegations together, it may fairly be construed as showing that the property claimed is real property, and that the plaintiff is the owner of that property.

The allegations of the complaint are, in substance, that plaintiff is the owner in fee of "that certain real property" described in two certain instruments annexed to and made a part of the complaint, and being—First, a certain undivided interest in 42 inches of water measured under a 4-inch pressure, flowing through a certain canal and pipe line "from" certain described lands; second, "the right of way for carrying the said 42 inches of water" through said canal and pipe line; third, the right to use said water for certain purposes; and, fourth, the right, in aid of such use, of making connections with said canal and pipe line. The instruments annexed to the complaint describe the property as follows: First, "the following described water and water rights, * * * being forty-two inches of water, continuous flow, * * * being part of that water and water right * * * on and flowing from" certain lands described; second, a right of way through a certain pipe line and canal, for the carrying of said water, "together with a proportionate interest in said pipe line and canals in the proportion that the said 42 inches bears to the whole carrying capacity thereof." The complaint further alleges that the property in question was conveyed by the Vivienda Water Company, a corporation, by said instruments, to G. A. Fudickar (plaintiff's grantor) and one F. C. Howes, and that said instruments, "together with certain transfers from G. A. Fudickar * * * to plaintiff, constitute the foundation of the plaintiff's claim, right, and title to the aforesaid water rights and rights of way." It is further alleged that the defendant claims adversely to plaintiff some estate or interest in the property, under a conveyance from said Vivienda Water Company subsequent to plaintiff's conveyance therefrom. This latter allegation, so far as relates to the canal and pipe line, is admitted by the answer.

Appellant first contends that the plaintiff has attempted to set forth a deraignment of the title, which must be considered as controlling the general allegation of her ownership, and that this deraignment is insufficient, because (a) no title is alleged in the Vivienda Water Company; (b) the alleged right is mere personal property, which cannot be the subject of an action to quiet title; and (c) the alleged rights granted by the Vivienda Water Company in the canal and pipe line constitute merely a servitude in gross, and were not transferable to plaintiff.

(a) As both the complaint and the answer show that plaintiff and defendant claim under a common grantor, it was not necessary to allege the title of that common grantor. We do not, however, consider the complaint as setting forth a deraignment of title. The reference to the instruments annexed to the complaint appears rather to be for purposes of description, and as more clearly defining the nature of the rights claimed. The allegation of the ultimate fact of ownership must therefore be deemed to control, unless inconsistent with the facts specially alleged.

(b) The answer disclaimed any interest in the water right, and we therefore could not reverse the judgment on account of any defect in the complaint in that particular. But, as we construe the complaint, the water right claimed is real property. For the purpose of ascertaining its nature, the terms of the instrument annexed to the complaint may be examined. Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327. From them it is seen to consist of a continuous flow of water on certain land, and from thence through a canal and pipe line. Such a right is, or at least may be, real property. So long as the water flows in its natural channel it is undoubtedly real property; and, while flowing by right through a canal or pipe which is real property and owned by the owner of the water, it is appurtenant to the canal or pipe, and therefore real property. Civ. Code, §§ 658, 662. The canal and pipe in this case were real property, and appellant concedes that they were such. If, therefore, plaintiff has any estate in the canal and pipe line, the water right is entirely real property. There is nothing in the cases of Mining Co. v. Hoyt, 57 Cal. 44, and Bloom v. West (Colo. App.) 32 Pac. 846, cited by appellant, which conflicts with this doctrine, and the latter case clearly recognizes its correctness.

(c) Appellant contends that neither the instruments of conveyance nor the allegations of the complaint contain anything to show that the rights claimed were appurtenant to any land of the plaintiff; that the complaint claims only a "right of way" in the canal and pipe line; and that such a right is one of the servitudes in gross mentioned in section 801 of the Civil Code, and is not transferable. It is true that, at common law, servitudes merely in gross were not assignable, though this doctrine was so far looked on with disfavor that many nice distinctions were invented to limit it. But the Civil Code of this state has swept away both the rule and the distinctions. By sections 654 and 802,[1] this class of servitude is declared to be property; and by section 1044 every species of property, except a mere possibility not coupled with any interest, may be transferred. Rice v. Whitmore, 74 Cal. 625, 16 Pac. 501. It is true that in Painter v. Water Co., 91 Cal. 73, 84, 27 Pac. 539, it was said that the servitudes named in section 802 are not assignable. That remark was, however, merely dictum; and that question was not argued in that case, nor the attention of the court directed to section 1044. In Bloom v. West, supra, cited by appellant, such rights were expressly held to be assignable. But what the complaint claims is not a mere "right of way." It is so denominated by the pleader, but the language of the conveyances, which are part of the complaint, and which control as to description, shows that it is a definite interest or estate in the canal and pipe line. By those conveyances an undivided interest, equal to the grantee's proportionate share of the water, was conveyed. That interest is a corporeal estate, and not an easement or servitude at all; and to that estate the water right is appurtenant. The complaint alleges that a certain undivided portion of this interest has been conveyed to plaintiff, and she is therefore entitled to sue with respect to that interest.

2. The findings are sufficient to support the judgment. Most of the objections urged to them by appellant are covered by what we have said respecting the pleadings. Appellant also contends that the deed from the Vivienda Water Company to Fudickar and Howes is void on its face, as against public policy, because executed by Fudickar, as president of the corporation, to himself as grantee. But this deed purports to have been made under authority of a resolution of the board of directors, directing its execution by the president and secretary, and recites that a full board was present at that meeting. On the face of the deed, therefore, the president acted, not as a trustee, but as the mere instrument of the board of directors, and the doctrine relied on does not apply.

3. Appellant's contention that the evidence does not justify the findings embraces many particulars; but, in the view which we take of the case, it is necessary to consider only one of them. As we have said, the only issue in the case is as to plaintiff's ownership of an interest in the canal and pipe line, and, under the pleadings, that interest must be regarded as real property. If it be not real property, this action cannot be maintained, for no action will lie in this state merely to quiet the title to personal property.

Plaintiff seeks to deraign her title to this real property through the Vivienda Water Company, a corporation, the title of which corporation is now held by defendant, unless it was previously conveyed to plaintiff. In actions of this character the plaintiff must establish a legal, as distinguished from a mere equitable, title. Von Drachenfels v. Doolittle, 77 Cal. 295, 19 Pac. 518; Nidever v. Ayers, 83 Cal. 39, 23 Pac. 192; Bryan v. Tormey, 84 Cal. 126, 24 Pac. 319; Harrigan v. Mowry, 84 Cal. 456, 22 Pac. 658, and 24 Pac. 48. Being real property, the interest sued for could be conveyed only by deed; and, to support the deed of a corporation (when, as in this case, it does not bear the corporate seal), it is incumbent on the party relying on it to show affirmatively that it was executed by authority of a resolution of the board of directors, entered on the records of the corporation, or that it was ratified by such a resolution. Salfield v. Reclamation Co., 94 Cal. 546, 29 Pac. 1105. In the present case the deeds relied on by plaintiff were neither authorized nor ratified by any such resolution. The only resolutions of the board of directors on the subject were the following: November 7, 1887: "Moved and seconded that the company gives and exchanges with Messrs. Howes and Fudickar forty-two inches of water from the Raynor supply for the forty-two inches now owned by them from the Vivienda Well supply, and that the forty-two inches so received from Messrs. Howes and Fudickar be sold by the company, and the proceeds thereof to represent the proceeds of the forty-two inches so exchanged from the Raynor supply, and be diverted with Mr. Raynor's consent according to the contract with him, the said water to be given and taken in exchange at the common point of meeting, the northeast corner of the Goldkoffer property. Motion carried." May 11, 1888: "It was moved and seconded that the president and secretary be authorized to carry out the terms of that certain resolution heretofore made by this company for exchange with G. A. Fudickar and F. C. Howes of forty-two inches of water, and that the president and secretary be authorized to execute and deliver and receive deeds in accordance with the above." March 12, 1889: "Resolved, that the forty-two inches of water deeded to Fudickar and Howes be carried free of charge by this company to the lands of Fudickar and Howes, in section 32, township 1 south, range 4 west, S. B. M., on the East Riverside Mesa. Motion seconded by Mr. Howes, and carried." We do not discover anything in the transcript to show that the second of the above-quoted resolutions was ever adopted by the board. But, however this may be, it is evident that none of these resolutions purport to grant any authority to convey any interest in the canal or pipe line of the corporation. At the most, they authorize only a conveyance of the water right (not in dispute in this action), and an agreement on the part of the corporation to deliver that water at a certain point or points. The deeds executed by the president and secretary, so far as they purport to convey any interest in the canal and pipe line, were therefore unauthorized and void. They were not, as respondent contends, merely voidable. They were not the acts of the corporation at all, and the parol acts of ratification and acquiescence relied on by plaintiff did not validate them (Civ. Code, § 2310), and therefore cannot aid the plaintiff in this action.

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[1] Civ. Code, § 654, declares ownership of a thing to be the right of one or more persons to use it to the exclusion of others. Section 802 provides that a servitude of a right of way, though not attached to land, may be granted and held.

These considerations dispose of plaintiff's right to recover under the pleadings as now framed, and necessitate a reversal. But the evidence tends strongly to suggest that, though the legal title is in defendant, plaintiff is equitably entitled to a conveyance from defendant, as a purchaser from the Vivienda Water Company, with notice of plaintiff's equities. As the case appears to have been tried on both sides upon a wrong theory, the evidence is not clear on this point, and it would not be proper to express at this time any opinion as to its sufficiency for that purpose. But as it appears that, under pleadings properly framed for that purpose, plaintiff might be entitled to a specific performance of the contract between the corporation and Fudickar and Howes, or some other equitable remedy, we think the ends of justice will be best subserved by permitting the plaintiff to amend so as to avail herself of her equities, if any. In this view it is probable that many of the questions discussed on this appeal will not arise upon a new trial; and we will therefore briefly state our conclusions on such points only as appear to be necessary for the guidance of the court below.

A contract between a corporation and one of its directors by which such director obtains property of the corporation, or some other advantage to himself, is not absolutely void, but is voidable only at the instance of the corporation or of its stockholders. The corporation, as well as its stockholders, may moreover be estopped from questioning its validity, either by express ratification, or by their laches or acquiescence. On these points the burden of proof is upon the director claiming the benefit of the contract. The right to avoid such a contract must be exercised by the corporation itself (or a stockholder acting for it), and cannot be transferred to another. Sanborn v. Doe, 92 Cal. 153, 28 Pac. 105. If, however, in a purely equitable action, the rights of the plaintiff depend entirely upon such a contract, the plaintiff must show the existence of the facts upon which the validity of the contract depends, even though the defendant is not the corporation, but merely its assignee, because a plaintiff must come into a court of equity with clean hands. But if the defendant claims only under a quitclaim deed from the corporation, and does not otherwise connect himself with the rights of the stockholders, this rule will not apply, unless the case of the plaintiff discloses actual, as distinguished from constructive, fraud. The defendant in such a case, not having been injured by the transaction, cannot be heard to complain of it.

The deed to plaintiff from Fudickar is not void for uncertainty. It contains a description which might, by appropriate evidence of the facts therein referred to, be shown to apply to the property here in controversy. Nothing more is required of any deed.

The other points made cannot be properly decided upon the present record, and no reference to them is necessary.

The judgment and order denying a new trial are reversed, and the cause remanded to the court below, with directions to permit the parties to amend their pleadings, as they may be advised, and for such further proceedings as shall not be inconsistent with this opinion.

We concur: HARRISON, J.; GAROUTTE, J.

109 Cal. 275

PEOPLE v. HICKEY. (Cr. 28.)

(Supreme Court of California. Sept. 30, 1895.)

SODOMY — CONVICTION FOR ASSAULT — QUESTION FOR JURY—CONSENT.

1. When, on prosecution for felonious assault and the commission of sodomy, evidence of two different occasions is given, one of which fails to show a felonious assault, but might show a simple assault, it is error to refuse to charge that defendant might be convicted of a

simple assault; Pen. Code, § 220, recognizing the offense of assault with intent to commit the crime charged.

2. On prosecution for assault on a human being, to commit sodomy, the question whether the assault was committed with consent of the other party is a question of fact, for the jury.

3. On prosecution for assault on a human being, with intent to commit sodomy, proof of consent of the other party relieves the case of the element of simple assault.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Thomas Hickey was convicted of a felony, and from an order granting a new trial the people appeal. Affirmed.

Atty. Gen. Fitzgerald, for the People. W. F. Aram, for respondent.

GAROUTTE, J. The defendant was convicted of the crime of sodomy, and his motion for a new trial was subsequently granted. The motion was granted upon the ground that the trial court committed error in not instructing the jury, at the request of the defendant, that under the evidence he might be convicted of a simple assault. There is some question made by defendant's counsel that the information charged specifically the offense of assault, in addition to the felony; but, in the absence of a special demurrer upon that ground, we think the matter of little importance. The offense of simple assault may or may not be an element in the felony designated as "sodomy." It is not an element of the offense where the crime is not committed with or upon a human being; and, secondly, it is not an element in the offense where the act is done or attempted with the consent of the other party. It therefore follows that in many cases the trial court is justified in refusing to instruct the jury as was here requested. This case is not one coming within the first class stated; and, as to the evidence of consent, we think it may well have been submitted to the jury, as a question of fact.

It is further argued that the evidence discloses either a commission of the felony, or establishes that the defendant is wholly innocent. Possibly the evidence might support such conclusion, if the prosecution had confined itself to facts occurring at a single time; but, for reasons not here perceptible, evidence was introduced as to circumstances of guilt arising upon two different occasions, and upon different days. The evidence failed to disclose the commission of a felony upon one of these occasions, at least, but possibly disclosed a simple assault. By reason of these facts the principle of law presented is enveloped in some confusion. But section 220 of the Penal Code in terms recognizes the offense of assault with intent to commit the crime here charged, and a simple assault is a necessary element in the offense named in said section 220. From all the facts here disclosed, we conclude the question of consent was an open one, which should have been presented to the jury, and also that the case was such that the question of assault, likewise, should have been submitted to the jury. For these reasons the order is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

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109 Cal. 211

CHAFFEE et al. v. BROWNE et ux. (No. 19,430.)

(Supreme Court of California. Sept. 26, 1895.)

MORTGAGES—DESCRIPTION OF PREMISES—CONSIDERATION.

1. A complaint to foreclose a mortgage showing that, at the time the mortgage was given, the debt was due and unpaid, need not further allege the nonpayment of the sum demanded.

2. A mortgage by a legatee of all her interest in the estate of the testator, executed after distribution, but referring to the administration files and records for a more complete description of the mortgagor's interest, authorized the court to decree a sale of land which afterwards vested absolutely in the mortgagor by reason of deeds of release from other legatees interested therein.

3. A mortgage by one of her interest in an estate "as child and heir at law" will cover the property she took under a will.

4. A promise made by a debtor, after being discharged in insolvency proceedings, to pay a debt contracted prior thereto, is binding on him.

5. A mortgage executed by a wife on her separate property to secure an antecedent debt for family supplies is without consideration where she, at the time the debt was contracted, lived with her husband, and her individual credit was not pledged, though the mortgage recited that she and her husband were jointly and severally indebted for the goods.

Commissioners' decision. Department 2. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by W. S. Chaffee and others against A. W. Browne and wife to foreclose a mortgage. Plaintiffs had judgment, and defendants appeal. Reversed.

H. L. Poplin, for appellants. W. H. Wilde, for respondents.

BRITT, C. Action for the foreclosure of a mortgage made by defendants, A. W. Browne and his wife, Neotia Browne, in favor of plaintiffs, who are copartners in business under the firm name of Chaffee, Gilbert & Bonestel. The mortgage bore date December 10, 1890, but was not in fact executed until May 26, 1891. It recited that the mortgagors, residents of the county of Ventura, are jointly and severally indebted to the mortgagees in the sum of $1,442.47 for goods, wares, and merchandise theretofore had and received by them (the mortgagors) from said mortgagees; that said Neotia is a child and heir at law of Peter Rice, deceased, "whose estate is in administration in said Ventura county, and, as such heir at law, is the owner of an undivided interest in the estate of said deceased, and therein is and will be entitled to her share in said estate when the same shall be settled and distribution thereof made, reference being had to the proceedings, files, papers, documents, and records of the administration of the estate of said deceased in the superior court in and for the county aforesaid, for a more full and complete description of property, rights, and credits of said estate, and the interest of said Neotia Browne therein"; that said Neotia desires to give to the mortgagees a mortgage lien upon her interest in said estate to secure payment of said indebtedness. It is then declared that in consideration "of the premises and of the indebtedness hereinabove named, justly due from the said A. W. Browne and the said Neotia Browne to the said Chaffee, Gilbert & Bonestel, I, the said Neotia Browne, the mortgagor, hereby * * * mortgage to the * * * mortgagees all and singular my estate, right, title, interest, claim, or advantage, of whatsoever kind or nature, that I have or may or can have in the estate of said Peter Rice, deceased, as a child and heir at law of the said Peter Rice, deceased, now being administered, * * * as aforesaid, to secure the indebtedness hereinabove named, together with the interest accrued and to accrue thereon." It was further provided that, in default of payment, the mortgagees might foreclose the mortgage, and have the interest of said Neotia in the property coming to her from the said estate sold to pay the amount due to them, etc.

The fact was that Peter Rice left a will, which was probated in said superior court, and the interest which Mrs. Browne had in his estate was under the will, and not as heir at law in the technical sense; and previously to the execution of the mortgage, viz. on February 3, 1891, the estate of said Rice had, by decree of said court, been distributed to the persons entitled under the terms of the will in undivided shares. The decree was filed on said February 3d, and it specifically described the property distributed. Thereby a first interest of $1,000 in value was set over to one Lucretia Bell, and to Mrs. Browne was allotted an undivided one-fourth of the residue. Among the tracts of real estate thus distributed was a certain lot in the town of San Buenaventura. On March 17, 1893, plaintiffs, at request of the Brownes, released from the mortgage a part of the lands mentioned in said decree. Such release was signed by Browne and wife, as well as plaintiffs, and recited the indebtedness to plaintiffs much the same as in the mortgage. On April 4, 1893, the distributees named in such decree, for the purpose of making partition of the lands set over to them by the terms thereof, executed deeds among themselves, by virtue of which Mrs. Browne became and is yet the owner of the whole of said town lot as and for her share of the lands before held in common. The court below decreed that this lot be sold for the payment of the expenses of the action and the amount due plaintiffs as provided in the mortgage, and that plaintiffs have execution for any deficiency against Browne and wife. Defendants pleaded, among other alleged defenses and partial defenses, that the mortgage was executed by Mrs. Browne without consideration. The court found that, in the year 1889, A. W. Browne was indebted to plaintiffs in the amount of $593.93, for provisions, wearing apparel, and other family necessaries, which plaintiffs "had theretofore sold and delivered to said A. W. Browne and Neotia Browne, his wife"; that on June 26, 1889, said A. W. Browne made a transfer of certain property to plaintiffs and others, and plaintiffs, in consideration thereof, released the said indebtedness of A. W. Browne to them; that about July 1, 1889, A. W. Browne was adjudged an insolvent debtor, and thereafter, with his approval, plaintiffs delivered to his assignee for the benefit of his creditors all the property transferred to them as above stated on June 26, 1889, whereby their release of said sum of $593.93 owed by him was "made null, void, and no effect"; that after his discharge as such insolvent (which was granted April 21, 1890) said A. W. Browne promised to pay plaintiffs said sum of $593.93, notwithstanding his discharge in insolvency; that after July 1, 1889, and thenceforward until October, 1890, A. W. and Neotia Browne purchased of plaintiffs goods, etc., consisting of groceries, provisions, wearing apparel, and other family necessaries to the amount of $848.54, which goods were charged in account upon the books of plaintiff to A. W. Browne, but the greater portion thereof were in fact purchased by said Neotia; that on December 10, 1890, plaintiffs presented to A. W. Browne a memorandum containing the figures denoting the amount then due from him and his said wife, viz. $1,442.47, consisting of said sums of $593.93 and $848.54, and thereupon and thereafter Browne and wife promised to pay plaintiffs the sum of $1,442.47, "upon the account so stated between them"; that the mortgage in suit was executed to secure the payment of said sum last named, and was made for a good and valuable consideration.

At the trial the evidence regarding the question of consideration was in substance this: Mr. Chaffee, one of the plaintiffs, testified that the indebtedness was for "goods, wares, and merchandise furnished Mr. Browne and family, nine-tenths of it, at least, to Mrs. Browne. * * * The item of $593.93 was for merchandise sold A. W. Browne prior to July 1, 1889; and the books were balanced as to that account * * * on the 2d day of July, 1889, when the receipt was given on the 1st of July, 1889; and the account of A. W. Browne was continued right along until October 8, 1890. I never had any conversation with Mrs. Browne about it at any time. I had charge of the business during all that time. We never had any account on our books against Mrs. Browne. The account is A. W. Browne, charged up to him. It was his family expenses. Q. Did Mrs. Browne ever authorize you to charge anything to her? A. Yes; by reason of her purchase of it. Q. Why did you put it to Browne's account and charge it to him? A. Because it was all in the family." Mr. Gilbert, also one of the plaintiffs, testified that in the fall of the year 1890 he presented to A. W. Browne a statement of the amount due the firm; this consisted of two items,—$593.93 and $848.54, —making $1,442.47; that Browne seemed satisfied, and said his wife had agreed to transfer her interest in her father's estate to secure the debt; that about December 10, 1890, he (the witness) saw Mrs. Browne, and she said "that Mr. Chaffee had been kind to them, and she was going to see that we didn't lose a cent by them." A. W. Browne testified that for some time after July 1, 1889, he had purchased supplies and provisions for his family from plaintiffs; that he knew his wife was purchasing goods of plaintiffs on his account after the insolvency proceedings. Mrs. Browne testified that she never had any conversation with plaintiffs about the indebtedness; that, after her husband's insolvency, she continued to purchase goods of plaintiffs,—groceries and provisions and dry goods and supplies for herself and children and family.

The appellants urge very many objections upon the record, and the case is prolific of disputed points. Since, in our opinion, a new trial should be had, some of these questions, not necessary to the determination of the appeal, may be here noticed. Thus, the objection to the complaint that it does not allege nonpayment of the sum demanded is not tenable. It does show with reasonable certainty that, at the time the mortgage was given, the debt recited was already due and unpaid. There was no occasion to reiterate the fact in terms. The description in the mortgage of the property to be charged with the intended lien was sufficient to warrant the action of the court in directing the sale of the real estate which, in virtue of the common deeds of release executed by the devisees of Peter Rice, became the property of Mrs. Browne in severalty. Although, at the time of the execution of the mortgage, the estate of Rice had been distributed, and so withdrawn from administration (Bates v. Howard, 105 Cal. 183, 38 Pac. 715), yet the mortgage refers to the files and records of the administration for a more complete description of the interest to be incumbered, and among such files was the decree of distribution, which showed the specific property in which Mrs. Browne took an interest and the extent of her right. The recitals and references contained in the mortgage make it manifest that by mention of Mrs. Browne's interest "as child and heir at law" was meant whatever property she took in the estate of her deceased father. We do not understand that Emeric v. Alvarado, 90 Cal. 461, 27 Pac. 356, is opposed to this conclusion.

So we see no error in overruling the partial defense of Browne's discharge in insolvency. The demand in suit, to the extent of $593.93, accrued before the commencement of the insolvency proceedings, but it clearly appeared that after his discharge Browne promised to pay the same. The promise was binding on him. Chabot v. Tucker, 39 Cal. 437. The release given to him June 26, 1889, seems to have been rescinded for failure of consideration. It appears unnecessary to inquire how those matters concern Mrs. Browne, if at all. Nor do we think that the plea of the statute of limitations (Code Civ. Proc. § 339, subd. 1) was sustained. The action was begun July 12, 1893; and as late as the month of March previous the appellants had signed, with the plaintiffs, the instrument releasing from the mortgage a part of the incumbered property. Such instrument referred to the alleged indebtedness in such terms as, fairly considered, constituted an acknowledgment thereof. The running of the statute was thus interrupted. McCormick v. Brown, 36 Cal. 180.

It may be that the personal liability of A. W. Browne for the whole amount claimed is made out, but we are unable to see how the judgment against Mrs. Browne and her property can stand, unless we are to depart from rules of law which have been regarded as well established. The law justly imposes upon the husband the duty to maintain his wife and children, and does not absolve him of this duty save under exceptional circumstances. The evidence here shows only the ordinary case where the wife living with the husband obtains on his credit the supplies needed in the conduct of their common domestic establishment. For such purposes she is his agent and incurs no personal liability. This is matter of common knowledge, and, when persons furnishing to families supplies of the character appearing here expect to charge the wife therefor, they must take care that they have a contract for her personal credit. This will not be implied from the mere circumstance that she personally obtains the goods. In a case arising in the state of Michigan, the dealer had charged the goods to the wife, and sued her for the price. The court said: "If he knew that she was a married woman, living with her husband, and the goods were not of a character to indicate that they were bought for other than family use in the husband's family, and she did not claim affirmatively to be purchasing them on her individual account, the natural inference would be that she was purchasing them on her husband's account and for the use of his family, and she could not be made individually liable without an express agreement to become so, or that the goods should be charged or the credit given to herself." Powers v. Russell, 26 Mich. 184. Flynn v. Messenger, 28 Minn.

208, 9 N. W. 759, is yet stronger in the same direction. Before such a demand can be charged in equity upon the wife's separate estate, there must be clear proof that she contracted the debt in her own behalf, or intended to bind her separate estate for its payment. The fact that the husband is insolvent, or unable to sustain the whole charge of the family's support, does not affect the rule. Dodge v. Knowles, 114 U. S. 430, 5 Sup. Ct. 1108, 1197; Magee v. White, 23 Tex. 180; Haynes v. Stovall, Id. 625. The intention to extend the credit to the wife, and not to the husband, must be expressly declared or otherwise communicated to her. Rushing v. Clancy, 92 Ga. 769, 19 S. E. 711. In the present case the goods were all charged to the husband's account, and the wife's personal responsibility therefor was neither offered nor required before the whole debt had accrued.

But respondents claim that defendant Neotia is concluded by the recitals in the mortgage to the effect that she and her husband are jointly and severally indebted to plaintiffs for goods, etc., had and received by them from plaintiffs. Coles v. Soulsby, 21 Cal. 47, and other cases of like nature are cited in support of the proposition. The doctrine of those cases has no application here. It was always limited to the protection of the operative words of conveyance in a grant of property (Feeney v. Howard, 79 Cal. 530, 21 Pac. 984), and never extended to executory covenants even in the same instrument. To allow it effect as contended by respondents would be to forbid inquiry into the consideration of every promissory note recited in a mortgage given for its security, which is not the law. Jones v. Jones, 20 Iowa, 388. Said recitals, relating, as they do, to the consideration of the mortgage, do not estop. Code Civ. Proc. § 1962, subd. 2. Compare Moffatt v. Bulson, 96 Cal. 106, 30 Pac. 1022; Rosenberg v. Ford, 85 Cal. 610, 24 Pac. 779; Bayler v. Com., 40 Pa. St. 37.

It follows that in the execution of this mortgage the defendant Neotia Browne undertook to assume and secure her husband's antecedent debt. "No new consideration was given at the time it was executed. The wife received nothing. The husband received nothing. The creditor parted with nothing. The instrument was therefore no more than a collateral security given for an old debt of the husband" (Bayler v. Com., 40 Pa. St. 37), and was not obligatory in the absence of a new consideration (Civ. Code, §§ 2792, 2831, 2844; Bohm v. Hoffer, 2 Colo. App. 146, 29 Pac. 905). The judgment and order should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

109 Cal. 236

VERMONT MARBLE CO. v. BROW, Constable. (No. 18,397.)

(Supreme Court of California. Sept. 27, 1895.)

SALE OR CONSIGNMENT—LEVY OF EXECUTION—NOTICE OF CLAIM BY THIRD PERSON.

1. A shipment of goods "on consignment" to one to whom plaintiff had previously been selling, to be held as the property of plaintiff and subject to its order until sold, the price at which they were listed to the consignee to be remitted as fast as they were sold, and, when he took notes in lieu of cash, these notes to be remitted as collateral for his account, does not constitute a sale.

2. A consignment of monuments under an agreement that the consignee should keep an account of their sale in a book, and send such book to the consignor on the first of each month, and, "as fast as * * * sold and erected, * * * pay to" the consignor the list price to the consignee "of each piece sold by him," either by cash or customer's note, the same to be placed to his credit as fast as cash should be received, the monuments to be paid for when sold, and remaining the property of the consignor "until paid for as above," and at all times subject to its order, does not constitute a sale.

3. A written claim of property in goods about to be levied upon under execution, which states that the claimant is the owner of the property, and had delivered it for purposes of sale, and that it was so held when seized by the sheriff, and not otherwise, sufficiently complies with Code Civ. Proc. § 689, as to the manner of "setting out the title" and "stating the grounds" of title.

Commissioners' decision. Department 2. Appeal from superior court, Yuba county; E. A. Davis, Judge.

Action by the Vermont Marble Company, a corporation, against E. Brow, as constable, to recover the value of certain monuments sold by defendant under writ of execution against the property of one Plymire. There was judgment for plaintiff, and defendant appeals. Affirmed.

Forbes & Dinsmore, for appellant. W. H. Carlin, for respondent.

BRITT, C. Defendant was constable of Marysville township, in Yuba county, and was sued in this action by plaintiff, a corporation, for the value of certain marble monuments sold by him July 10, 1893, under writs of execution issued from the justice's court of said township against the property of one Plymire, upon judgments obtained there by creditors of Plymire. The chief question involved is whether the marble when levied upon and sold was the property of plaintiff or of said Plymire. The latter had a marble shop at Marysville, and was a dealer in funeral stones and monuments. He had been accustomed for several years to purchase from plaintiff unfinished monuments and other marble needed in his business, and on July 19, 1892, he was in plaintiff's debt some $2,500 for such materials purchased previously to that time, and plaintiff was apprehensive that further sales to him outright would involve loss. To prevent this, Plymire agreed in writing with the marble company, on the date last mentioned, that, in consideration of its sending to him certain specified monuments "on consignment," he would hold the same as the property of the company until sold, and subject to its order; that, as fast as he sold the monuments, he would remit the money (the cost price at which each was listed to him); and, when he took notes in lieu of cash, he would remit the notes as collateral for his account. Subsequently, in May, 1893, Plymire agreed with plaintiff for a further consignment of goods, specifically described, written memoranda of which agreement provided in substance that he should keep an account of the sale of the monuments described in a book, and send such book to the marble company on the 1st of each month, and, "as fast as said work is sold and erected," pay to the company the list or cost price to him of each piece of marble sold by him, "either by cash or customer's note," the same to be placed to his credit as fast as cash should be received; that he held the marble merely on consignment, to be paid for when sold; and that it remained the property of the marble company "until paid for, as above," and at all times subject to its order. Ten monuments, of the value of $683, were converted by defendant, as the court found; and of these three had been delivered to Plymire under his arrangement with plaintiff of July, 1892, and seven under that of May, 1893. By the terms of an oral agreement, not embodied in said written memoranda, Plymire promised that, whenever he received payment from a customer for a monument, he would pay plaintiff an additional sum of 25 per cent. on the cost price charged him for the same by plaintiff, which further percentage was to be applied on his indebtedness of $2,500 existing before July, 1892. The debts on which the judgments mentioned were recovered against Plymire accrued prior to the receipt by him of any part of the goods in controversy. Plymire, it was further understood, would take orders for and sell the marble in his own name. He had the right to fix the selling price and the terms of sale. He was to bear the cost of transporting the marble from San Francisco to Marysville. Apparently the marble company exercised no control over his business. The monuments, when seized by defendant, were in the same condition as when received by Plymire from plaintiff, he having done no lettering or other work on them. Plymire testified at the trial: "I was not to sell these monuments in the same condition that I received them. * * * I have to sell them first, and then put on the inscription. * * * If a man wanted a design, I showed him a style of monument, and told him what it would come to when finished and set up; found out how he wanted it lettered, whether he wished any further design carved on it, and then fixed it up, put a bottom base on it, set it up, and then took the money for it." Before the execution sale, plaintiff demanded the property of defendant, the particulars of which demand appear in another connection.

Appellant contends that the facts stated evidence a sale on credit, in which the title to the goods passed at once to Plymire, and they thus became liable to execution for his debts; and it is said that it is "unmeaning for parties to a contract to say it shall not amount to a sale when it contains every element of a sale." This latter proposition is doubtless correct. The transaction must be judged by the intent of the parties to it, gathered from the whole scope and effect of their language and their explanatory conduct. Mere verbal formulas are to be disregarded if inconsistent with a specific intent thus manifested. But, looking at the facts in the light of this principle, we find no transmission of title to Plymire. "Mere transfer of possession, without the agreement, express or implied, that such transfer is a sale, on the one hand, and a purchase, on the other, will not be a sale or have the effect to transfer the title." Borland v. Bank, 99 Cal. 94, 33 Pac. 737. We consider that the true nature of the transaction was that of a sale upon condition; the condition being, as to each monument, that Plymire should sell the same to some third person. Until then he was under no obligation to pay plaintiff the cost price, and until then he was compellable to surrender the goods to plaintiff upon demand. When he sold a monument, he was precisely within the case put by Mellish, L. J., in Ex parte White, 6 Ch. App. 397, 405: "If A. hands over his goods to B., and B. is to pay him a certain price if he sells, but is at liberty to sell on what terms he pleases, and B. then sells to C., the natural inference from these facts is, beyond all doubt, that there is a sale made to B. and another sale from B. to C." But obviously there is no completed sale to B. until he sells to C. This is illustrated in Nutter v. Wheeler, 2 Low. 346, Fed. Cas. No. 10,384. There W. & Co. were in the habit of sending their manufactured goods to one Gear, in Boston; and Gear sold them at such prices and on such terms as he pleased, not less than the trade prices fixed by W. & Co. Whenever he made a sale, he was to pay W. & Co. in 30 days the prices shown in their list to him, less an agreed discount. After a sale was made by him, his credit only was looked to by W. & Co. Gear became bankrupt, and W. & Co. took back the goods of their manufacture in his shop unsold. The court said: "Until a sale was made, the property in the goods remained in the defendants [W. & Co.], and they were well justified in reclaiming those which remained on hand at the time of the failure of Gear." So, in our opinion, at the time of the levy and sale by defendant here, the monuments were the property of plaintiff, and not liable to execution for Plymire's debts.

As suggested by appellant, there may be impolicy in allowing a severance of title and possession where an ultimate sale is designed by the parties. But this consideration is for the legislature, and not the courts. The common-law right of the seller, by appropriate contract, to retain the title until performance of some valid condition on the part of the buyer, has been long recognized in this state, as almost universally elsewhere. Putnam v. Lamphier, 36 Cal. 151; Kohler v. Hayes, 41 Cal. 455; Hegler v. Eddy, 53 Cal. 597; Sere v. McGovern, 65 Cal. 244, 3 Pac. 859; Benj. Sales (Bennett's 6th Ed.) pp. 255, 282, et seq. That the property is to be resold by the first (conditional) purchaser does not affect the rule. Hirsch v. Steele, 10 Utah, 18, 36 Pac. 49, and cases cited.

Appellant further argues that the written claim to the marble in question served on him by plaintiff prior to the execution sale, under section 689, Code Civ. Proc., is defective in the manner of "setting out the title," and in "stating the grounds of such title," as provided in that section. Waiving the question whether the statute referred to imposes a condition precedent to the right to maintain the action, we think the objection is not tenable. The writing stated, among other things, that plaintiff is the owner of the property, and had delivered it to Plymire for purposes of sale, and that he held it when seized by defendant for those purposes, and not otherwise. The phrase "grounds of such title," in the Code section, is not very definite, but we suppose it has reference to the reasons why the claimant avers himself to have a title superior to that of the execution debtor; and the explanation in this instance of the manner in which such debtor acquired possession of the property from the claimant, coupled with a statement of the claimant's ownership, seems to be all that should be required in such a case. Some other points are made concerning rulings on matters of evidence at the trial, but they are unimportant. If all were determined in appellant's favor, we cannot see that the result could be affected. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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109 Cal. 250

TRUMPLER v. COTTON et al. (No. 18,319.)

(Supreme Court of California. Sept. 27, 1895.)

PROBATE PRACTICE — JURISDICTION — SERVICE BY PUBLICATION — GUARDIAN AND WARD — COMPELLING ACCOUNT—LIABILITY OF SURETIES.

1. Code Civ. Proc. tit. 11, § 1773, providing that the court may, "on application made for that purpose by any person, compel the guardian to render an account to the court of the estate of the ward," authorizes an order to a guardian to present his account on the application by the brother of the ward.

2. Code Civ. Proc. § 1808, applying the provisions relating to the estates of decedents and proceedings thereon in the superior court to proceedings in regard to guardians; section 1718, providing that the accounts of guardians and their settlement shall be governed by the provisions concerning the estates of decedents; section 1709, requiring that citations be served in the same manner as the summons in a civil action; and section 412, authorizing service by publication where the person to be served resides out of the state,—confer on the probate court power to notify by publication a guardian residing in a foreign country of its order on him to submit his accounts for settlement and allowance.

3. Under Code Civ. Proc. § 639, the probate court, having acquired jurisdiction of a nonresident guardian by publication of its order on him to present his accounts for settlement and allowance, may, on his nonappearance, refer the account to some proper person to state and present it.

4. Where the complaint in an action on a guardian's bond avers that a demand of payment was made on the sureties after a date named, "and previous to the filing of this complaint," the allowance of interest on a judgment for the amount of the bond from the date first named, instead of from the date on which the complaint was filed, is error.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

Action by Eva C. Trumpler against A. T. Cotton, E. Lathrop, and J. Goldman, upon an undertaking executed by defendant Cotton, as principal, and his codefendants, as sureties, conditioned for the faithful performance by defendant Cotton of his duty as guardian of the person and estate of plaintiff. There was judgment for plaintiff, from which defendants Lathrop and Goldman appeal. Modified.

Armstrong & Platnauer, for appellants.
Holl & Dunn, for respondent.

SEARLS, C. This is an action upon an undertaking executed by the defendant A. T. Cotton, as principal, and by defendants E. Lathrop and J. Goldman, as sureties, conditioned for the faithful performance by said Cotton of his duties as guardian of the person and estate of Eva C. Trumpler, the plaintiff herein, in the penal sum of $1,250. The cause was tried by the court without a jury and judgment rendered in favor of plaintiff for $1,250, and legal interest thereon from October 3, 1892, and costs. Defendants Lathrop and Goldman appeal from the judgment, and from an order denying their motion for a new trial.

Defendants demurred to the complaint, which demurrer was overruled by the court, and the ruling is assigned as error. The essence of defendants' objection is not fully disclosed by the allegations of the complaint. The same question arose, however, repeatedly, in the course of the trial, and is embodied in the bill of exceptions or statement on motion for a new trial, and a proper disposition of the case requires it to be met and determined. The following facts constitute the principal factors in the problem: A. T.

Cotton was duly appointed the guardian of the person and estate of Eva C. Trumpler, an infant, by the probate court of Yolo county, on the 4th day of October, 1886, and duly qualified and filed an undertaking, with the other defendants as sureties, for the faithful discharge of his duties as such guardian. Cotton caused to be made and filed on the 11th day of February, 1888, an inventory and appraisement of the estate of his ward which had come to his possession, and showing its value to be $3,513.21. On the 11th day of July, 1891, the plaintiff reached her majority. Prior thereto, and on the 24th day of March, 1890, said Cotton filed an account as guardian, showing that there was in his hands as such guardian of plaintiff, the sum of $4,539.35, in cash, as well as certain property, real and personal, which account was duly settled and allowed by said probate court. In January, 1891, the said A. T. Cotton, guardian, absconded from the state of California, and ever since has remained without and absent from the state, and has never filed any other or final account. Under these circumstances, on the 30th day of March, 1892, Harry F. G. Trumpler, a brother of plaintiff, made and filed a petition, duly verified, in the superior court of the county of Yolo, setting forth the facts, and showing that the said guardian had failed to file his final account, and praying a citation to said guardian, requiring him to appear and render his account, etc. Thereupon a citation in due form was ordered by the said court, requiring said guardian to appear and file his account on June 27, 1892; and upon an affidavit showing that said guardian was a nonresident of the state of California, and a resident of Victoria, British Columbia, dominion of Canada, etc., an order was made in due form for publication of said order requiring said guardian to appear and file his account. The order was duly published, and a copy duly deposited in the mail, directed to said guardian at Victoria, etc. Cotton, the guardian, failed to appear, and, upon proof of service of the order as aforesaid, the superior court by order appointed one E. B. Mering, Esq., a referee to prepare, render, and present for allowance the final account of said guardian. The account was made and presented by the referee, due notice of the settlement thereof given; and on the 1st day of September, 1892, defendants Lathrop and Goldman appeared by counsel, filed a demurrer to the jurisdiction of the court, and an answer, objections and exceptions to the ruling of the court and to its jurisdiction. The court overruled the objections, settled the account, and by its decree adjudged that there was in the hands of said guardian of the funds of his ward, the plaintiff herein, the sum of $4,705.51, which was decreed to be paid to plaintiff.

The points made by appellants may be stated in condensed form thus: (1) In probate matters, and in proceedings relating to guardians, the superior courts can only exercise such special jurisdiction as is conferred upon them by statute; and their powers, and the móde of their exercise, can only be exercised in the cases and in the mode provided by statute. (2) The superior court has no jurisdiction to settle and allow an account of a guardian, except when presented by him; and there is no authority for any other person to return, file, or swear to an account for him. (3) The rendering and filing of an account by a guardian is jurisdictional, and without it the court has no power in the premises, except to attach the guardian and remove him from office. (4) In a case where the guardian has absconded, and is without the jurisdiction of the court, and has failed to render his account, the case is like that where the guardian is deceased, and the sole jurisdiction is in equity. (5) The liability of the surety is dependent upon the liability of the principal, and does not attach until that of the latter is determined by a court of competent jurisdiction. (6) Harry F. G. Trumpler had no interest in the estate of plaintiff. He was a stranger to the proceeding, and his petition could confer no jurisdiction on the court to take action in the matter. The contentions of appellants, as embodied in the foregoing propositions, will be considered without reference to the consecutive order of their statement.

Title 11 of the Code of Civil Procedure, commencing at section 1294, relates to proceedings in the probate court, and relates to the proof of wills, appointment of executors and administrators, the various proceedings for the settlement of the estates of deceased persons, and cognate matters connected with or relating thereto, and also contains a chapter in reference to guardians and wards, the manner of the appointment of such guardians, their duties, etc. Section 1773 provides that every guardian must return to the court an inventory of the estate of his ward within three months after his appointment, and annually thereafter, and further provides that "the court may, upon application made for that purpose by any person, compel the guardian to render an account to the court of the estate of his ward." By section 1774 the guardian is required, upon the expiration of a year from the time of his appointment, and as often thereafter as he may be required, to present his account to the court for settlement and allowance. It will be observed from the language of section 1773, supra, that the court is authorized to compel the guardian to render an account upon the application of any person. It is not necessary that the person making such application shall have an interest in the estate. The application on the part of Harry F. G. Trumpler, the brother of plaintiff, was therefore sufficient, and the order or citation to the guardian to present his account for settlement and allowance was properly made upon such application.

Was the service of the citation sufficient to give the court jurisdiction? Under section 1808, "The provisions of this title [title 11] relative to the estates of decedents, so far as they relate to the practice in the superior court, apply to proceedings under this chapter"; that is to say, to proceedings in regard to guardians. It is further provided by section 1789 that accounts and the settlement of accounts of guardians must be had and made as required by the provisions concerning estates of decedents, unless otherwise specially provided. Turning to section 1709, Code Civ. Proc., and we find that citations must be served in the same manner as a summons in a civil action. In a civil action, when a person to be served with a summons resides without the state, service may be made by publication. Code Civ. Proc. § 412.

The affidavit for publication was such as is required in cases of publication of summons in a civil action, and must be held sufficient. The court having thus, by substitute service, obtained jurisdiction of the person of the guardian, and possessing, under the statute, jurisdiction of the subject-matter of the settlement of his account, and the guardian being without the jurisdiction of the court, and not amenable to process of attachment, and having failed to file his account, it was within the province of the court to (as was said in Graff v. Mesmer, 52 Cal. 637) cause "the account to be made up, audited, and settled upon such evidence as should be adduced on behalf of the ward." Where jurisdiction is conferred upon a court by the constitution or a statute, all the means to carry it into effect are also given; and, if the course of proceedings is not specifically designated by the Code, any suitable mode may be adopted which may appear most conformable to the Code. Code Civ. Proc. § 187. Spencer v. Houghton, 68 Cal. 82, 8 Pac. 679, is to the point that a guardian is bound to settle his accounts whenever directed by the probate court, and that the guardian who receives his appointment under the law which prescribes that notice may be served by publication is to be regarded as assenting in advance that, upon leaving the state, service may be made upon him by publication. See, also, Ashurst v. Fountain, 67 Cal. 18, 6 Pac. 849; Estate of Aveline, 53 Cal. 260; Graff v. Mesmer, 52 Cal. 637. As the court could take and state the account, so it could refer it to some proper person to state it. Code Civ. Proc. § 639; Hidden v. Jordan, 28 Cal. 309. Counsel for appellant liken a case like the present to that of Chaquette v. Ortet, 60 Cal. 594, where the administrator of an estate died before rendering his account, and this court held that jurisdiction to compel an accounting vested in a court of equity, and that an adjustment of the account by that court was a prerequisite to an action against the sureties on the administrator's bond. The decision proceeds upon the theory that "there is no provision of the statute providing for the settlement of the account of an administrator who dies before rendering an account." In re Allgier, 65 Cal. 228, 3 Pac. 849, was a similar case, and was decided upon like grounds. The reason of the rule does not prevail in a case like the present. Here the court not only has jurisdiction of the subject-matter, but the statute designates specifically the means by which it shall obtain jurisdiction of the person of the guardian, and such guardian cannot thwart the object of the law by failing or refusing to present his account. It was said in Graff v. Mesmer, from which we have quoted supra: "It is the peculiar province of the probate court to settle the accounts of guardians, and, as we have seen, it has authority to do so even after the letters are revoked. The statute contemplates that its power in this respect shall be exclusive in those cases in which the necessary authority has been conferred, as in this case. If the rule were otherwise, a suit against the sureties on the official bond would often involve the settlement of a complicated account before a jury, instead of a probate court, which possesses peculiar facilities for scrutinizing the accounts and holding the guardian to a proper accountability." That was an action against the sureties on the bond of a guardian, without a previous settlement of his account by the probate court; and the court held that the action could not be maintained until such settlement had been had, and, as hereinbefore quoted, that if the guardian could not, from any cause, be compelled to present his account, the court could order it made up from the evidence at hand. We conclude that the account, as settled by the court, was adjusted within the lines of the law, and is binding upon the sureties of the guardian, the appellants here, and hence that the various objections going to the validity of the account as settled were properly overruled by the court below, and the several errors assigned upon such rulings cannot be upheld.

The court gave judgment against the defendants, as sureties, for the sum of $1,250, the amount of their undertaking, with legal interest thereon from October 3, 1892, the date of the decree settling the account and adjudging its payment. The general rule is that judgment cannot be rendered against sureties for a greater amount than the penalty of the bond, and they "cannot be held liable for interest beyond the penalty of the bond, except for such interest as accrued from their own default in unjustly withholding payment after having been notified of the default of their principal." Murfree, Off. Bonds, § 689, and cases cited. In the absence of a notification, interest is only allowed from the issuance of the writ. The complaint avers a demand of payment from the sureties "after October 3, 1892, and previous to the filing of this complaint." The complaint was filed October 22, 1892. Under such an allegation in the complaint, we are not at liberty to assume that the demand was made until the last moment before filing the complaint. It follows that the interest for some 19 days was improperly allowed. The amount is less than $5,—a trifle scarcely worthy of an appeal. The point being made, however, we must hold that there was error in allowing interest prior to October 22, 1892. The order denying a new trial should be affirmed, and the cause remanded to the court below, with directions to modify the judgment by striking therefrom the allowance of interest from October 3, 1892, to October 22, 1892, and as so modified the judgment should be affirmed. Each party to pay his own costs on this appeal.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying the motion for a new trial is affirmed, and the cause remanded to the court below, with directions to modify the judgment by striking therefrom the allowance of interest from October 3, 1892, to October 22, 1892, and as so modified the judgment is affirmed. Each party to pay his own costs on this appeal.

TRUMPLER v. COTTON et al. (No. 18,318.)

(Supreme Court of California. Sept. 27, 1895.)

Department 2. Appeal from superior court, Sacramento County; Matt. F. Johnson, Judge.

Action by Harry F. G. Trumpler against A. T. Cotton, E. Lathrop, and J. Goldman, on an undertaking executed by defendant Cotton, as principal, and his codefendants, as sureties, conditioned for the faithful performance by said Cotton of his duties as guardian of the person and estate of Eva C. Trumpler. There was judgment for plaintiff, from which defendants appeal. Modified.

Armstrong & Platnauer, for appellants. Holl & Dunn, for respondent.

PER CURIAM. This appeal involves the same questions, and is submitted upon the same briefs, as in Trumpler v. Same Defendants (No. 18,319) 41 Pac. 1033. Upon the authority of that case, the order denying a new trial is affirmed, and the cause is remanded to the court below, with directions to modify the judgment by striking therefrom the allowance of interest from October 3, 1892, to October 22, 1892, and as so modified the judgment is affirmed. Each party to pay his own costs on this appeal.

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5 Cal. Unrep. 159

CASTLE et al. v. HICKMAN et al. (No. 18,391.)

(Supreme Court of California. Sept. 28, 1895.)

PLEDGE—SUBSTITUTION OF COLLATERAL—TRIAL BY COURT—FINDINGS—WRITTEN INSTRUMENTS—PROOF OF EXECUTION.

1. The delivery by the payee of a note, to the maker thereof, of a life insurance policy held by him as security for the payment of the note, which delivery was conditioned on the return of a paid-up policy to be thereafter issued, does not divest such payee of his lien on the security.

2. Failure of the court to make a finding is not reversible error, in the absence of a showing that there was evidence to justify a finding.

3. A copy of a decree of discharge in insolvency is not a "written instrument," within Code Civ. Proc. § 448, providing that "when the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, the genuineness and due execution are deemed admitted, unless the plaintiff file an affidavit denying the same."

Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by George H. Castle, Jr., and others, as executors of the last will and testament of George H. Castle, deceased, against Edward Hickman and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

J. G. Swinnerton and White & Dunlap, for appellants. Nicol & Orr and F. T. Baldwin, for respondents.

HARRISON, J. The defendants, Edward Hickman and Hepsabeth Hickman, his wife, executed their promissory note to George H. Castle, February 23, 1889, for the sum of $4,343, and on the 22d of April, 1890, for the purpose of securing the same, assigned to him a certain policy of insurance that had been issued by the Equitable Life Assurance Society, payable to Edward Hickman. In January, 1891, Edward Hickman was desirous that the policy should be surrendered for a paid-up policy, and thereupon he and Castle made an agreement to that effect, and that the paid-up policy, when issued, should be held by Castle in lieu of the other, and with like effect and purpose. The policy was thereupon delivered to Hickman, and the insurance company was directed by him to issue therefor a paid-up policy, and, when issued, to forward it to Castle's attorney. The company made the paid-up policy payable to the defendant Hepsabeth Hickman, and, in case of her death, to her children, and, instead of forwarding the policy to Castle's attorney, forwarded it to Hickman, who afterwards delivered it to the attorney. The present action was brought by the executors of Castle to obtain judgment for the amount of the promissory note, and declaring that the claim of the defendants upon the paid-up policy is subordinate and subject to the claim of the plaintiffs therein. Judgment was rendered in favor of the plaintiffs, and the defendants have appealed.

It was shown at the trial that the defendant Hepsabeth signed the promissory note as an accommodation to her husband, subsequent to its execution by him, and that her assignment of the policy was without any consideration. She claimed in her answer that her husband had previously agreed that he would hold the policy as a security for the payment of certain money that he had borrowed from her, and that, when he exchanged it for the paid-up policy, the latter was made payable to her for the purpose of carrying out this agreement, and that its subsequent delivery by him to Castle was without her knowledge. At the trial, however, after the plaintiffs had produced the assignment of the original policy executed by her, she testified that she executed it at the request of her husband, who informed her that Castle wanted it as security for the note that had been made to him. There was no evidence that the policy had ever been assigned by her husband to her, and the only evidence in support of her claim to it as security for her husband's debt was her statement that he had made a verbal promise to give it to her; but there was no evidence that he had ever carried out his agreement with her. She testified that, when she signed the assignment, she thought it was of another policy, but she also testified that she did not read the assignment, although it was placed in her hands. Nor did she testify that her husband had made any misrepresentation of the contents of the instrument when he asked her to sign it. Her testimony on this subject is as follows: "The paper my husband wanted me to sign was given to me. He did not tell me not to read it. He did not tell me about the contents of it. He said Mr. Castle wanted more security. I signed it because I was willing to give him more security. I was willing to aid my husband in giving Castle more security. I was desirous that Mr. Hickman should make such arrangements as might be satisfactory to Mr. Castle at the time. I signed this paper, of course, at his request." The court found that the assignment by her to Castle was not executed by mistake, or without any intention to assign it to him, and that it had not at any time prior thereto been assigned or pledged with her as security for any debt of her husband. The testimony before the court was ample to support these findings, and, upon the facts thus found, the court was authorized in holding that her claim to the policy is subordinate to that of the plaintiffs.

The agreement between Castle and Hickman that the paid-up policy should be held "in lieu of the other" gave Castle the same right to it as security for Hickman's note as if the paid-up policy had been originally delivered to him. The delivery to Hickman, for the purpose of procuring a paid-up policy to be issued in lieu thereof, did not divest the lien under which it was held by Castle. Palmtag v. Doutrick, 59 Cal. 154; Civ. Code, § 2913. Whether the paid-up policy was issued in favor of Mrs. Hickman by the direction of Mrs. Hickman, or without any directions, is immaterial. Mrs. Hickman testified that it was done without her knowledge, and there was no evidence that any directions upon the subject had been given to the company. The fact, however, that it was so issued without the consent of Castle, is all that it was necessary for the plaintiffs to show.

The failure of the court to find upon certain issues does not constitute a reversible error. It does not appear that there was any evidence in support of the affirmative defense of Edward Hickman, and it has been frequently held that it is not error for the court to omit to make a finding, unless it shall be made to appear that there was evidence which will justify such finding. The copy of the decree of discharge in insolvency, which is set forth in his answer, is not a "written instrument," within the meaning of section 448, Code Civ. Proc.

We find no error in the record, and the judgment is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

109 Cal. 294

PEOPLE v. EPPINGER. (Cr. 54.)

(Supreme Court of California. Oct. 1, 1895.)

CRIMINAL LAW—FORMER JEOPARDY—MINUTES OF TRIAL COURT—VERDICT—ISSUE OF PRIOR CONVICTION.

1. An arrest of judgment operates as an acquittal only when no evidence has been shown sufficient to charge an offense.

2. An arrest of judgment for defects in the information does not operate as a bar to the filing of an indictment for the same offense.

3. A mere ministerial irregularity in the minutes of the trial court will be disregarded.

4. On the trial, under a plea of not guilty, of an indictment charging defendant with forgery, and with having suffered a prior conviction of larceny, the jury must specifically find on the issue of prior conviction.

5. On the trial of an indictment charging defendant with forgery, and with having suffered a prior conviction of larceny, a general verdict of "guilty as charged" will be treated as an acquittal of the charge of prior conviction.

6. Where, on the trial of an indictment charging defendant with forgery and with having suffered a prior conviction of larceny, the jury return a verdict of "guilty as charged," and the court imposes the maximum penalty for forgery, it will be presumed that the court treated the verdict as a finding against defendant on the issue of prior conviction.

Department 2. Appeal from superior court, San Francisco county; William T. Wallace, Judge.

W. L. Eppinger was convicted of making, uttering, and passing a fictitious check, and appeals. Reversed.

W. M. Cannon, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

HENSHAW, J. Defendant was convicted under an indictment charging him with making, uttering, and passing a fictitious check (Pen. Code, § 476), and with having suffered a prior conviction for petty larceny. He pleaded jeopardy, former acquittal, and not guilty. Under instructions from the court to that effect, the verdicts of the jury upon the first two pleas were for the people. The instructions and the verdicts were proper.

The circumstances are that defendant had been convicted of the same offense under an information which this court held to be defective. People v. Eppinger, 105 Cal. 36, 38 Pac. 538. Upon issuance of the remittitur, the trial court, adjudging that evidence had been produced sufficient to charge him with an offense, recommitted defendant to the custody of the sheriff to await the action of the grand jury, which in due time returned this indictment. The defendant, upon the first trial, at the time of his arraignment for sentence, moved in arrest of judgment upon the ground of defects in the information, and now contends that the ruling of this court sustaining him in his motion, operates as an acquittal under section 1188 of the Penal Code. But the arrest of judgment operates as an acquittal only when no evidence has been shown sufficient to charge the defendant with any offense. It is not necessary that the evidence should be sufficient to convict him. If, for example, the people had failed to lay or prove the venue, the evidence would not be sufficient to convict, but it still might establish to a certainty that somewhere the defendant had committed the particular crime charged. And it was never intended to be nor is it the law that, under such a state of facts, the mistrial should operate as an acquittal or as a bar to further proceedings.

The minutes of the court show that defendant was arraigned upon an information charging him with forgery, whereas, in fact, it was upon an indictment charging him with uttering a fictitious instrument. But these ministerial irregularities do not affect any of the substantial rights of the defendant, who was in fact arraigned upon an indictment a copy of which was given to him, and who was thus fully informed of the nature of the charge against him, and answered to it by his pleas. The trial court has the power to correct its minutes to make them import verity, and the irregularity must be disregarded. Pen. Code, § 1258; People v. Ah Sing, 95 Cal. 654, 30 Pac. 796.

A more serious objection is found in the form of the verdict returned by the jury upon the general issue. The defendant, having pleaded not guilty, put the prosecution to proof upon all material averments, of which that of prior conviction was one. The jury did not find specifically upon this issue, as they were required to do by section 1158 of the Penal Code, but returned a verdict finding the defendant guilty as charged. Had the prior conviction not been charged, or had it been found that the charge was not true, the court, in pronouncing sentence, could have exercised its discretion, and imprisoned the defendant for any period from 1 to 14 years. Had the prior conviction been found as true, the statute then deprives the judge of this discretionary power, and makes the sentence an absolute one of fourteen years. Pen. Code, § 667, subd. 2. In this case the sentence imposed was 14 years. It is impossible to say whether this term was fixed by the judge in the exercise of his discretion, or without the exercise of discretion, in accordance with the mandate of the statute upon prior conviction found. But it is not necessary to determine this. It was unquestionably error for the jury to have failed to find upon the issue. The error being shown, the injury will be presumed, unless the contrary is clearly made to appear. People v. Ybarra, 17 Cal. 166; People v. Williams, 18 Cal. 187; People v. Stanley, 47 Cal. 113. In other words, it must be presumed that the trial judge treated the general verdict as including a finding in favor of the truth of the charge of prior conviction, and thus sentenced under section 667 of the Penal Code. Had the sentence been for any less period than 14 years, the difficulty would have been obviated, for it would then certainly have appeared that the court treated the verdict as favorable to the defendant upon the charge of prior conviction. Not having done so affords additional ground for the belief that it felt compelled to sentence under section 667. But, in so doing, the judge incorporated into the verdict a finding of fact which the jury did not make, and sentenced the defendant under an issue upon which the jury did not pass.

The verdict rendered should be treated as a finding against the defendant upon the crime charged, and in favor of the defendant upon the question of prior conviction. The judgment must therefore be reversed, with directions to the trial judge to pronounce a judgment and sentence upon defendant in the exercise of his discretion upon the facts and circumstances of the case, as provided for by section 476 of the Penal Code. And at the same time the judgment should designate the offense as the making, passing, and publishing a fictitious check with intent to defraud. People v. Johnson, 71 Cal. 384, 12 Pac. 261.

The foregoing are the only contentions which, in our view, merit consideration.

We concur: McFARLAND, J.; TEMPLE, J.

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109 Cal. 299

HILDRETH v. JAMES et al. (No. 18,353.)

(Supreme Court of California. Oct. 1, 1895.)

EJECTMENT—BY WHOM MAINTAINED.

A mortgagor cannot maintain ejectment against his mortgagee in possession until the debt is paid.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Ejectment by Laura J. Hildreth, as administratrix of the estate of Thomas Hildreth, deceased, against J. G. James and others. There was judgment for defendants, from which plaintiff appeals. Affirmed.

J. C. Black, for appellant. W. C. Graves and L. D. McKisick, for respondents.

McFARLAND, J. This is an action of ejectment to recover certain parcels of land, containing about 13,000 acres. The superior court rendered judgment for defendants, and plaintiff appeals.

We see no reason for reversing the judgment, or the order denying appellant's motion for a new trial. We pass over respondents' contentions that the title to the land passed to Charles McLaughlin by the deed to him from Burr, Shotwell, and the decedent Thomas Hildreth; that all demands of the estate of said Hildreth against respondents were compromised with William Dunphy, administrator of said estate, with the approval of the probate court; and that, even viewing the deed to McLaughlin as a mortgage, this action must fail, because a mortgagor cannot maintain ejectment against a mortgagee in possession until the debt is paid. There are other points made by respondents which we do not deem it necessary to review. We pass these points and contentions, because, in our opinion, the appellant is estopped and debarred from the prosecution of this action by the judgment rendered in the action of Kate McLaughlin, executrix of the will of Charles McLaughlin, deceased, against Laura J. Hildreth et al., to quiet title to the lands involved in the present action. The nature of that action, and the facts concerning it, are fully set forth in the transcript, and it would serve no useful purpose to recite them here. The judgment and order denying appellant's motion for a new trial are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.; TEMPLE, J.; HENSHAW, J.

VAN FLEET, J., deeming himself disqualified, did not participate in the foregoing.

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109 Cal. 301

HILDRETH et al. v. JAMES et al. (No. 18,385.)

(Supreme Court of California. Oct. 1, 1895.)

JUDGMENT—ACTION TO SET ASIDE—LACHES.

An action to set aside a judgment will not be entertained, five years after the entry thereof, on the ground that plaintiff can now prove from court records then on file that the title to certain realty determined by that judgment to be in defendant was in fact held by her, as mortgagee, the deed under which she claimed being in fact a mortgage; defendant having simply averred in the former action, to quiet title, that, as the successor of her husband, she owned the land in fee.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Laura J. Hildreth (administratrix with the will annexed of Thomas Hildreth, deceased) and others against J. G. James and others, to have canceled and set aside the judgment rendered in a certain action, in which Kate D. McLaughlin was plaintiff and plaintiffs herein were defendants, quieting the title of plaintiff therein to certain land. There was judgment for defendants, from which plaintiffs appeal. Affirmed.

J. C. Black, for appellants. W. C. Graves and L. D. McKisick, for respondents.

McFARLAND, J. This is an action to have canceled and set aside a judgment rendered in a certain action, in which Kate D. McLaughlin, executrix of Charles McLaughlin, deceased, was plaintiff, and Laura J. Hildreth (plaintiff herein) and others were defendants, rendered on the 2d day of February, 1888, quieting the title of plaintiff therein to certain land. This present action was not brought until more than five years after the entry of the judgment sought to be canceled. A general demurrer to the amended complaint was sustained, and, plaintiffs failing to further amend, judgment was rendered for defendants. Plaintiffs appeal.

The demurrer was properly sustained. In the complaint no facts are averred showing any diligence on the part of appellants, at the time of the pending of said action of Kate D. McLaughlin v. Laura J. Hildreth et al., to discover what they now allege to have been a defense to said action. One of the principal averments is that a certain deed to Charles McLaughlin, absolute on its face, was in fact a mortgage, and that the plaintiff in said action concealed the fact that it was a mortgage from the defendants therein (appellants herein). The only concealment consisted in the fact that Mrs. McLaughlin averred in her complaint that she, as successor to Charles McLaughlin, owned the land in fee. The defendants therein demurred to the complaint, and, the demurrer being overruled, they failed to answer; and there is no averment in the complaint in the present action that they took any steps to inform themselves as to what they now aver to have been the real facts. Indeed, it affirmatively appears from the complaint that they were guilty of gross carelessness. They aver, for instance, that they can now prove by the records of the probate court, then in existence, that, in the inventory of the estate of Charles McLaughlin filed by Mrs. McLaughlin, she stated that the only interest which the estate of said Charles had in the land in contest was a mortgage interest, secured by a deed absolute on its face, but given as a mortgage. If this be true, there was a public record at the time of said action which would have been evidence of the fact claimed to have been concealed. We think that the averments of the complaint are totally insufficient to warrant a decree setting aside a solemn judgment of the court of record, especially after it has stood for so long a period unchallenged. The judgment is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.; TEMPLE, J.; HENSHAW, J.

VAN FLEET, J., deeming himself disqualified, did not participate in the foregoing.

109 Cal. 258

PEOPLE v. FULTZ. (No. 21,194.)

(Supreme Court of California. Sept. 27, 1895.)

JURY — DEFENDANT'S CHALLENGES — RAPE — EVIDENCE.

1. Where a juror stated that he had an opinion as to defendant's innocence, not based on public rumor, and it would require considerable evidence to change it, the court properly sustained a challenge for cause.

2. Pen. Code, § 1070, provides that, if the offense charged be punishable with death or with imprisonment for life, defendant is entitled to 20 and the state to 10 peremptory challenges. On a trial for any other offense defendant is entitled to 10 and the state to 5 peremptory challenges. *Held*, that on a trial for rape defendant is limited to 10 challenges.

3. Where prosecutrix, on the trial of her father for rape, was asked on cross-examination whether she heard her mother say anything "bad" to her father, and answered that she called him a certain name "when he hit her," it was not error to refuse to strike out the answer, as the testimony would have been admissible on redirect examination to show the circumstances under which the language was used.

4. On the trial of a father for rape of his daughter, evidence of prior rapes is admissible to account for there having been no outcry, and to explain the absence of laceration.

5. It was not error to permit a witness for the state to testify without objection merely that she was defendant's wife, that she resided at the place where and at the time when the crime charged was alleged to have been committed, where the time and place were not disputed, and defendant testified to the same facts.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

George W. Fultz was convicted of rape, and appeals. Affirmed.

Daney & Wright, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

VANCLIEF, C. The defendant was convicted of the crime of rape, committed upon his own daughter, under the age of 12 years, in the county of San Diego, and was sentenced to imprisonment in the state prison for the term of 15 years. He appeals from the judgment and from an order denying his motion for a new trial.

1. It is contended for appellant that the trial court erred in permitting the prosecuting attorney to challenge the juror Chambers for cause, for the alleged reason that no lawful cause for the challenge was shown. The statements of the juror upon his examination warranted the court in finding that he had formed, and still had, the opinion that the defendant was not guilty; that such opinion was not based upon public rumor, common notoriety, nor statements of newspapers; that it would require considerable evidence to change that opinion, although he would try to act fairly and impartially in this case, and thought he could do so. While the statements of the juror were not very explicit, and hardly self-consistent, they clearly tended to prove a state of his mind which would prevent him from acting as a juror in this case with entire impartiality and without prejudice to the rights of the people, and therefore justified the court in so finding, under the rule announced in People v. Wells, 100 Cal. 227, 34 Pac. 718.

2. Counsel for appellant contend that the court erred in restricting the defendant to 10 peremptory challenges of jurors. Such restriction was in strict accordance with the decision of department 1 of this court in the case of People v. Clough, 59 Cal. 438, which was approved and adhered to by the court in bank in People v. Riley, 65 Cal. 107, 3 Pac. 413. It is urged, however, that those cases should be overruled, but without assigning any reason therefor which could have been overlooked or not considered by the court in those cases; therefore I think the construction put upon section 1070 of the Penal Code in those cases should be adhered to until that section is changed by the legislature, although, were the question res integra, I would be inclined to concur with counsel for appellant.

3. It is claimed that the court erred in permitting testimony that the defendant on one occasion struck his wife, the mother of the prosecuting witness. The only foundation for this objection appears in the testimony of Lizzie Fultz, the prosecutrix, and that of her brother, Fred. Fultz, given under the following circumstances: On the cross-examination of those witnesses for the prosecution the attorney for the defendant endeavored to show that the wife of defendant was hostile to him and favorable to the prosecution. On the cross-examination of Fred. Fultz he testified that he had heard his mother and father quarrel lots of times. "I have heard my mother call my father bad names. * * * I heard my mother call my father the devil once." On redirect examination by the district attorney the witness was asked and answered the following questions: "Q. You said one time you heard your mother call your father a devil. Do you know what that was for? A. No, sir; I do not remember. Q. Had your father struck her before that? A. No, sir; I do not think he had struck her before. Q. When did he strike her, then? A. After she had called him a devil." Objections to those questions by the district attorney, on the grounds of incompetency and irrelevancy, were overruled. On the cross-examination of Lizzie Fultz counsel for defendant asked and she answered as follows: "Q. Do you remember your mama saying anything bad about your papa to you? A. She called him a devil when he hit her." Thereupon counsel for defendant moved that her answer be stricken out as not responsive to the question. This motion was denied, and defendant excepted. Strictly, the question called for no further answer than "Yes" or "No"; but, supposing that she had so answered, and that counsel for defendant had not further asked her what bad thing her mother said about her father (which is very improbable), still it would have been relevant and proper for the district attorney, on redirect examination, to ask such further question, and also to ask what were the cir-

cumstances or provocation under which her mother said such bad things about her papa, as he did in the case of Fred. Fultz as above stated, and it is highly probable that he would have done so in the case of this witness. But, whether any further question touching the subject of that particular inquiry would have been asked by either party or not, the answer objected to was relevant to that particular subject, and was competent and material evidence, and the defendant could not have been injured by it; whereas the cause of the people and the reputation of defendant's wife might have suffered injury from the mere answer of the witness that she had heard her mother say something bad about her papa, without saying what it was, or stating any of the circumstances under which it was said. Besides, the mere opinion of the child witness that what her mother said was bad should not have been given without informing the jury what her mother said that was considered by the witness bad. On this ground the question itself was objectionable, and the mere answer it called for was inadmissible under a proper objection to it. The answer given, however, being relevant and competent evidence, was not subject to objection on the mere ground that it was not so; and there was no objection on the ground that the question was leading. Under these circumstances I think the court properly refused to strike out the answer of the witness. If the foregoing under this head is correct, it also answers the objection to the testimony of Fred. Fultz. On the redirect examination of this witness the district attorney was properly permitted to ask him to explain the circumstances under which his mother called the defendant a devil.

4. It is insisted that the court erred in permitting evidence of rapes and acts of lewdness committed by the defendant upon and with his daughter, other than that charged in the information. But I think such evidence was properly admitted, under the peculiar conditions of this case, to account for there having been no outcry and no pain suffered by the child, as she testified, when the particular act charged was committed; and also to account for the absence of laceration and the abnormal capacity of the vagina at the same time, as shown by the testimony of the physician who examined her person soon after the alleged commission of the act charged in the information; and, as it was important that the prosecution should account for the existence of these facts and conditions at the time and immediately after the commission of the act charged upon some other hypothesis than that of the innocence of the defendant, the evidence was admissible, even though it tended to prove the commission of other crimes than that for which the defendant was on trial. People v. Lane, 101 Cal. 513, 36 Pac. 16; People v. Tomlinson, 102 Cal. 24, 36 Pac. 506. It is true that it does not appear that the court instructed the jury that the evidence in question should be considered only for the purpose above stated, as would have been proper; but, since it does not appear that the defendant asked for such an instruction, he is not in condition to complain of the omission here; and, indeed, does not complain of it, but broadly contends that the court erred in admitting the evidence for any purpose whatever.

5. Mrs. Margaret V. Fultz was called and sworn as a witness for the people, and after she had testified, without objection, merely that she was the wife of the defendant, and that she had resided at the place where and at the time when the crime charged was alleged to have been committed, the defendant and his attorney were asked whether or not they consented that she should further testify in the case; whereupon defendant's attorney expressly declined to answer, and instructed the defendant not to answer the question; yet the defendant answered that he did not consent, and thereupon the witness was withdrawn, and testified no further. It is insisted by counsel for appellant that the court erred in permitting the defendant to be asked whether he consented that his wife should testify, and also in permitting her to testify to the extent she did as to the place of her residence at the alleged time of the commission of the act charged, for the reason that such testimony corroborated and strengthened that of her daughter as to the alleged time and place of the commission of the crime. But the testimony of the defendant also corroborated that of the daughter, not only as to time and place, but as to many other much more material circumstances. There was no question or dispute as to the time or place. Further than this, I think that the bare statement of the questions under this head is a sufficient refutation of plaintiff's contention.

6. It is finally urged that the evidence is insufficient to justify the verdict of the jury. Without stating the revolting details of the evidence, I think it enough to say that, if the jury believed the testimony of the daughter, corroborated, as it was, in respect to all material circumstances, by the testimony of Arvilla Coats and the defendant, it was amply sufficient to justify the verdict, and that it bears upon its face the impress of truthfulness. I think the order and judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are affirmed.

(5 Cal. Unrep. 171)

HEALEY v. NORTON. (No. 15,938.)

(Supreme Court of California. Oct. 11, 1895.)

SUFFICIENCY OF FINDING.

A finding that all the allegations of the complaint are true, and all the allegations of the answer untrue, is sufficient.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by C. S. Healey against William H. Norton on promissory notes. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Ash & Mathews, for appellant. James H. Creeley, for respondent.

PER CURIAM. Action against the defendant, an indorser, on three promissory notes. The complaint was unverified, and the answer was a general denial, and that the notes had been theretofore transferred to one Cerini, who brought an action to recover thereon, which was dismissed; and the judgment in that action is pleaded in bar of this. The court made general findings that all the allegations of the complaint were true, and all the allegations of the answer untrue, and rendered judgment against defendant, from which, and an order denying him a new trial, he appeals.

There is no substantial merit in the appeal. The objection that the findings are insufficient to cover the issues is untenable (Pralus v. Mining Co., 35 Cal. 34; Carey v. Brown, 58 Cal. 184; Moore v. Waterworks Co., 68 Cal. 146, 8 Pac. 816); and the further objection that the findings are unsupported by the evidence equally so. The only particular suggested under the latter point is as to the sufficiency of the demand and notice, and of that there is no question. Judgment and order affirmed.

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109 Cal. 493

BLOSS v. LEWIS, Clerk of Superior Court.

(No. 18,417.)

(Supreme Court of California. Oct. 10, 1895.)

CONSTITUTIONAL LAW—FEES OF COUNTY CLERK—LOCAL ACTS.

1. Act March 31, 1891, § 162, creates counties of the thirty-third class, and section 195 allows the clerk of each of such counties a salary of $3,000, and authorizes him to collect fees for services in settlement of estates based on the value thereof. Const. art. 11, § 5, authorizes a classification of counties for the purpose of regulating the compensation for county officers according to duties. *Held*, that section 195, in fixing a fee for official services in counties of the thirty-third class different from that in other counties, violates Const. art. 11, § 4, directing the legislature to establish a system of county government which shall be uniform throughout the state.

2. And also violates Const. art. 1, § 11, requiring all laws of a general nature to operate uniformly.

3. And also violates Const. art. 4, § 25, subd. 33, forbidding local or special laws in all cases where a general law can be made operative.

Commissioners' decision. Department 1. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Petition by George S. Bloss against J. A. Lewis, clerk of the superior court of the county of Stanislaus, for a writ of mandamus to compel defendant to file an inventory of an estate of which the plaintiff was executor. From a judgment denying the writ, plaintiff appeals. Reversed.

James F. Peck, for appellant. L. W. Fulkerth, for respondent.

VANCLIEF, C. This appeal is from a judgment of the superior court of the county of Stanislaus denying a peremptory writ of mandate petitioned for by appellant. The verified petition for the writ shows that the petitioner was one of the two executors of the will of John W. Mitchell, deceased, who at the time of his death, in November, 1893, was a resident of said county, and left estate therein, and in the counties of Madera, Fresno, and Merced, an inventory and appraisement of which had been made according to law, said estate, real and personal, having been appraised at $1,364,367.65. That in May, 1894, the petitioner and his coexecutor returned such inventory and appraisement in due form to the superior court of the county of Stanislaus, in which court said will had been proved, and in which proceedings for the settlement of said estate were then pending, and offered the same to the defendant, clerk of said court, and demanded that he receive and file the same, and then and there tendered to said clerk $25 in payment of the lawful fees for filing said inventory and appraisement, and at the same time requested that the surplus of said $25, if any there should be, over and above such fees, be credited on account of fees thereafter to accrue in the matter of said estate; but the defendant clerk then refused, ever since has refused, and still refuses, to receive or to file said inventory or appraisement, by reason whereof said executors have been prevented from making return of said inventory to said court as required by law. Wherefore petitioner prays for the writ of mandate commanding the clerk to receive and file said inventory. An alternative writ was ordered, issued, and served; and the defendant showed cause for not having obeyed it by demurring to the petition on the sole ground that it does not state sufficient facts to entitle petitioner to the writ, or any relief whatever. The court sustained the demurrer, and upon the refusal of petitioner to amend his petition rendered judgment denying a peremptory writ.

Under the classification of counties for the purpose of regulating the compensation of county officers by the county government act of March 31, 1891, the county of Stanislaus belongs to the thirty-third class, the county clerk of which, by section 195 of said act (St. 1891, p. 397), is entitled to a salary of "three thousand dollars per annum; provided, that such clerk shall collect and pay into the county treasury, for the use and benefit of the county, the following prescribed fees, to wit." Here follows a list of fees, other than those allowed in probate proceedings, as to which that section makes the following provision: "For filing papers and issuing letters testamentary, or of administration, guardianship, or special administration, in any case, two dollars. For services up to and including the final settlement of the case, in which the value of the estate does not exceed five thousand dollars, except as hereinafter provided, ten dollars, and one dollar for each additional one thousand dollars in value, as shown by the inventory."

Respondent contends that the demurrer was properly sustained, on the ground that the petition does not state nor show that the executors tendered to the clerk $1 for each $1,000 valuation of the estate, as shown by the inventory, additional to $5,000, which, in this case, amounted to $1,358; and it is not claimed that the petition is otherwise deficient, nor that the tender of $25 was not sufficient to pay all fees which could have been lawfully demanded, except the $1 for each $1,000 valuation of the estate over $5,000, as shown by the inventory. Therefore, the only question presented for decision is whether or not the clerk was authorized to demand a fee, equal to the amount of $1 for every $1,000 in excess of $5,000 of the appraised value of the estate, as a condition precedent to his duty to accept and file the inventory. If the 195th section of the county government act of March 31, 1891, is not repugnant to the constitution of the state, it is perfectly clear that it authorized the clerk to demand and collect the fee in question, and that he properly refused to accept or file the inventory without the payment or tender of such fee by or on behalf of the executors of the estate. But the appellant contends that, in so far as said section 195 purports to authorize or require the clerk to demand or collect a fee of $1 on each $1,000 valuation of estates of deceased persons in excess of $5,000, it is repugnant to the state constitution, and therefore void; and, in so contending, I think he is fully warranted by the authorities.

In thus fixing a fee for the official service of the clerk, the provision in question violates section 4, art. 11, which commands the legislature to establish "a system of county governments which shall be uniform throughout the state" (Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66); and also violates section 11, art. 1, requiring that "all laws of a general nature shall have a uniform operation," since there is no perceptible or conceivable reason why the fee or tax in question should be exacted in any one county rather than in any other (Dougherty v. Austin, 94 Cal. 620, 28 Pac. 834, and 29 Pac. 1092). It is also repugnant to subdivision 33, § 25, art. 4, forbidding local or special laws, "in all other cases where a general law can be made applicable," for surely the provision of section 195 of the county government act in question can be made general, and uniformly applicable to all counties in the state, laying aside, as we may for the purpose in hand, all considerations relating to the necessity or policy of such a general law. The only ground upon which the provision in question is claimed to be a general law is that it operates uniformly upon a class of counties authorized by the constitution itself. But the constitution (section 5, art. 11) authorizes a classification of counties only for the purpose of regulating the compensation of county officers according to duties, which purpose is not promoted nor affected in any degree by the provision in question. In the county of Stanislaus the county clerk and all other county officers, except coroner and public administrator, are compensated by fixed salaries, to be paid from the county treasury, the payment of which is no more dependent upon the tax or fee in question than it is upon any other source of an equal amount of county revenue. This tax or fee required to be collected from estates of deceased persons, like all other fees collected by the clerk and other county officers, is to be paid into the county treasury for the use of the county, and thence applied to the payment of any lawful demand against the county. True, they are primarily to be apportioned to the salary fund, but subdivision 20 of section 25 of the county government act, which authorizes the establishment of a salary fund and such other funds as deemed necessary, also authorizes the board of supervisors "to transfer moneys from one fund to another as the public interest may require"; so that, when the salary fund is deficient, money from other sources than fees may be transferred to it, and when there is a surplus in the salary fund, it may be transferred to the county bond fund, or any other fund, "as the public interest may require." Therefore, from no view of the subject does it appear that the tax or fee in question has the slightest tendency to regulate the compensation of the county clerk, or that of any other officer of the county, according to the duties of such officer, unless it can be seen that the performance of the duty of filing an inventory of the estate of a deceased person in the county of Stanislaus should be paid 5,000 times as much as is required to be paid for the performance of the same duty in the adjoining county of Merced.

Should it be suggested that the classification of counties, authorized by the constitution, for the purpose of regulating the compensation of county officers according to duties, is also appropriate for the purpose of apportioning uniform taxation, or for the purpose of regulating fees for services of county officers whose compensations are regulated by fixed salaries, and which fees are to be paid, as part of the county revenue, into the county treasury, a full and satisfactory answer to such suggestion may be found in the following cases: City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, and 29 Pac. 1092; Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66; and Darcy v. City of San Jose, 104 Cal. 642, 38 Pac. 500. These cases evolve from the authorities the principle upon which classification for legislative purposes must be based. The conclusion reached in the first of these cases is expressed as follows: "That, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." In Darcy v. City of San Jose, supra, it was said: "It will not be presumed that it was intended to deprive the legislature of all power to adapt its laws to the varying conditions of its inhabitants. From necessity it has been held that the legislature may classify, in order that it may adapt its legislation to the needs of the people. If this cannot be done, laws will not always bear equally upon the people. This classification, however, must be founded upon differences which are either defined by the constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purpose of classification, that legislation really local or special may seem to be general, but for the purpose of meeting different conditions naturally requiring different legislation." What is the difference in the condition of the people or their property in the county of Stanislaus from that of the people or property of other counties, which requires or justifies a law compelling estates of deceased persons in that county to pay more for filing a paper in the office of the clerk of the superior court than is required to be paid by such estates for the same service in any other county in the state? The obvious reason for classifying counties, for the purpose of regulating the compensation of officers according to service, is that much more official service is required in some counties than in others, the purpose of the classification being to effect equality of compensation for like services of county officers throughout the state; whereas the effect of the law in question is diversity and inequality of official fees for like services, without affecting the compensation of officers in any way.

I think the judgment should be reversed and the cause remanded, with instruction to overrule the demurrer.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with instruction to overrule the demurrer to the petition.

(109 Cal. 268)

SOUTHERN PAC. R. CO. v. WHITAKER et al. (No. 18,320.)

(Supreme Court of California. Sept. 28, 1895.)

ADVERSE POSSESSION—TITLE TO RAILROAD LAND—LIMITATION OF ACTIONS—TRIAL—HARMLESS ERROR.

1. Act Cong. July 27, 1866, granting lands in aid of the construction of a railroad, operated to vest title as soon as the map locating the proposed route was filed in the general land office, and said lands then became subject to the laws of adverse possession, and the effect of such possession was not interrupted by the subsequent issuance of a patent therefor to the railroad company.

2. Code Civ. Proc. § 325, provides that to establish adverse possession it must be shown that the land has been occupied and claimed for a period of five years continuously, and that the party has paid all the taxes which have been assessed on such land. *Held*, that a finding of adverse possession need not show that defendant paid taxes up to the time of suit, where he had held adversely and paid taxes for more than five years continuously, and the fact that one claiming under plaintiff paid taxes for one year will not defeat the title so acquired.

3. The failure to find on an ultimate fact is not prejudicial where the evidence shows that, if there had been such finding, it would have been against the party complaining.

4. The commencement of a contest in the United States land department will not stop the running of the statute of limitations of the state.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; W. W. Cross, Judge.

Ejectment by the Southern Pacific Railroad Company against Horace Whitaker and others. Defendants had judgment, and plaintiff appeals. Affirmed.

Joseph D. Redding, for appellant. E. O. Larkins, for respondents.

BELCHER, C. This is an action of ejectment to recover possession of 160 acres of land. The complaint was filed January 21, 1892, and it alleges that plaintiff is the owner and entitled to the possession of the said land, and that on or about the 1st day of December, 1891, while plaintiff was in possession and entitled to the possession of the same, the defendants wrongfully entered thereon, and wrongfully and unlawfully ousted the plaintiff from the possession thereof. The defendant Daniel Rhoads disclaimed having any interest in the demanded premises. The defendants Horace Whitaker and Nathan H. Garretson answered, and, among other defenses set up, pleaded in bar of the action sections 319–322 of the Code of Civil Procedure. The case was tried by the court without a jury, and the findings were in substance as follows: That the plaintiff was the holder of a United States patent for the land described in the complaint, which was duly issued to it on November 1, 1891, under and by virtue of the act of congress of July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast, by the southern route." That the road was located and constructed in conformity with the provisions of the granting act. That on January 3, 1867, plaintiff duly located its line of route opposite the land in controversy, and on that day filed in the office of the commissioner of the general land office at Washington a map definitely locating the route of the railroad to be built by plaintiff. That the lands in controversy were shown to be agricultural lands, and within 20 miles of the definite line of the road as laid out and constructed; and that under said act of congress plaintiff became the owner in fee of said lands, and entitled to the possession thereof, upon the filing of the map of definite location on January 3, 1867. That on April 9, 1867, the defendant Whitaker duly swore to a possessory claim including the land in controversy, setting up that he claimed the land under and by virtue of the act of the legislature of the state of California approved April 20, 1852. That Whitaker settled on said land in 1865, and built a cabin thereon in 1866, and commenced the cultivation thereof; and that up to 1876 he used said land for stock and farming purposes, and claimed the right to the possession of the same as his own under color of title adverse to the plaintiff and to the whole world. That such possession was hostile to the plaintiff, and was open and notorious, and plaintiff during said time had knowledge of his adverse claim. That in October, 1875, a certificate of purchase for said land was issued to Whitaker by the United States land office, and the purchase price therefor was duly paid by him to said land office. That on April 29, 1876, defendant Whitaker executed a grant, bargain, and sale deed of said land to defendant Garretson, and that immediately after the transfer Garretson went into possession of said land under said deed, and ever since has used the same for farming and stock purposes. That the possession of Garretson has been open, notorious, and continuous, under color and claim of title, to the exclusion of plaintiff and the whole world, for a period of more than five years; and that during the whole of said time plaintiff has had knowledge of the claim of Garretson, but has never in any way interfered with his possession or occupation before the filing of the complaint in this action. That the land was surveyed in 1869, and was withdrawn for the plaintiff May 21, 1867. That on February 28, 1872, Whitaker filed a declaratory statement for the land, alleging settlement thereon in 1865. That on November 4, 1872, he submitted his pre-emption proof, and tendered payment for the land, but his application to enter was rejected by the local officers of the United States land office, whose action was sustained by the commissioner of the general land office in June, 1874, and again by the secretary of the interior in April, 1875. That upon a motion for review the secretary of the interior, in September, 1875, allowed Whitaker to complete his entry by making payment of the land, and the former decision was revoked, and Whitaker's entry was allowed upon the proof offered by him in 1872. That after the payment of the said purchase money the railroad company moved for a new trial, which was granted July 1, 1876, and on February 27, 1877, the trial was had at the local land office at Visalia, and resulted in favor of the plaintiff, and a patent was finally issued to plaintiff in 1891, as before stated. As conclusions of law the court found that plaintiff became the owner in fee of said land, and entitled to the possession thereof, upon filing said map of definite location on January 3, 1867; and from the stipulation as to the facts and from the evidence the court concluded that the government of the United States has not had any interest in said land since January 3, 1867, and that Garretson has acquired the ownership of the land by adverse possession, and is now the owner thereof as against the plaintiff, and that plaintiff's rights thereto are barred by the statute of limitations. Judgment was accordingly entered in favor of the defendants, from which, and from an order denying its motion for a new trial, the plaintiff appeals.

That the grant to the railroad company was a grant in præsenti, and operated to vest in the grantee a perfect title to the granted lands when the map of the definite location of the road, opposite the lands, was filed in the office of the commissioner of the general land office, is no longer an open question. It has been so held by numerous decisions rendered in similar cases by the supreme court of the United States and by this court. And thereafter the grantee could have maintained an action for the possession of any such lands, without waiting for the issuance of a patent therefor. Curtner v. U. S., 149 U. S. 675, 13 Sup. Ct. 985, 1041, and cases cited; Forrester v. Scott, 92 Cal. 402, 28 Pac. 575; Jatunn v. Smith, 95 Cal. 154, 30 Pac. 200. In the case last cited it is said: "When the legal title to land is granted by act of congress, the title of the government is as effectively divested as it would be by the issuance of a patent therefor by the executive department, under authority of law; and such land then becomes subject to the limitation laws of the state in which it is situated; and an adverse possession thereof after the date of such grant for the requisite period fixed by such laws will ripen into a legal title in favor of the adverse possessor, and the effect of such possession is not interrupted or defeated by the subsequent issuance of a patent therefor, in pursuance of such act of congress,"—citing cases. But, conceding the law to be as above stated, still it is earnestly insisted for appellant that the findings are insufficient to support the judgment, because there is no finding that after 1878 defendants paid all the taxes, state, county, or municipal, which were levied and assessed upon the land, as required by section 325 of the Code of Civil Procedure, as amended in that year. The section referred to provides "that in no case shall adverse possession be considered established, under the provision of any section or sections of this Code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county or municipal, which have been levied and assessed upon such land." It was clearly proved that defendants held possession of the land and claimed title thereto adversely to all the world continuously from the time plaintiff acquired its title in 1867 up to the time of the trial, and that Garretson paid all taxes levied and assessed upon the land up to 1891, when a claimant under the plaintiff paid them for that year. If, therefore, the statute ran in favor of defendants after 1872, Garretson acquired a perfect title in fee to the land long before 1891. And the rule is that a defendant in ejectment, who relies on the statute of limitations, makes a complete defense if he shows a continued adverse possession for five years, and a payment of all taxes after 1878, although not the five years next preceding the commencement of the action; and, when the fee is once acquired by a five years' adverse possession, it continues till conveyed by the possessor, or till lost by another adverse possession of five years. Arrington v. Liscom, 34 Cal. 365; Cannon v. Stockmon, 36 Cal. 535. Whether, then, Garretson paid the taxes assessed on the land for the year 1891 was wholly immaterial, as his failure to pay them could not divest or in any way affect a title already acquired. Webber v. Clarke, 74 Cal. 11, 15 Pac. 431. The ultimate fact to be determined was whether or not Garretson had acquired title to the demanded premises under and by virtue of the statute of limitations; and to establish that fact the burden was upon him to show that he or his grantor had held possession of the property adversely, and had paid all taxes levied and assessed thereon, for a period long enough to vest the title in him under the provisions of the statute. Whether he had paid all the taxes or not was a mere probative fact, which it was not necessary to allege (Ball v. Nichols, 73 Cal. 193, 14 Pac. 831), and which was necessarily covered by the finding as to the ultimate fact. It is well settled that findings should be statements only of the ultimate facts in controversy, and not of the probative facts, though findings of probative facts, where the ultimate facts necessarily resulted from them, have been held sufficient. Mathews v. Kinsell, 41 Cal. 512; Biddel v. Brizzolara, 56 Cal. 374; Smith v. Mohn, 87 Cal. 489, 25 Pac. 696; Bull v. Bray, 89 Cal. 286, 26 Pac. 873. Ross v. Evans, 65 Cal. 439, 4 Pac. 443, cited by appellant, was an action of ejectment in which the defendant pleaded the statute of limitations. The court found an adverse possession by defendant and his grantors from 1862 to the trial, in 1883, and that the lands had never been assessed to defendant or his grantors since the year 1877, nor had they paid the taxes thereon. The plaintiff had judgment, and the defendant appealed. The court said: "The defect in the findings is that it is not made to appear by them whether any taxes were levied and assessed on the land in suit. If none were assessed, of course he is not bound to prove that he paid them. But, as said above, if the taxes were levied on the land, and assessed to any one, defendant must, to make out the defense set up, show that he or his grantors paid them." And for this defect and other errors the judgment was reversed. That case is clearly distinguishable from this, and we conclude that the findings here complained of were sufficient. But, conceding that there should have been a specific finding as to the assessment and payment of taxes, still it clearly appears from the evidence that, if such a finding had been made, it must have been in favor of defendants. And, this being so, the plaintiff was in no way prejudiced by the failure, and the judgment cannot be reversed on this ground. Hutchings v. Castle, 48 Cal. 152; People v. Center, 66 Cal. 551, 5 Pac. 263, and 6 Pac. 481; Murphy v. Bennett, 68 Cal. 528, 9 Pac. 738; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504.

It is further contended that, while the contest between the plaintiff and defendants in regard to the title to this land was pending in the land department of the government,—from 1872 down to near the time when the patent was issued, in 1891,—the statute of limitations did not and could not run in favor of defendants. No authorities in support of this contention are cited, and we know of none that uphold it. The time within which actions must be commenced is a matter of statutory regulation. Under our statute no action for the recovery of real property or the possession thereof can be maintained unless such action is commenced within five years after the cause of action accrues. Sections 318, 319, Code Civ. Proc. There are some exceptions to this rule, as provided in section 328, Code Civ. Proc., but there is no such exception as that claimed here. The plaintiff's cause of action accrued when it acquired its title in 1867, and we know of no statute or rule of law which could have prevented or stopped the running of the statute thereafter. It follows that the judgment and order appealed from should be affirmed.

We concur: BRITT, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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109 Cal. 290

JENNINGS v. BROWN. (S. F. 181.)

(Supreme Court of California. Oct. 1, 1895.)

ELECTION CONTEST—RECORD ON APPEAL—CERTIFICATION OF BALLOTS AS EVIDENCE.

In an election contest the court refused to allow ballots introduced in evidence to be incorporated into the bill of exceptions, on the ground that he had not ordered them to be marked as exhibits in the case. It appeared elsewhere in the bill of exceptions that the ballots were marked as exhibits, with the knowledge of the court, and that the court had ordered the clerk to preserve the ballots, and seal them up. *Held* that, since the ballots could be identified with certainty, plaintiff is entitled to have them certified to the supreme court.

Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

Action by J. T. Jennings against J. J. Brown to contest defendant's election as county supervisor. Judgment for defendant, and plaintiff appealed. Appellant petitioned to have certain ballots introduced in evidence certified to the supreme court. Granted.

Geo. C. Ross and Knight & Heggerty, for appellant. Sullivan & Sullivan, for respondent.

McFARLAND, J. The above-entitled action is an election contest for the office of supervisor of the second supervisor district of San Mateo county. The judgment of the superior court was in favor of Brown, and Jennings has taken an appeal from said judgment to this court. The present proceeding here, now under consideration, is a petition by the appellant, Jennings, under section 652 of the Code of Civil Procedure, to prove certain exceptions taken at the trial, which he alleges the judge of the superior court refused to allow.

At the trial the appellant—there the contestant—objected to 11 ballots which were counted by the court for the respondent, and which were marked "Contestant's Exhibits from No. 1 to 11." His objections were overruled, and he excepted. When the bill of exceptions came to be settled, the appellant requested the judge of the court to certify to the said 11 ballots, or photographs thereof, and he refused to do either. In his answer to the petition here he says that said ballots "were not marked by affiant as exhibits or otherwise, and affiant further avers that he did not order the clerk of said superior court to mark any of said ballots as exhibits"; and he further says "that, if it was right and proper for him to do so, he would, at the hearing of said matter in the supreme court, properly identify said ballots, if he could identify them, and found them in the same condition as the ballots used on the hearing and determination of this matter in the lower court." He says that he refused to certify the photographs presented by appellant because they were not correct reproductions of the ballots, and "were not, in size and general appearance, correct copies of any ballots cast at said election." He does not aver that he cannot identify said ballots. It is averred in the petition here that the clerk marked all of said 11 ballots as contestant's exhibits, and in the answer there is, upon this point, merely the averment, "upon and according to his information and belief, that none of said ballots last aforesaid were marked as exhibits by said clerk at the time same were counted as aforesaid." But the bill of exceptions which the judge allowed consists entirely of the reporter's notes of the trial, and is certified by the judge as "full, true, and correct"; and in those notes it is said of the first ballot objected to by appellant, "It is marked on the back 'Counted Contestant's Ex. No. 1,' " and of the second ballot objected to, "It is marked 'Contestant's Ex. No. 2, Counted for Brown.' " It appears, also, from said notes, that, when the third ballot to which appellant objected was counted for Brown, counsel for appellant said: "We except, and ask that it be marked 'Contestant's Ex. No. 3,' " and the same appears as to the fifth ballot objected to by appellant. As to all the rest of the 11 ballots, the reporter's notes read, "It is marked 'Contestant's Ex. No. ——' " (giving the number). The notes show that the same course was taken with certain exhibits of the opposite party. They also show that at the close of the evidence the following occurred: "The Court (to the clerk): Reserve these exhibits very carefully, and see that they are sealed up." It seems, therefore, that there can be no difficulty in identifying and certifying the 11 exhibits of appellant. Counsel ought to be able to stipulate to their genuineness. The reporter's notes show that they were marked with the knowledge and consent of the court, which is equivalent to an express order of the court to that effect.

In Lay v. Parsons, 104 Cal. 661, 38 Pac. 447, which was a case like the one at bar, the court said: "In instances involving defects like the one here complained of, in order to put this court, as nearly as possible, in possession of the facts as they appeared to the lower court, either the original ballots, authenticated and identified in some appropriate manner, and properly referred to in the bill of exceptions, should accompany the record, or a copy, by photographic or other process by which the fac simile can be produced, should be in the bill of exceptions." There can be no proper determination of the validity of a ballot, under our present election laws, without an inspection of the ballot itself; and the appeal in this case would be an empty proceeding, without the presence here of the ballots to which the appellant objected. To grant petitioner's request to have said ballot certified for the inspection of this court would not be inconsistent at all with the rulings in Hyde v. Boyle, 86 Cal. 352, 24 Pac. 1059; Vance v. Superior Court, 87 Cal. 390, 25 Pac. 500; and kindred cases. It cannot be said, in the case at bar, that the judge of the trial court has allowed an exception to a ruling admitting a certain ballot in evidence, when the ballot itself—the very thing objected to—is excluded from the bill. Of course, where the question is whether or not certain evidence was actually introduced, the determination of the judge, evidenced by the bill or statement settled by him, is conclusive; but there is no such question here. There is no doubt that the ballots were marked at the trial as alleged by petitioner, and that they can be easily identified. They are presumed to be in the same condition as when the court ordered the clerk to seal them up and take care of them. If it shall be contended that they are not in the same condition, that matter can be inquired into here. It is ordered that the judge of the superior court of the county of San Mateo direct the county clerk of said county to bring into his court the said ballots introduced in evidence at the trial of said action of J. T. Jennings v. J. J. Brown, and that said judge do certify the said 11 ballots marked "Contestant's Exhibits from No. 1 to No. 11" as the originals of said ballots referred to in the bill of exceptions herein, and send the same, sealed, to the clerk of this court.

TEMPLE and HENSHAW, JJ. We concur in the judgment and in the opinion, except that in our judgment the right to prove an exception involves the right, when necessary, to prove upon what it was based.

(109 Cal. 304)

HIGGINS v. CALIFORNIA PETROLEUM & ASPHALT CO. (No. 19,524.)

(Supreme Court of California. Oct. 2, 1895.)

MINING LEASE — CONSTRUCTION — ROYALTIES — WHAT CONSTITUTES "GROSS TON."

1. A joint lease for mining purposes, executed by owners in severalty of two adjoining tracts, provided that the lessee should pay as royalty a certain sum monthly to the lessors. One of the lessors subsequently conveyed his separate tract to the lessee. *Held*, that the remaining lessor was entitled to royalty thereafter in an amount equal to the value of his distinct tract as compared with that conveyed to the lessee.

2. Where a mining lease, executed jointly by owners in severalty of adjoining tracts, provided that the lessee could extract asphaltum from any part of the leased premises, and the share of one lessor was subsequently conveyed to the lessee, it is no defense, to an action by the remaining lessor for royalties, that no asphaltum was taken from his separate tract.

3. Under Pol. Code, § 3215, providing that 20 hundredweight constitute a ton, the words "gross ton," as used in a mining lease as the basis for payment of royalties, means a ton of 2,000 pounds.

4. Under a mining lease of "a deposit of bituminous rock," and a "deposit of liquid asphaltum," providing that the lessee should pay a royalty "for each and every gross ton of bituminous rock and liquid asphaltum which he may have mined, taken, or removed from said premises," the words "mined," "taken," or "removed," were used in the same sense, and do not mean that the royalty shall be paid on a basis of the crude rock, or the refined product, after being shipped from the premises.

5. In a mining lease of a deposit of bituminous rock, and also of a deposit of liquid asphaltum, a provision that the lessee should pay a certain royalty per ton on liquid asphalt applies only to the asphalt taken from the liquid deposit, and not to liquid asphalt extracted from the crude rock.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county; W. C. Cope, Judge.

Action by C. P. Higgins against the California Petroleum & Asphalt Company to recover royalties under a mining lease. Judgment for plaintiff, and defendant appeals. Affirmed.

R. B. Canfield, for appellant. Wright & Day, for respondent.

VANCLIEF, C. On June 4, 1887, the plaintiff and Mary A. Ashley executed a written lease to Joseph Scheerer, for the term of 20 years of the following described property: "That certain deposit of bituminous rock which lies between the Carpinteria creek on the west, and the east line of the lands of said C. P. Higgins on the east, and the S. P. Branch R. R. Co's railway line on the north, and the Pacific Ocean on the south; also that certain deposit of liquid asphaltum which crops and flows out of the earth within 200 yards of the palm tree standing S. E. of the old Olmstead ranch house,—all in Carpinteria valley, in the county of Santa Barbara, state of California." In consideration of the lease, the lessee, among other things, promised to pay "to the parties of the first part" (lessors), on the first day of each and every month thereafter, during said term, "the sum of 50 cents per ton for each gross ton of bituminous rock and liquid asphaltum which he may have mined, taken, or removed from said premises during the calendar month then next preceding, and at the same time and place of such payment to deliver to the said parties of the first part a full and true statement in writing of the number of gross tons of bituminous rock and liquid asphaltum mined, taken, or removed from said premises during the calendar month for which such payment is then being made." It was mutually agreed that the lessee should have "the right of ingress and egress to and from said deposits, over the lands owned by the said parties of the first part, upon such line as may be agreed upon between the parties hereto; the party of the second part to have the privilege of erecting such building upon the land adjacent to such deposits as may be necessary for the accommodation of his workmen and the prosecution of his work." The lease contains other covenants and conditions not relevant to any question to be considered on this appeal. On December 16, 1891, the defendant became the sole owner of the lease by assignment. It appears, and is undisputed, that, at the date of the lease, the lessors were not tenants in common of any part of the land described in the lease, nor of any part of the "deposit of bituminous rock" leased, but that each severally owned a definite part of both, adjoining each other, and the "deposit" leased extended, horizontally, through the contiguous lands of both lessors as described in the lease. On June 22, 1892, Mary A. Ashley conveyed all that part of the land described in the lease, which she severally owned, to the defendant, by a definite description. Since this conveyance the tract so conveyed has been known as the "Ashley Tract," and the remainder of the land described in the lease as the "Higgins Tract;" and by these names they will be distinguished in this opinion. During the first seven or eight months immediately after the conveyance of the Ashley tract to defendant, the plaintiff claimed, and was paid by defendant, one-half of the stipulated rent or royalty (25 cents per ton) upon statements regularly made by defendant to plaintiff, as per lease; and during the same period, and ever after, Mary A. Ashley treated the lease, so far as she was interested, as extinguished or merged in her deed of her land, and no rent or royalty has ever been demanded by or paid to her. In February, 1893, differences arose between plaintiff and defendant as to the proper construction of the lease in the following particulars: (1) Whether or not payment on rock merely mined, and not removed from the premises, was due before the rock was shipped away from the mine; (2) whether a ton should consist of 2,240 pounds, or only 2,000 pounds; and (3) whether, when the bituminous rock was reduced to liquid asphalt before removed from the premises of the mine, the royalty was to be paid on each ton of the crude rock, or only on each ton of the liquid asphalt. But defendant continued to pay the royalty on all rock mined, estimated at 2,000 pounds for a ton, until April 1, 1893, after which date it refused to make further payment on rock not shipped from the mine, or per ton of less than 2,240 pounds, or upon rock reduced to liquid asphalt at the mine, except per ton of the liquid extracted therefrom. The object of this action is to recover from defendant $1,000, unpaid royalty on 4,000 tons of rock at 25 cents per ton, alleged to have been mined from the deposit (whether reduced to asphalt or shipped from the mine or not) during the months of April, May, June, and July, 1893. The court found that 2,685 tons (of 2,000 pounds) had been mined from the deposit by defendant during those four months, on which there was due and unpaid to plaintiff a royalty of 25 cents per ton, amounting to $671.25, for which judgment was rendered against the defendant. Defendant appeals from the judgment, and from an order denying its motion for a new trial.

1. It appears that no bituminous rock has ever been mined from that part of the deposit lying within the Higgins tract, by the lessee, or by any assignee of the lease, and that all the rock mined under the lease, including that mined by defendant during April, May, June, and July, 1893, has been mined from that part of the deposit lying within the boundaries of the Ashley tract, which was conveyed to defendant on June 22, 1892, as aforesaid; and for this reason the appellant contends that he is not obligated by the lease to pay any royalty to plaintiff on rock mined from that part of the deposit lying within the Ashley tract. No case has been cited, and I have found none, in which distinct contiguous properties of different owners have been jointly leased as in this case, though leases by tenants in common have been of frequent occurrence. Yet I have no doubt that the lease in question here was and is a valid lease, as seems to be conceded by both parties, who differ only as to its effect. It is to be observed that no part of the land described in the lease, except the deposit of bituminous rock therein, and a right of way thereto, with the right to construct such buildings on the land as necessary to carry on the work of mining, was leased. Yet, such a lease of a mine, reserving a royalty as rent, is unobjectionable. Gear, Landl. & Ten. §§ 73, 133, and cases there cited; Wolffing v. Ralston, 61 Cal. 288; Waters v. Stevenson, 13 Nev. 157. Had the lessors in this case been tenants in common of the demised premises, the effects of a conveyance by Ashley of her reversionary estate therein to the lessee would have been to merge her interest in the leasehold term in the reversion, and to extinguish pro tanto the covenant of the lessee to pay rent; yet, thereafter, Higgins would have been entitled to receive from the lessee the same portion of rent as before such conveyance. Hill v. Reno, 112 Ill. 154; Van Rensselaer v. Bradley, 3 Denio, 135; Linton v. Hart, 25 Pa. St. 195. And I perceive no reason why the effects of Ashley's conveyance of her separate part of the demised premises, of which she was sole owner, should not be substantially the same as they would have been if the lessors had been tenants in common of every part of such premises; the only possible difference being in the mode of apportioning the rent. Had they been tenants in common, Higgins would still be entitled to a part of the rent proportionate to his undivided portion of the demised premises; but, as they are not tenants in common, he is entitled, in the absence of an express or presumed agreement to the contrary, to a portion of the royalty proportionate to the comparative value of his distinct part of the demised premises. Hill v. Reno, supra. And in this case the terms of the lease warrant the presumption that each lessor was to receive one-half of the royalty, and such presumption is in perfect accord with the practical construction of the lease, by the parties thereto, up to April, 1893. The fact that, prior to the commencement of this action, the lessee had elected to mine only in that part of the "deposit" lying within the Ashley tract detracts nothing from the right of Higgins to demand his proper share of the royalty, nor from the obligation of defendant to pay it. The royalty of 50 cents on each ton of rock mined was, by the terms of the lease, to be paid to the lessors, not to the individual lessor from whose land the rock may have been mined. The lease does not restrict the mining to any particular part of the deposit at any time. The lessee has had the right, at all times since the execution of the lease, to mine any part of the deposit, and will continue to have such right until the expiration of the term of 20 years, only about 5 years of which had elapsed when this action was commenced; and more than one-half of the term is still in the future, during which defendant is at liberty to mine exclusively in that part of the deposit lying within the Higgins tract, and may completely exhaust it. The royalty per ton of

rock mined is but a mode of estimating the rent to be paid for the right to occupy exclusively the whole premises demised, and to mine any part or all parts thereof at any time during the term, at the election of the lessee.

2. I think the court did not err in holding that a "gross ton of bituminous rock" is equal to 2,000 pounds avoirdupois, and no more. Section 3215, Pol. Code, provides that "the hundred-weight consists of one hundred avoirdupois pounds, and twenty hundred-weight constitute a ton." No act of congress conflicting with this has been cited, and I know of none. The regulation of weights and measures by a state is valid, so far as not in conflict with any act of congress. Weaver v. Fegely, 29 Pa. St. 27. It may be true that the parties might have contracted for a ton constituted of 2,240, or of 3,000, pounds, but I find nothing in the lease indicating such intention; and the practical construction by the parties up to April, 1893, shows that they intended a gross ton to be 2,000 pounds and no more. If the word "gross" was intended to qualify the word "ton" in any way, I think it was to distinguish the crude, unrefined rock of which it was composed from the product of a process of refinement thereof by which it is reduced to pure asphalt, which product is only one ton from about seven tons of the crude rock. Such a use of the word would have been appropriate, as it appears that a portion of the crude rock was reduced to asphalt by the lessee before it was shipped away from the premises. The only thing that can be said against this construction is that the adjective is misplaced, as it often is; as, for example, when one asks for a good cup of coffee, meaning, and being perfectly understood to mean, a cup of good coffee.

3. It is contended that the royalty was not due until after the crude rock or the refined product thereof was shipped away from the premises. The lease provides that payment of the royalty should be made on the first day of each month "for each and every gross ton of bituminous rock and liquid asphaltum which he may have mined, taken, or removed from said premises" during the preceding month. The "premises" referred to are the demised premises,—"the deposit of bituminous rock,"—and the lessee is obligated to pay on each ton mined, or taken, or removed from that deposit. If the words "mined," "taken," and "removed," are used in different senses, then the royalty is due when the rock is simply mined from the deposit, as is plainly indicated by the disjunctive word "or." But I think those words were used in nearly the same sense, and that neither of them was used in the sense of transportation to market. Otherwise, the lessee might reduce the royalty from 50 cents to about 7 cents per ton of the gross rock, by reducing it to asphalt before shipping it for transportation to market, which, to say the least, was probably not intended. The words "taken" and "removed" were probably intended to apply solely to the "liquid asphaltum which crops and flows out of the earth," near the palm tree, which could be taken without mining, but none of which, it is admitted, ever was taken or shipped by the lessee or by the defendant.

4. It is further contended, for appellant, that the provision of the lease that the lessee should pay 50 cents per ton royalty on liquid asphalt applies to and includes liquid asphalt extracted from the crude rock mined from the "deposit," as well as the liquid asphalt flowing from the earth near the palm tree; but I think the court did not err in holding that the royalty on liquid asphalt was intended to apply only to such as should be taken from the spring "within 200 yards of the palm tree." This construction alone gives harmonious effect to all the language of the lease. The flowing spring of liquid asphalt is wholly distinct from the deposit of bituminous rock; and as no liquid asphalt has been taken from it, nothing in relation to it need be considered, except for the purpose of construing the language of the lease as above.

I think the order and judgment appealed from should be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment appealed from are affirmed.

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109 Cal. 323

NICHOLS v. EMERY et al. (No. 19,517.)

(Supreme Court of California. Oct. 2, 1895.)

EXPRESS TRUST—VESTED RIGHTS—POWER OF SETTLOR—CONSIDERATION.

1. Deceased conveyed land to plaintiff, as trustee; the deed providing that the grantee should sell the property within 10 months after the grantor's death, and divide the proceeds among his children, one of whom was plaintiff. The power of revoking the trust was expressly reserved. *Held*, that the instrument was a valid, express trust, passing a present interest, subject to divestiture only by revocation, though the enjoyment of such interest was to commence in the future.

2. In the absence of fraud, mistake, or some similar ground of relief, a settlor cannot, by failing to recognize the trust, or even by repudiating it, affect the rights of the trustee and beneficiary which have vested under the deed.

3. A voluntary settlement for the benefit of the settlor's children, which is fully executed, requires no other consideration for its support than that of parental affection and duty.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Walter R. Nichols against Adeline Emery and others. From a judgment for defendants, plaintiff appeals. Reversed.

B. F. Thomas, for appellant. C. A. Storke and Blackstock & Ewing (Victor Montgomery, of counsel), for respondents.

HENSHAW, J. Appeals from the judgment and order denying a new trial. The plaintiff set up in his complaint the following facts: His father, Walter E. Nichols, during his lifetime conveyed to plaintiff, as trustee, a piece of real property, upon certain trusts expressed in the deed, which were to sell the land within 10 months after the death of the grantor, dividing the proceeds of the sale, one-fifth each to four named beneficiaries, the grantor's children, one being the trustee, while the remaining part was to be invested by the trustee, and the profits of the investment paid over to another child (a daughter) during the life of her husband, and upon his death, if she survive him, to her absolutely, with other provisions made in case she should die first, leaving surviving issue. Disposition was likewise made of the allotted interests in the event of any of the beneficiaries dying before sale and distribution. The power of revoking the trust was expressly reserved, but no form of revocation was prescribed. Plaintiff pleaded his acceptance of the trust, and the death of his father intestate; his inability to sell the land within the designated 10 months, but his present ability to do so, provided he obtain an order of court so directing. He also averred the consent of the beneficiaries to the proposed sale. The beneficiaries were made defendants. The court was asked to declare certain sums expended by the trustee to be charges upon the trust fund; to settle the trustee's account, fix his compensation, and decree a sale. Certain money claims of some of the beneficiaries against the property are asked to be determined, and decreed invalid. The defendant Adeline Emery answered, admitting that Walter E. Nichols did "make, execute, and deliver" the trust deed set out in the complaint, but denied that plaintiff accepted the trust, or ever held the land in trust. She averred a revocation by the grantor of the deed of trust; that the property was, at the death of Walter E. Nichols, a part of his estate; and that she, as heir at law, was entitled to one-fourth part thereof. By cross complaint she pleaded ownership in herself of one-fourth of the property, and asked for a decree accordingly. The defendant, Mary F. Foster, another daughter and beneficiary, and her husband, Fred A. Foster, answered, admitting the trust and its acceptance, and claimed under it; the husband averring that he had acquired the interest of William E. Nichols, a beneficiary and son of the grantor, and that the beneficiary. James M. Nichols, was dead. William Nichols made default, and the action was dismissed as to James, who was found to be dead.

The court found the execution and delivery to plaintiff of the deed of trust by Walter E. Nichols, and "that said Walter E. Nichols at no time made any other or further disposition of the land mentioned and described in the instrument." It then finds: "That it was not the intention of the said Walter E. Nichols when he executed the said instrument and delivered the same, nor of said Walter R. Nichols when he received the same, that said instrument should pass any immediate interest in said lands to said Walter R. Nichols; but it was intended that said Walter E. Nichols, the grantor in said deed, might use, possess, and occupy said lands, and the products thereof, during his life, and might make, during his life, any disposition of said lands that he might choose, other and different from that determined upon in the said instrument; and said Walter E. Nichols did, from the date of said instrument up to his death, use and occupy said lands, and take to himself the entire product thereof. That no consideration ever passed to said Walter E. Nichols, grantor therein, for said instrument." Due exception is taken to these findings. The court concluded, as matter of law, that the instrument (the trust deed) is testamentary in character, and is to be judged by the laws of wills, and, so judged, that it is void for want of execution with the formalities prescribed for wills. No express finding was made upon the issue of revocation of the trust; the court apparently deeming it unnecessary, under its construction of the instrument. The only declaration touching the matter is the one above quoted,—that the grantor never made other disposition of the lands.

A formal, written acceptance of the trust. over the signature of the trustee, is embraced in the instrument, which was duly acknowledged by both grantor and grantee, and recorded at request of the latter. It was pleaded and proved at the trial that the beneficiaries, as beneficiaries under the trust, had executed and acknowledged to plaintiff, as trustee under the trust, an authorization to sell the property. No question of the invalidity of the trust is raised by the pleadings, the only claim in hostility to it being that presented by the averments of its nonacceptance and revocation. It is true that defendant Adeline Emery, by cross complaint, pleads ownership in fee of the undivided fourth part of the land; but nowhere in the pleadings, or in the arguments of her counsel upon the trial, as disclosed by the record, is it even suggested that the trust instrument is void because testamentary in character. The surprise which plaintiff urged as a ground for a new trial seems, under the circumstances, to have been quite natural. The court reached its conclusion from its interpretation of the instrument by the light of the evidence in the case. That evidence is brief, consisting only of the testimony of the trustee, and it may be well to quote it. He says, upon cross-examination: "The deed of trust was executed at its date. I did not go into the actual possession of the property until after the death of W. E. Nichols, who occupied the premises from the date of the deed to the date of his death. He farmed the place, and took all of its revenues. I took all of its revenues. I think he offered the property for sale; advertised it in a newspaper for sale. He paid the taxes on the land. They were assessed to him. I knew that the deed of trust gave to my father the right to revoke the trust. In speaking of this land, W. E. Nichols spoke of it as his own land. He had cultivated the crop that was on the place at the time of his death. A part of the crop was his. He leased part of the land." At this point objection was made to "this testimony, and this line of testimony." And the attorney for Mrs. Emery stating that he sought to show that the grantor had remained in possession of the land and had not recognized the trust, and that he would claim that the grantor had "acquired a right to the land by adverse possession," and that, therefore, he had filed his cross complaint, the court, after discussion, sustained the objection. Returning to the evidence, it is to be noted at a glance that its statements are in some respects contradictory and ambiguous. "He farmed the place, and took all the revenues. I took all the revenues." "A part of the crop was his. He leased part of the land." Whether as lessor or lessee is not made plain. However, these matters need not further be considered, since, as has been said, there is no finding upon the question of the revocation of the trust, and since a settlor, in the absence of fraud, mistake, or some similar ground of relief, cannot, by failing to "recognize" the trust, or even by repudiation of it, affect the rights of the trustee and beneficiary, vested under his deed. The evidence must, by the court, have been considered as bearing upon the intent of the grantor in making the deed, and we proceed to review its decision in this regard.

It is undoubtedly the general rule enunciated by the leading case of Habergham v. Vincent, 2 Ves. Jr. 231, and oft repeated, that the true test of the character of an instrument is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property, to accrue and take effect only upon his death, and passing no present interest. The essential characteristic of an instrument testamentary in its nature is that it operates only upon, and by reason of, the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights, and divested himself of no modicum of his estate; and, per contra, no rights have accrued to, and no estate has vested in, any other person. The death of the maker establishes for the first time the character of the instrument. It at once ceases to be ambulatory. It acquires a fixed status, and operates as a conveyance of title. Its admission to probate is merely a judicial declaration of that status. Upon the other hand, to the creation of a valid express trust it is essential that some estate or interest should be conveyed to the trustee; and, when the instrument creating the trust is other than a will, that estate or interest must pass immediately. Perry, Trusts, § 92. By such a trust, therefore, something of the settlor's estate has passed from him, and into the trustee, for the benefit of the cestui; and this transfer of interest is a present one, and in no wise dependent upon the settlor's death. But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the cestui may be made to commence in the future, and to depend for its commencement upon the termination of an existing life or lives, or an intermediate estate. Civ. Code, § 707. Did the grantor in the present case divest himself, by the instrument, of any part of the estate in the land which he had formerly owned and enjoyed? By the terms of the instrument, an estate was assuredly conveyed to the trustee. The language is appropriate to a conveyance, and the grantor's execution and delivery of the deed (both found), he being under no disability, and impelled by no fraud, operated to vest so much of his estate in the trustee as was necessary to carry out the purpose of the trust. The especial purpose was to sell and distribute the proceeds upon his death,—a legal purpose, authorized by section 857 of the Civil Code. The term of the duration of the trust,—the life of the settlor,—did not violate the provisions of section 715 of the same Code. We have, therefore, an estate conveyed to a named trustee, for named beneficiaries, for a legal purpose and a legal term, —such a trust as conforms, in all its essentials, to the statutory requirements. That no disposition is made by the trust of the interest and estate intervening in time and enjoyment between the dates of the deed and the death of the settlor, cannot affect the trust. The trustee takes the whole estate necessary for the purposes of the trust. All else remains in the grantor. Civ. Code § 866. In this case there remained in the grantor the equivalent of a life estate during his own life, and he was thus entitled to remain in possession of the land, or lease it and retain the profits. Nor did the fact that the settlor reserved the power to revoke the trust operate to destroy it, or change its character. He had the right to make the reservation. Civ. Code, § 2280. But the trust remained operative and absolute until the right was exercised in proper mode. Stone v. Hackett, 12 Gray, 232; Van Cott v. Prentice, 104 N. Y. 45, 10 N. E. 257. Indeed, this power of reservation was strongly favored in the case of voluntary settlements at common law, and such a trust, without such a reservation, was open to suspicion of undue advantage taken of the settlor. Lewin, Trusts, *pp. 75, 76; Perry, Trusts, § 104. We think, however, that the circumstances of the reservation of power to revoke, and the limitation of the trust upon the life of the settlor, have operated to mislead the learned judge of the trial court. If the life selected had been that of a third person, and if no revocatory power had been reserved, no one would question but that a valid express trust had been created. But the fact that the designated life in being was the settlor's could not operate to destroy its validity, for he had the right to select the life of any person as the measure of duration. And the fact that he reserved the right to revoke did not impair the trust, nor affect its character, since title and interest vested subject to divestiture only by revocation, and, if no revocation was made, they became absolute. A man may desire to make disposition of his property in his lifetime, to avoid administration of his estate after death. Indeed, in view of the fact, both patent and painful, that the fiercest and most expensive litigation, engendering the bitterest feelings, springs up over wills, such a desire is not unnatural. And when it is given legal expression, as by gifts absolute during life, or by gifts in trust during life, or voluntary settlements, there is manifest, not only an absence of testamentary intent, but an absolute hostility to such intent. The evidence above quoted does not militate against the establishment of the trust. At most, it was addressed to showing an attempted revocation by the settlor,—a revocation, however, which the court does not find. The deed, being a voluntary settlement for the settlor's children, and being fully executed, does not require other consideration for its support than that of parental affection and duty. Lines v. Lines, 142 Pa. St. 149, 21 Atl. 809. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: TEMPLE, J.; McFARLAND, J.

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109 Cal. 312

TULARE COUNTY BANK v. MADDEN et al. (No. 18,446.)

(Supreme Court of California. Oct. 2, 1895.)

FORECLOSURE OF MORTGAGE—DEFICIENCY JUDGMENT—COSTS.

1. A deficiency judgment may be had against a grantee of mortgaged premises, who accepts the conveyance subject to the mortgage, and assumes the payment of the mortgage debt.

2. In an action against a mortgagor and his grantee, who has assumed the payment of the mortgage debt, judgment for costs is properly entered against them jointly.

Commissioners' decision. Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by Tulare County Bank against D. W. Madden, E. M. Root, and others, to foreclose a mortgage. From a judgment for plaintiff for foreclosure of the mortgage, and deficiency judgment against himself, as grantee of the mortgagor, defendant Root appeals. Affirmed.

W. Rigby and Aylett R. Cotton, for appellant. C. L. Russell, for respondent.

HAYNES, C. The plaintiff is the assignee of a note and mortgage executed by defendant Madden. Afterwards Madden conveyed the mortgaged premises to appellant, E. M. Root, and this action was brought against Madden and his grantee, and others, to foreclose said mortgage. Plaintiff obtained a decree for the sale of the mortgaged premises, with the provision that, if the sale thereof should not satisfy the amount found due, a judgment for the deficiency be docketed against the defendants Madden and Root; and from this judgment Root, the grantee of Madden, appeals upon the judgment roll and a bill of exceptions. The deed of conveyance from Madden to Root recites that it was made subject to the mortgage held by plaintiff; that said mortgage is a lien on said premises, "and said second party hereby assumes and agrees to pay the said amount due thereon, as a further consideration for this conveyance." The only questions arising in the case are: First, whether appellant is liable for any deficiency in case the premises should not satisfy the mortgage; and, second, whether he is liable for costs in the action.

It is well settled that the grantee of the mortgaged premises, who not only takes the land subject to the mortgage, but assumes its payment, is liable to the mortgagee for any deficiency which may remain after exhausting his security under the mortgage, though, as to the ground upon which this liability is placed, the authorities are by no means uniform. That he is so liable, see Biddel v. Brizzolara, 64 Cal. 356, 30 Pac. 609; Pellier v. Gillespie, 67 Cal. 583, 8 Pac. 185; Thomson v. Bettens, 94 Cal. 82, 29 Pac. 336; Williams v. Naftzger, 103 Cal. 438, 37 Pac. 411; Keller v. Ashford, 133 U. S. 622, 10 Sup. Ct. 494. Appellant seems to rely upon the point that he did not promise to pay the note secured by the mortgage, and that his promise was not made for the benefit of the mortgagee. It may be that there is no such privity of contract between the mortgagee and the grantee of the mortgagor, resulting from the acceptance of the deed, nor any such promise for the benefit of the mortgagee, as would sustain an action at law against him. The best-considered cases place the liability of the subsequent grantee of the mortgaged premises, who has assumed the payment of the debt, upon the ground that, as between him and his grantor, he becomes primarily liable for the payment of the debt secured by the mortgage, and his grantor becomes his surety; that though, as between the grantor, Madden, and the plaintiff, the mortgagee, Madden is the principal debtor, yet in equity the creditor is entitled to the benefit of all securities or collateral obligations that his debtor may have acquired for the payment of the debt, and the creditor may, in his action to foreclose the mortgage, treat the mortgagor's grantee, who has assumed the payment of the debt, as a principal debtor, and hold him liable for any deficiency for which the mortgagor would be liable on his express promise. Williams v. Naftzger, 103 Cal. 440, 37 Pac. 411, and cases there cited. It results that the court did not err in authorizing the deficiency judgment to be docketed against the appellant.

That appellant is liable for costs in the action is also clear. He held the title to the land, and was therefore a necessary party to the action, and was the only defendant who answered or made any contest, and his only contest was based upon his desire to escape personal liability for a deficiency. Having failed in that defense, he, as well as Madden, the maker of the promissory note and mortgage, is liable for costs, and the court did not err in the judgment rendered in that regard. The appeal is without merit, and the judgment appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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109 Cal. 315

CITY OF SOUTH PASADENA v. LOS ANGELES TERMINAL RY. CO.

(No. 19,414.)

(Supreme Court of California. Oct. 2, 1895.)

STREET RAILWAY—REGULATION—FARES.

Under Const. art. 11, § 11, allowing any city to make and enforce "within its limits" any regulations not in conflict with the general laws; and Civ. Code, § 470, prohibiting a railroad from using a public street of a city unless the right so to use it is granted by two-thirds vote of the city authorities,—a provision in a city ordinance granting a railway right of way on its streets, regulating fares to be charged outside of the limits of the city, is void.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the city of South Pasadena against the Los Angeles Terminal Railway Company to have the franchise granted defendant by plaintiff declared void. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Burnett & Gibbon, for appellant. W. S. Knott and A. W. Hutton, for appellee.

BRITT, C. Plaintiff is a municipal corporation of the sixth class. It is situated in Los Angeles county, a few miles from the city of Los Angeles, and on a line of railway owned and operated by defendant, extending from Los Angeles, through said South Pasadena and beyond, to the city of Pasadena, in the same county. This, together with other tangible property and franchises pertaining thereto, was acquired by defendant in virtue of a consolidation effected about September 26, 1890, under the laws of this state, with another railroad corporation, called the "Los Angeles, Pasadena & Glendale Railway Company," to which, until said consolidation, such railroad property, and franchises belonged. On July 22, 1889, the board of trustees of the plaintiff, the city of South Pasadena, passed an ordinance granting to said Los Angeles, Pasadena & Glendale Railway Company the right to construct, maintain, and operate a steam railroad in certain public streets of the city upon various conditions relating to the improvement of such streets, the maintenance of stations within the city limits, the number of trains to be run each day, etc. Among said conditions was the following: "That round-trip fares between any of the above-named stations (those within the city limits) and the business center of Los Angeles city, on the line of the Los Angeles cable railway, shall never exceed thirty cents, including the round-trip fare of said Los Angeles cable railway; * * * and that such round-trip tickets shall be on sale at all proper times within said city of South Pasadena." The ordinance further declared that "this franchise is especially granted upon each and all of the provisions and conditions herein contained, and, if said grantee or assigns shall fail in any particular to comply therewith, then and in that event all rights under this ordinance shall thereupon and immediately be forfeited, and this grant shall thereupon be null and void." The Los Angeles, Pasadena & Glendale Company, pursuant to the license thus granted, constructed the road above mentioned, and its rights and obligations under said ordinance passed to the defendant in virtue of said consolidation. Prior to September 1, 1891, the defendant and its said predecessor operated the road in conformity with the requirements of said ordinance relating to rates of fare, and carried passengers between stations in South Pasadena and the business center of Los Angeles at the round-trip rate of 30 cents, including the fare within that city on said cable railway; the defendant's road stopping short of such business center by the space of about one mile, and the intervening distance being covered by the cable railway which connected with the road of defendant. The fare on the cable road was five cents each way. The defendant's business proved unprofitable, the road not paying expenses of operation; and on August 24, 1891, the board of railroad commissioners of this state passed a resolution to the effect that the said Los Angeles Terminal Railway Company be, and it was thereby in terms, authorized to make the rate of single-trip tickets either way between Los Angeles and Pasadena 25 cents, and for round-trip tickets either way between the same places, good for two days, 35 cents, and to raise the rates to and from all intermediate stations in the same proportions. The stations within the limits of South Pasadena are intermediate stations between the city of Pasadena and the city of Los Angeles. Accordingly, about September 1, 1891, the defendant raised its rate for round-trip tickets between its stations in South Pasadena and the business center of Los Angeles from 30 cents to 40 cents, including the cable-road fare; this was a net advance on the line of defendant's own road from 20 cents to 30 cents; and the last-mentioned sum—30 cents—was proportionate, as the charge between South Pasedena and Los Angeles, to the charge of 35 cents between Pasadena and Los Angeles, mentioned in the order of the railroad commission. The more important matters above stated appear from the findings and admitted allegations of the pleadings. Some others are shown by the undisputed evidence.

The plaintiff commenced this action November 30, 1891, alleging sundry violations by defendant of the conditions specified in said ordinance of July 22, 1889, including that concerning round-trip fares; but as the court found that defendant has fulfilled the requirements of the ordinance in the particulars complained of, except as to such fares, the other matters do not concern us. The prayer of the complaint was in the alternative: First, that defendant be required to fix and charge for its said round-trip fare a sum not exceeding 30 cents, including the fare on the Los Angeles cable railway; or, second, that defendant be enjoined from operating any portion of its road on the route allowed by the terms of said ordinance, and that its road now existing along or over said route be abated as a nuisance. The court below adjudged that said ordinance and all its conditions are binding upon defendant; that it has violated the condition thereof in respect to said round-trip fares; that by reason of such violation it has forfeited its right of way granted by such ordinance; that its line of track and other improvements in the streets of plaintiff are a nuisance; that the same be abated; and enjoined defendant from operating the road in the streets occupied by it.

It is by statute provided that "no railroad corporation must use any street, alley or highway, or any of the land or water within any incorporated city or town, unless the right to so use the same is granted by a two-thirds vote of the town or city authority from which the right must emanate." Civ. Code, § 470. By the terms of section 862 of the municipal corporation act (St. 1883, pp. 269, 270), plaintiff's board of trustees is given power: "Thirteenth. To permit, under such restrictions as they may deem proper, the laying of railroad tracks and the running of cars drawn by horses, steam or other power thereon * * * in the public streets." Somewhat advanced ground is taken on behalf of respondent upon the effect of these enactments. It is claimed by counsel that the "power thus granted is an absolute one, the franchise to be granted or not, in the discretion of the city authorities"; that, "having this power to grant or refuse, it may annex such terms and conditions to its grant as to its authorities may seem proper, so long as such conditions do not conflict with any law." With the qualification stated,—viz. that such conditions do not conflict with any law,—we may accept the statement as correct for the purposes of this decision. The ruling in Pacific Railroad Co. v. City of Leavenworth, 1 Dill. 398, Fed. Cas. No. 10,649, was that the authorities of the city might prescribe in such a case, as conditions of their assent, "such lawful and proper terms as they deemed expedient." The authority of the city board of trustees, under the statutes referred to, is legislative in its nature. Primarily, it is of a piece with the power to enact municipal, police, and other ordinances,—local laws (McCracken v. San Francisco, 16 Cal. 620),—and is not referable for its support to the power of making contracts (San Francisco v. Spring Valley Waterworks Co., 48 Cal. 529; People's Railroad v. Memphis Railroad, 10 Wall. 51; Dill. Mun. Corp. [4th Ed.] § 724; Tied. Mun. Corp. § 302). See Town of Arcata v. Arcata & M. R. R. Co., 92 Cal. 639, 28 Pac. 676; Reagan v. Trust Co., 154 U. S. 397, 14 Sup. Ct. 1062. If the city could make a valid agreement for rates of fare to Los Angeles, including the charges of a connecting line of street railway, then it might also stipulate for rates over connecting lines to San Francisco or elsewhere. And if, as claimed by respondent, the case is one of mere contract obligation, then we think it clear that some grant of authority mediately through the legislature,—and this would be of doubtful constitutionality,—or immediately through the constitution, from the people of the state, either in express terms or by necessary implication, must be exhibited to warrant such a contract; and, since none appears, we think the city was as destitute of capacity to bargain with a railroad company for rates of transportation to distant points for its inhabitants and other persons to whom it does not stand in loco parentis (San Diego Water Co. v. City of San Diego, 59 Cal. 620) as it was, for example, to bargain with a purveyor to supply them with entertainment. The city is not the agent of its inhabitants or of the public for such purposes. Hodges v. City of Buffalo, 2 Denio, 110; Love v. City of Raleigh (N. C.) 21 S. E. 503. And see Wallace v. Mayor of San José, 29 Cal. 186–188; Herzo v. San Francisco, 33 Cal. 143; Aberdeen v. Honey, 8 Wash. 251, 254, 35 Pac. 1097; Tied. Mun. Corp. § 169. Therefore, we must determine whether the ordinance under view transgresses any of the just and needful restrictions which the general law of the state imposes upon local legislation of this nature.

A municipal ordinance must consist with the general powers and purposes of the corporation; must harmonize with the general laws of the state, the municipal charter, and the principles of the common law. Ex parte Frank, 52 Cal. 609; Ex parte Kearney, 55 Cal. 225. One of the limitations upon such ordinances is that they can have no extraterritorial force unless by express permission of the sovereign power. In the nature of things, this must be so unless intolerable confusion and evil is to result; and the constitution of the state, recognizing the necessity for such a restriction, has provided (article 11, § 11) that "any county, city, etc., may make and enforce within its limits all such local, * * * and other regulations as are not in conflict with general laws." Here was a road lying partly within the confines of at least three municipalities,—Los Angeles, South Pasadena, and Pasadena. Conceding the right of plaintiff to impose a limitation on the charges to be made for passage between stations within its limits and stations elsewhere, then the other cities named have, or might have, the same right. But suppose the city of Los Angeles, as a condition of the occupation of its streets by the railroad, had ordained that the round-trip fare between stations within its limits and South Pasadena should be more or less than that fixed by the ordinance of the latter city; or that the fare to Pasadena—a place more remote than South Pasadena—should be less than that to the latter point as fixed by its own ordinance. Is it not plain either that a conflict must arise and inevitable discrimination between the places ensue (expressly prohibited by Const. art. 12, § 21), or that the railroad company must charge only the lowest of the rates thus fixed by jurisdictions of equal authority, and so the ordinance prescribing the lowest rate be made operative in and between both places? Similar illustrations of possible confusion might be multiplied indefinitely. It is not disputed that the ordinance here has extra municipal effect, if any at all, but this is justified on the theory that it is a mere contract.

Respondent likens the case to one in which an individual grants the right of way for a railroad over his land, and in part consideration thereof receives a free pass on the road for himself and family. But the analogy fails in all essentials: (1) As we have seen, the city, unlike an individual, has no authority to provide free passes or other transportation for anybody, unless a convict or some such person to whom the city occupies a relation of guardianship. (2) The streets of the city are not held as corporate or municipal property, subject to the power of contractual disposition, like the property of an individual. San Francisco v. Spring Valley Waterworks Co., 48 Cal. 529; In re Philadelphia & T. R. Co., 6 Whart. 44. (3) The ordinance here does not confine its scope to any individual or number of individuals, but attempts to regulate the fares to be paid by the general public,—all persons, wherever resident; in short, is of governmental character.

The views above expressed render it unnecessary to consider the questions presented by counsel concerning the power of the railroad commission to fix round-trip rates of fare, and whether, if it has the power, the order of the commission made August 24, 1891, was a sufficient exercise thereof to properly affect the rates involved here. It seems to us, however, that the usefulness of that commission for some of the principal purposes it was designed to accomplish—the prevention of discrimination between places, and the imposition of excessive charges by transportation companies—must be greatly impaired, not to say destroyed, if its action may be forestalled by local ordinances prescribing rates of fare to distant points passed by every city or town admitting a railroad into its streets. We incline to think that what Chief Justice Gibson called the "universality of the public sovereignty" over the entire subject (In re Philadelphia & T. R. Co., 6 Whart. 44) is so manifest in the constitution of this state that probably even the legislature could not confer upon a municipality the power claimed by respondent. But this need not be decided; it is sufficient to say that the legislature has not attempted to do so.

We are of opinion that the clause of the ordinance found to have been violated by defendant was void for want of power in the municipality to enact it; and that the judgment and order appealed from should be reversed, and the cause remanded, with instructions to the court below to modify the conclusions of law contained in the findings so as to conform to this opinion, and thereupon to enter judgment for defendant.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded, with instructions to the court below to modify its conclusions of law contained in the findings so as to conform to this opinion, and thereupon to enter judgment for defendant.

109 Cal. 336

SPENCER v. BRANHAM, Justice of the Peace. (No. 18,395.)

(Supreme Court of California. Oct. 2, 1895.)

JUSTICE OF THE PEACE—OPENING DEFAULT.

A motion to open a justice's judgment on default cannot be made by simply filing a written motion within the 10 days prescribed by Code Civ. Proc. § 859, and giving notice of a hearing at a time after the period has expired.

Department 2. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Proceeding for a writ of prohibition, instituted by F. V. Spencer against James Branham. The writ was denied, and plaintiff appeals. Reversed.

Spencer & Raker and F. C. Spencer, for appellant. Goodwin & Goodwin, for respondent.

TEMPLE, J. Proceeding for writ of prohibition. April 20, 1893, plaintiff obtained a judgment by default before the respondent, who is a justice of the peace. On the 27th day of the same month Leonard, against whom the judgment was obtained, filed with the justice an application to have the default and judgment vacated, on the ground that it was obtained through his inadvertence, surprise, and excusable neglect. Several affidavits were filed with the written application, and plaintiff was notified that the court would be asked to grant the relief on Monday, May 1st, following. The motion was signed "Goodwin & Dodge, Attorneys for Defendant, by J. E. Pardee, at the Request of W. N. Goodwin." On Monday, May 1st, the parties appeared before the justice, and the plaintiff objected to the motion upon the ground that Pardee had no authority to act for Leonard. The objections were overruled. The further proceedings had in the justice court are stated in the docket of the justice of the peace as follows: "On motion of defendant, hearing and making of motion continued until Tuesday, the 2d, at 10 o'clock a. m. Motion not having been made." The parties again appeared before the justice on Tuesday, and the docket shows the following: "Counsel for defendant ask leave to withdraw motion and papers filed April 27th on application to set aside judgment by default, without prejudice to the hearing of any motion that may have been filed subsequent to the 27th day of April, 1893. Counsel for plaintiff object to withdrawal of the motion, on the ground that the only power and jurisdiction of the court is to disregard the motion entirely, and the court has no power to allow the motion to be withdrawn without prejudice, in that the 10 days within which this court can act have passed, no motion or application being made within that time to open the default." The objections were overruled, but nothing further was done on that day. On the next day, at the request of the attorney for the defendant in that action, the justice prepared and served the attorney for the plaintiff the following: "In Justice's Court, No. 1 Township, Lassen County, California. E. V. Spencer, Plaintiff, vs. J. G. Leonard, Defendant. Defendant in the above-entitled cause having on Monday, the 1st day of May, 1893, presented to me a written request to be relieved from, and have an order entered setting aside, the judgment by default entered against him on the 20th day of April, 1893, through his mistake, inadvertence, surprise, and excusable neglect, together with affidavits in support of the same, you are notified that I will take up the matter to be disposed of on Monday, the 8th day of May, 1893, at 10 o'clock a. m. of that day, and that you have until that time to prepare and file counter affidavits. May 3, 1893. James Branham, Justice of the Peace, No. 1 Township." Indorsed: "Notice of time of hearing application to set aside judgment by default." Plaintiff then commenced this proceeding, and now appeals from the judgment denying his remedy, and from an order refusing a new trial.

Plaintiff claims that the justice had no power to grant the relief demanded, because the application was not made within 10 days from the entry of judgment, as required by section 859, Code Civ. Proc. As judgment was entered on the 20th, and the last day of April was Sunday, defendant had until May 1st within which to make his application. As he withdrew the proceedings inaugurated on the 27th, he must rely upon the motion filed on the 1st of May, the hearing of which was set for the 8th day of May. The written motion was handed to the justice on Monday evening, and the justice was told to file it. He was not asked to act upon it, and the counsel for the opposite party were not notified of any hearing, and were not present. Indeed, respondent's counsel seem to admit that the paper was handed to the justice at a time when no action could be expected. They say that a justice court is wherever you find the justice, and that "attorneys, like other human beings, are not above the customs of a country, and it is at least awkward, if not downright impoliteness, to stop the deal in a game of frog, and distract the attention of the 'swampers' from the contents of the 'widow,' by injecting into the proceedings, 'If your honor please, as attorney representing the defendant in Doe v. Roe, I respectfully move, etc.!' How much better to respect the rights of all, and when the court is sipping the fruits of a well-earned victory (his own or someone else's), quietly hand him the paper, with a statement of the contents, and a request that it be filed, and if the 'victories' have not been so frequent but that he knows what he is asked for, and proceeds thereafter to act upon the request, it would seem that as much had been accomplished as could have been by the most formal viva voce motion." Although not able to determine from the language of the learned counsel what his honor was then doing, I understand the statement as an admission that he was not then engaged in judicial work, and was possibly not in a condition to do so. At all events, no present action was asked, and none could have been had in the absence of the opposite party without notice to him. The question then is, when a motion must be made upon notice within a given period can a party extend his own time by filing a written motion within the period, and giving notice of a hearing of the motion at a time after the period has expired? To ask the question is to answer it. The application for relief must be by motion, and "making and not filing a written application for such rule or order is not sufficient. The attention of the court must be called to it, and the court moved to grant it." People v. Ah Sam, 41 Cal. 645. Here, although the attention of the court may have been called to it, no present action was requested. If the motion had been made, had the court continued the hearing for argument or for further evidence, it would not have lost jurisdiction, for in such case the application would have been made in time. The judgment and order are reversed.

We concur: McFARLAND, J.; HENSHAW, J.

109 Cal. 277

PEOPLE v. MARONEY. (Cr. 26.)

(Supreme Court of California. Sept. 30, 1895.)

CRIMINAL LAW—REVIEW ON APPEAL—BURGLARY—CONVICTION OF LESSER CRIME—INDICTMENT.

1. In a criminal case the decision of a jury upon legal evidence is not subject to review.

2. A conviction of burglary in the second degree will not be reversed, though the crime, as disclosed by the evidence, could only have been burglary in the first degree, such error not being prejudicial to defendant.

3. Where an indictment charges defendant with having been convicted of several prior offenses under different names, the use of the alias is proper, for the purpose of identifying defendant as the person who had suffered those convictions; and the fact that the part of the indictment containing the averment of prior convictions is not read to the jury, because defendant admits them, does not make it error to read the pseudonyms.

Department 2. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

John Maroney was convicted of burglary in the second degree, and appeals. Affirmed.

Reel B. Terry, for appellant. W. F. Fitzgerald, Atty. Gen., and W. S. Barnes, Dist. Atty., for the People.

HENSHAW, J. The defendant was charged with the crime of burglary, and by the jury was found guilty of burglary in the second degree. Upon behalf of the people, it was shown that after midnight a police officer passing the barber shop of one Antonia Thomas heard a noise therein. The shop was in darkness. He attempted to open the door, but was prevented by some one within. An entrance was forced, and the person within ran into the back room, and hid under the bed. That person was the defendant. He appeared to be stupid from whisky or opium, but said, upon his arrest, that the barber had given him permission to sleep in the shop. This declaration was, upon the trial, supported by a witness for the defense, who testified that he, the defendant, Thomas, and others had been drinking at a neighboring saloon until about midnight, when they went together to the barber shop. There they drank a bottle of whisky, and, the defendant being very drunk, Thomas suggested that he remain there, and sleep off his intoxication. The barber then took a number of razors to hypothecate for more liquor, and the party, after turning out the gas, left the shop with the defendant therein. They proceeded to the saloon of the witness' aunt, where more liquor was drunk. The razors were left with the witness as security, and upon the following day he returned them to Thomas. The defendant did not take the stand, and the other member of the party was reported as on his deathbed. The barber, Thomas, testified that he had been drinking upon the night in question, and had been drinking with these men; that he had taken 20 or 30 drinks, and was somewhat under the influence of liquor; but that he had not visited his shop that night with the defendant, or with any one else, had taken no razors from it, and had not given defendant permission to enter or stay in it. In this state of the case, it cannot be said that there was no evidence to warrant a conviction. If the jury believed the witnesses for the people, as, from the verdict, it seems they did, the evidence fully warranted a finding of the defendant's guilt. The power of a jury in determining the weight to be given to testimony is, within the rules of evidence, exclusive and supreme; and appeals to this court, in criminal cases, do not lie from the verdict of the jury upon controverted question of fact, but solely upon propositions of law. Const. art. 6, § 4; Pen. Code, § 1235. We are not by this to be understood as declaring that a verdict of guilty, unsupported by any evidence, could not be reviewed upon appeal. It could, for such a verdict would be contrary to law, and therefore subject to reversal, because the appeal would present a question of law, under the constitution. But we do mean to declare the rule—which is unquestionable, yet sometimes lost sight of by counsel—that the decision of a jury upon legal evidence, in so far as this tribunal is concerned, is absolutely final, and not subject to review upon appeal.

The jury found the defendant guilty of burglary in the second degree, and this is claimed to be error, in that the crime, as disclosed by the evidence, could only have been burglary in the first degree. This contention has however, been disposed of in the case of People v. Barnhart, 59 Cal. 381, where the court has said that it is a sufficient answer to such objection to say that the defendant is not prejudiced by the error complained of.

The indictment charged the commission of the crime against "John Maroney, alias James Forbes, alias Frank Moran, alias Frank Dolan"; and defendant claims that he was prejudiced, in the minds of the jury, by the reading to them of this list of pseudonyms. At ancient common law it was considered that no advantage could be taken of any error in the indictment as to the name of the defendant; it being held that the accusation was directed against the prisoner, by whatsoever name called. But by the statute of 1 Hen. V. c. 5, it was made necessary to state correctly "the names, estates, degrees, mysteries, and places of residence of defendants, in all criminal proceedings." Under this rule of criminal pleading, and the similar rule which obtained in civil practice, serious consequences arose from misnomers. Pleas in abatement were sustained to indictments and declarations, and delay and difficulty, of course, ensued. In criminal cases, therefore, where it was uncertain by which of two or more names the defendant should be designated, it became usual to plead all, connected by an alias dictus. Then, if the defendant pleaded misnomer, "the prosecutor may reply that the defendant is known as well by one name as the other," and the defendant was not allowed to interpose a plea that he was not known by the alias name. Chit. Cr. Law, *pp. 203-446; Bish. Cr. Proc. § 681. Under the reformed procedure of our Code, no plea of abatement lies in case of misnomer, and no new indictment becomes necessary for such irregularity. Upon arraignment a defendant is called upon to give his true name, or be proceeded against by the name charged in the indictment. If he answers to another name, that name is entered in the minutes, and the subsequent proceedings are had against him under it. Pen. Code, § 989. And if, at any time, his true name is discovered, it is used in all future steps. Id. § 953. Our system, therefore, renders unnecessary, in most instances, the use of the alias dictus; and there can be no manner of doubt but that this formula, useful and proper in its day, may now be made an engine of oppression to a defendant. At common law the jury was composed of the litigants' neighbors and friends. The individual selection was made of men who knew the parties, and, so far as possible, of men who knew of the facts in dispute. In criminal matters, also, jurors were drawn from the vicinage, in order that the defendant, tried by his neighbors, might have the advantage of a good reputation, if he had earned one, and the crown, upon the other hand, might be aided by the jurors' knowledge that he was a bad man, if such were the fact. But under our system, where, in practice, at least, it is sought to obtain a jury knowing as little as may be of the offense and the alleged offender, it needs no reasoning to show that if an indictment be read to such a jury, charging with the commission of a crime "John Doe, alias Slippery Jack, alias Ticket of Leave Bill," etc., the defendant at once is prejudiced in their minds; and, if such an indictment were so framed without reason, we should not hesitate to declare that its reading would prevent the defendant from obtaining the fair and impartial trial to which the law entitles him. But such is not this case. While, for most purposes, the need and use of the charging alias are done away with, it is still proper in some instances, an illustration of one of which is offered by this indictment. The indictment charged the defendant with conviction of prior offenses,—eight in number. The convictions in these cases were against this defendant, but under the different names charged. For the purpose of identifying him as the person who had suffered those convictions, the use of the alias was not only permissible, but proper. The indictment, upon its face, showed the reason; and the fact that the part of it containing the averments of prior convictions was not read to the jury, because the defendant admitted them, did not, under the circumstances, make it error to read the pseudonyms. It was the duty of the clerk to read all the indictment, excepting the portion withdrawn as an issue by the defendant's admission. The judgment and order are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

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5 Cal. Unrep. 163

DE LA CUESTA v. CALKINS et al. (No. 19,588.)

(Supreme Court of California. Oct. 9, 1895.)

DISMISSAL OF APPEAL.

A motion to dismiss an appeal cannot be considered where it is uncertain to which of two notices of appeal it is directed.

Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Motion to dismiss an appeal. Denied without prejudice.

Garber, Boalt & Bishop and Boyce, Taggart & Wheeler, for appellants. Wright & Day, for respondent.

PER CURIAM. A motion has been made to dismiss "the appeal" herein upon the ground that it has not been perfected in accordance with the provisions of the Code. The transcript upon record contains a notice of two appeals, one from the judgment and another from the order denying a new trial. As the sufficiency of each of these appeals does not depend upon the same considerations, it is uncertain to which appeal the notice of the present motion is directed, and the motion is therefore denied, without prejudice to its renewal at the hearing of the cause.

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5 Cal. Unrep. 162

STEINHART et al. v. COLEMAN. (No. 15,979.)

(Supreme Court of California. Oct. 4, 1895.)

REVIEW ON APPEAL—HARMLESS ERROR.

1. Where there is a substantial conflict in the evidence an order denying a new trial will not be disturbed.

2. Error in admitting testimony is harmless where the party complaining testified to the same facts.

Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by William Steinhart and others against L. C. Coleman. Plaintiffs had judgment, and defendant appeals. Affirmed.

Thos. F. Barry, for appellant. Rothchild & Ach, for respondents.

PER CURIAM. This is an action to recover from the appellant, Coleman, a certain amount of money, the same being an indebtedness from Peyser & Bro. to plaintiffs, and assumed by Coleman. The appeal is by Coleman from the judgment, and also from the order denying his motion for a new trial. It is insisted that the evidence fails to support the findings as to the assumption by Coleman of the aforesaid indebtedness. As to such contention, it is sufficient to say that there is a material and substantial conflict in the evidence upon this question of fact, and it follows that upon such grounds we will not disturb the order denying a new trial. Regarding the statements of Steinhart as to the declarations made by Coleman, if it be conceded that there was error in their admission as evidence, it was harmless error, for Coleman himself testified in effect to the same matters. For the foregoing reasons, the judgment and order are affirmed.

(109 Cal. 282)

ABBOTT v. SOUTHERN PAC. R. CO. (No. 19,431.)

(Supreme Court of California. Oct. 1, 1895.)

EMINENT DOMAIN—EVIDENCE OF DAMAGE.

Where a witness for plaintiff in an action to recover damages from the construction of a railroad testified that after the road was built plaintiff's land was worth a certain sum less than before it was built, but on cross-examination testified that this estimate might have been based partly upon the worth of the property had the road passed through the town upon some other street (which would have increased the value), defendant cannot have the testimony stricken out on the ground that the basis for the estimate was erroneous, as the objectionable evidence did not relate to the testimony given in direct examination, and was not prejudicial, where the court charged that in estimating damages the value of the land if the railroad had been constructed through some other part of the city should not be considered.

Commissioners' decision. Department 2. Appeal from superior court Santa Barbara county; W. B. Cope, Judge.

Action by Louisa Abbott against the Southern Pacific Railroad Company to recover damages to her premises, caused by the construction of defendant's road. Plaintiff had judgment, and defendant appeals. Affirmed.

R. B. Canfield, for appellant. B. F. Thomas, for respondent.

SEARLS, C. Plaintiff, the respondent herein, was the owner of a block of land in the city of Santa Barbara, Cal., bounded by four of the public streets of said city, along one of which, to wit, Gutierrez street, the defendant (a corporation) constructed in 1887 a railroad for the transportation of freight and passengers. This action is brought to recover damages sustained by plaintiff to her premises, for the erection, maintenance, and operation of such railroad. The answer of defendant put in issue the material allegations of the complaint, and for a further defense set up a grant to it, by the municipal authorities of Santa Barbara, of the right to lay, maintain, and operate its railroad upon, over, and through said Gutierrez street; and averred that the railroad was constructed and operated in a usual and proper manner, and in conformity with the requirements of the ordinance, and that the roadbed was made to conform as near as might be to the natural surface of said Gutierrez street and to the official grade thereof. The cause was tried by a jury, and a verdict for $1,400 rendered in favor of the plaintiff, upon which judgment was entered. Defendant appeals from the judgment, and from an order denying its motion for a new trial.

The first error assigned by appellant is based upon the action of the court in refusing to strike out the testimony of A. O. Perkins, a witness on behalf of plaintiff. The witness, upon his examination in chief, testified in relation to the value of plaintiff's lot of land and the injury thereto by the construction of defendant's railroad along the street adjoining it, substantially, that he was a real-estate agent, and knew the block of land upon which Mrs. Abbott resided, bounded by Gutierrez, Haley, De la Vina, and Bath streets. Just prior to the time the railroad commenced work, in August, 1887, the block could have been sold for $15,000. After the road was constructed and put into operation along the front of the property on Gutierrez street the lot was worth $3,000 less. For about half the frontage on that street the grade was raised 12 to 15 or 18 inches, so that the lots would have to be filled to grade, and, taking into account that a railroad in front of that property naturally depreciated it, he did not think it worth so much by $3,000 as before the road was built. The inconvenience and danger from the construction and operation of a railroad are considerations which naturally operate upon the minds of men in purchasing for a home. The lot is in the residence portion of the city, and outside of the business portion. Upon cross-examination the witness said he considered the block of land worth $15,000 just prior to August 1, 1887, just before it was known the railroad was going through that street. There had been a marked improvement in prices of lands, a "regular boom." Could not tell just when it started. Prices ruled high. Whether there was any marked improvement in prices before it was known the railroad was coming he could not say, as he had not given it a thought. San Francisco people and others came in and purchased land, which influenced people in purchasing. The cause of the boom might have been one thing or another, or a combination of things. Did not know that the coming of the road was the only cause. The fair value of the property just before the railroad company entered upon that portion of the street to construct its road was, according to his estimate, $15,000. His estimate of the value was placed at the time when it became known the road would be constructed on that street. When that fact was known it declined. "After it was understood and known that the railroad was going there [through Gutierrez street], then the property assumed a market value depending on that fact." Before that, and when it was known the road was coming to Santa Barbara, property began to stiffen up in town. It helped to increase values, and, with other causes combined, helped raise the price of property. The witness further explained that when the city council granted the right of way through Gutierrez street the price of property on that street was depreciated, and continued so until the road was completed, although the road did not become a fixed fact until the ties and rails were down. Counsel for defendant then asked the witness the following question: "Mr. Perkins, your estimate of the difference of the value of this property before the road was constructed and afterwards, which you have made at the sum of $3,000, I will ask you if that is not in fact based upon the consideration of what the property would have been worth if the road had gone through the town, but on some other street. Is not that a fact?" To which the witness answered: "Why, certainly; that is the damage to it; that is the cause of the damage. If the road had gone anywhere else, it would have benefited the property, in my judgment." At the request of the witness the last question was again read to him, and he then stated that he had not quite understood it, and that he intended to say that the road would naturally benefit the lot if it ran on another street, but that was not the basis upon which he made his statement of damages at $3,000; that this estimate of the difference in value before and after the road was built might have been based partly upon the worth of the property had the road passed through town upon some other street, and partly upon other considerations; and that he could not say to what extent his estimate was upon each several consideration. The contention of appellant is that this evidence should have been stricken out upon his motion, and such contention is supported by reference to Muller v. Railway Co., 83 Cal. 240, 23 Pac. 265, and cases there cited. That action was brought to recover damages for a strip of land taken by this same defendant upon which to construct its railroad, and for damages to an abutting lot, not taken, situate on this same street, viz. Gutierrez street, in the city of Santa Barbara. The court held, among other things: (1) That as to damage to the lot not taken, the difference between the value of the lot when the defendant entered to construct its road and the value when the road was completed was the measure of damages. (2) At the trial, defendant (the railroad company) called as a witness one Barker, who testified as to the value of the abutting lot before and after the construction of the road. Upon cross-examination counsel for plaintiff was permitted, against the objection of defendant, to put the following question to the witness: "What would the property be worth if the railroad had been constructed on Montecito street?" The answer was: "I think that the lot or quarter of a block, irrespective of improvements, would have been worth about six hundred dollars more if the railroad had gone on some other street." Defendant also requested the court to instruct the jury in that case that, "in estimating the damage to the portion of plaintiff's land not taken by the railroad, you must not consider what the value of the land would have been if the railroad had been constructed through the city, but along some other street than Gutierrez street." The court refused to so instruct, and the admission of the evidence and refusal to instruct the jury as above indicated being assigned as error, the court, speaking through Thornton, J., said: "We cannot see on what view or principle this evidence was admitted. The damage to plaintiff must be estimated on the actual facts of the case, not on any speculative theory of what might have been the result if something had occurred which in fact did not occur. * * * The damage allowed is not a failure to realize a profit which, under another state of matters, might have been realized, but the loss actually suffered; and the defendant is only called on to make compensation for that loss," etc. And the court held that the admission of the evidence and the failure to instruct as requested were both erroneous, and the judgment in favor of plaintiff was reversed.

The rule as to the measure of damages enunciated is in consonance with the adjudicated cases in this state and elsewhere. If the decision is open to criticism, it must be upon the ground that under the wide latitude permitted on cross-examination the question propounded to defendant's witness was admissible for reasons other than those mentioned by the learned judge who wrote the opinion. We have no disposition to criticise the opinion, and shall not discuss it. The case at bar presents the question in a form so entirely different as to differentiate it from that case. Here the witness had testified in chief as to the market value of the block of land before the railroad was constructed and as to such value after the road was built through the street, and had described the changes and inconveniences occasioned to the use of the street by the cut and fill thereon, and had fixed the reduction in the market value at $3,000. The objectionable evidence was called out by the defendant on cross-examination. If it was objectionable, and injurious to the interests of his client, it would seem reasonable to say it was the fault of counsel and not of the plaintiff, and that the defendant cannot profit thereby. If a party to an action can invoke error, and then avail himself of it to work a reversal, we shall have no end of error. But it may be urged that this testimony on cross-examination showed the improper basis upon which the witness had predicated his statement of damages, and hence that all of his testimony should have been stricken out. The answer to this position is twofold: (1) The case of Muller v. Railway Co., supra, holds that such evidence is improper as affecting the damages in just such a case. (2) It did not in any wise relate to the testimony given by the witness in his direct examination. The former was as to ultimate facts, viz. the market value at a given period of the block of land without a railroad in front of it, and the market value of the same land at a later period with such road in its front. "Market value" signifies a price established by public sales, or sales in the way of ordinary business. Black, Law Dict. The latter—that is to say, the value of the property if the road had gone upon some other street—related to a condition or state of things which never did exist, and, in the very nature of things, could not enter into the calculation. It is true that the witness in the course of his examination, and in answer to some of the questions on cross-examination made statements from which it might be inferred that the question of the value of the plaintiff's land, had the road been built on another street, entered into and became an element in his calculation of market value. An examination of his whole testimony, however, tends to convince us that he did what witnesses very often do, viz. stated facts quite accurately, and then gave wrong reasons for their existence. Conceding, however, that the cross-examination was proper, and that the effect of such examination was to show that the estimate of the value of the property was based in part upon its supposed value if the road had gone elsewhere, and it simply goes to the value of the testimony, and not to its admissibility; and, while a proper subject for comment before the jury, and for instructions from the court, does not require the court to strike out the whole testimony of the witness upon the given point. The court, at the instance of defendant, did instruct the jury, among other things, that "in estimating the damage to the premises described in plaintiff's complaint you must not consider what the value of the land would have been if the railroad had been constructed through the city, but along some other street than Gutierrez street."

A like error is assigned upon a like motion to strike out the testimony of a like character elicited under like circumstances from the witness Edward Harper. The rulings of the court in these cases do not call for a reversal. Like considerations apply to the error assigned upon the ruling of the court in refusing the motion of counsel for defendant to strike out the testimony of its own witness. The evidence was sufficient to sustain the verdict, and the latter, in view of all the evidence, was moderate in amount. There are some other errors assigned in the record, but, as they are not urged by appellant, we need not comment upon them. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(109 Cal. 264)

In re AMBROSEWF. (Cr. 85.)

(Supreme Court of California. Sept. 28, 1895.)

SENTENCE—CONFINEMENT IN CITY JAIL—CONSTITUTIONAL LAW—DIFFERENT PUNISHMENTS FOR SAME OFFENSE.

1. St. 1885, p. 214, and St. 1891, p. 292, organizing police courts in certain cities, provide that, when imprisonment is ordered, it is to be suffered in the city jail. St. 1877–78, p. 918, relating to the practice of medicine, provides that a person violating the requirements thereof shall be punished by imprisonment in the county jail. *Held* that, for a violation of the act of 1878, such police court had power to impose a sentence of confinement in the city jail.

2. St. 1885, p. 214, and St. 1891, p. 292, organizing police courts in certain cities, and providing that, when imprisonment is ordered, it is to be suffered in the city jail, is not unconstitutional on the ground that an offense committed within the county, but outside of corporate limits, is punishable by imprisonment in the county jail, thus creating different punishments for the same offense.

In bank.

Application by S. A. Ambrosewf for writ against the police court of Oakland. Writ discharged.

W. Brassey, for petitioner. H. A. Melvin, Pros. Atty., for respondent.

HENSHAW, J. Petitioner was convicted in the police court of the city of Oakland of misdemeanor, and, by the judgment of that court, sentenced to pay a fine of $100, and, in default of the payment of the fine, to be imprisoned in the city jail of the city of Oakland in the proportion of 1 day's imprisonment for every $2 of said fine. The charge against the defendant was for the violation of the act regulating the practice of medicine in the state of California. St. 1877–78, p. 918. The act provides that a violation of its terms shall constitute a misdemeanor, and that the person guilty thereof "shall be punished by a fine of not less than fifty dollars, or by imprisonment in the county jail for a period of not less than thirty nor more than three hundred and sixty-five days, or by both such fine and imprisonment." Defendant appealed to the superior court of Alameda county from this judgment, and, pending his appeal, was admitted to bail. Before the suing out of this writ he had been surrendered into custody, and, at the time of its issuance, was held in charge by the chief of police of the city of Oakland, and detained in the jail of said city. Since both his bondsmen had united in the surrender of his body before the issuance of this writ, the question of the right or power of one of the bondsmen so to surrender him is not here involved.

Petitioner contends, however, that the judgment of the police court was void in sentencing him to imprisonment, as an alternative for the nonpayment of his fine, in the city jail, instead of in the county jail. The police court of the city of Oakland is one created and organized by virtue of the so-called "Whitney Act" (St. 1885, p. 214; St. 1891, p. 292). By the provisions of this act, jurisdiction is conferred upon police courts in all cases of misdemeanor, and, when imprisonment is ordered, it is to be suffered in the city prison or jail. The contention of petitioner is that the Whitney act, in so providing for imprisonment, did not operate, and should not be construed to operate, to modify the provisions of the general statute providing for imprisonment in the county jail. But this position is not tenable. The cases to which we are referred are those cases enunciating the well-settled principle that a general act is to be construed as not repealing a particular one,—that is, one directed toward a special object, or a special class of objects, under the maxim,—"Generalia specialibus non derogant." This, however, like every rule of construction, must give way to the plain intent of the legislature, plainly expressed in the statute; and of this intent, in the present instance, there can be no doubt. The legislature meant to declare, and did declare, that the imprisonment for convictions had in the courts created by the Whitney act should be in the city prisons.

There is left for consideration the single proposition whether such a provision is violative of the law, as providing different punishments for the same crime; in other words, whether there is any vice in the law which provides, in effect, that if the crime of petit larceny be committed in Alameda county, but without the corporate limits of the city of Oakland, the imprisonment therefor shall be had in the county jail, while, if the same crime be committed within the corporate limits of the city of Oakland, the punishment therefor shall be by imprisonment in the city jail. We have instanced the case of petit larceny because jurisdiction over that offense is likewise conferred by the Whitney act upon the police court, while by the statute (Pen. Code, § 490) it is made punishable by imprisonment in the county jail. This point was decided against petitioner's contention in Ex parte Halsted, 89 Cal. 471, 26 Pac. 961. There the petitioner had been convicted of the crime of petit larceny in the police court of the city of Los Angeles, which also is controlled by the provisions of the Whitney act; and the judgment of the court imposed a fine, with the alternative of imprisonment in the city jail. This court said: "There is no conflict between the provisions of the Code and those referred to, and we think there can be no doubt of the power of the police court to direct imprisonment in the city jail." The same question as to the power of the legislature to provide different places of punishment for the same offense arose in construing the act in relation to the house of correction of the city and county of San Francisco. St. 1877–78, p. 953. By section 3 of this act it was provided that all persons appearing for sentence in the police judge's court, or the city criminal court, or the municipal criminal court of the city and county of San Francisco, who might be sentenced to imprisonment in the county jail or in the state prison, may, instead thereof, be sentenced to imprisonment in the house of correction in said city and county. By this law, too, it is apparent that one committing a given crime in the city and county of San Francisco would be imprisoned in the house of correction, while the perpetrator of the same crime in any other part of the state would be sent to a state prison. This law, however, was upheld in Ex parte Flood, 64 Cal. 251, 30 Pac. 437. Elsewhere, also, the reasonableness and validity of such acts have been upheld. In People v. Borges, 6 Abb. Prac. 134, the statute prescribed punishment in either the county jails (penitentiaries) or the state prison. It was argued that in those counties which did not possess jails the punishment must be, of necessity, imprisonment in the state prison, while in those counties possessing such penal institutions the imprisonment might be ordered therein. It was held that this was no objection to the law. In City of Miltonvale v. Lanoue, 35 Kan. 603, 12 Pac. 12, a defendant was convicted under a municipal ordinance which provided for imprisonment in the city jail, and was sentenced to imprisonment therein. Upon appeal he was retried in the district court, found guilty, and sentenced to the county jail. This sentence was upheld, and there was declared to be no clash between the ordinance and the statute, and no irregularity in the last judgment. In Kimbleawiez v. State (Ohio Sup.) 36 N. E. 1072, a law provided that punishment should be had by imprisonment in county jails or city prisons. A later act declared that, where a county had a workhouse, imprisonment should be had in it. This law was held to create no conflict. And in Brenan's Case, 10 Q. B. 492, the statute having enacted that, when any convict adjudged to transportation by any British court out of the United Kingdom was brought to England to be transported, it should be lawful to imprison him in any place of confinement provided under the act, it was held that, if the place in which the prisoner was imprisoned was not one of the appointed places, the officers concerned might be liable to censure, but the detention was not unlawful, so as to entitle the prisoner to be discharged. It follows from the foregoing that the writ should be discharged, and the prisoner remanded, and it is so ordered.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN FLEET, J.; TEMPLE, J.; HARRISON, J.

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5 Cal. Unrep. 172

BUHMAN v. BECKER. (No. 18,814.)

(Supreme Court of California. Oct. 12, 1895.)

Assumpsit for Services Rendered—Sufficiency of Evidence.

In assumpsit for the value of services in permanent improvements of a vineyard, defendant admitted the improvements, but claimed that they were made by plaintiff as lessee. There was evidence that defendant persuaded plaintiff, his son-in-law, to take the vineyard instead of leasing other land, saying that he did not know whether any profit could be made out of it or not, but that plaintiff would lose nothing by it; that he told plaintiff and others that he intended to give the vineyard to his daughter, and advised plaintiff to make improvements; that, until the death of his wife, plaintiff worked part of the time for defendant, but most of the time in improving the vineyard, paying out above receipts $2,900; that, after the death of the wife, defendant demanded $1,000 for rent, and that plaintiff leave the premises with all the improvements. *Held*, that plaintiff should recover for his services and the improvements.

Commissioners' decision. Department 1. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Action by William Buhman against Charles Becker for reasonable value of services in working and permanent improvements to a vineyard. From a judgment for plaintiff, defendant appeals. Affirmed.

Driver & Sims, for appellant. J. M. Gregory, for respondent.

VANCLIEF, C. Action to recover from defendant the reasonable value of work and labor alleged to have been performed by plaintiff for and at the request of defendant in cultivating a tract of defendant's land, on which was a vineyard, during the years A. D. 1891 and 1892, and in constructing upon said land a dwelling house and a barn, and in manufacturing boxes and trays in which to cure and store raisins produced from said vineyard; and also to recover the value of the lumber and other materials furnished and used by plaintiff in the construction of said house and barn, and in manufacturing said boxes and trays. The amount for which plaintiff prays judgment is an alleged unpaid balance of $4,345.27. The defendant denied that the alleged labor was performed or the materials furnished at his request, and denied that he promised to pay for either. He also filed a cross complaint, alleging that he leased said tract of land and said vineyard to plaintiff at a rental of $500 per annum, and that plaintiff occupied and cultivated the land and vineyard during said term as a tenant under said lease; that there was due from plaintiff to defendant $1,000 for rent, and also $2,104.73 for money which, at the special instance and request of the plaintiff, the defendant had expended and paid out in erecting improvements on said leased premises, and for conducting the business of raising grapes thereon, which the plaintiff promised to pay out of the proceeds of the first grape crop, but which he has wholly failed to pay; and for these sums, amounting to $3,104.73, the defendant prays judgment against the plaintiff. The court found that plaintiff had performed the labor and furnished the materials at the instance of defendant, as alleged in the complaint, and that the answer and cross complaint of defendant were wholly untrue, except that defendant had paid to plaintiff during said term sums of money amounting to $1,722.73, but further found a balance due plaintiff from defendant of $2,104.65, for which judgment was rendered against defendant. Defendant appeals from the judgment on a bill of exceptions as to matters of law and fact.

I think the evidence justifies the findings of fact. Without conflict it shows that plaintiff performed the labor and furnished the materials, as alleged in the complaint, at the instance of the defendant, and that such labor and materials were reasonably worth as much as they were estimated to be worth by the court. Nor was there any dispute that defendant had advanced to plaintiff $1,722.73, for which the court gave defendant credit. As to the additional credit of $382 claimed by defendant, the preponderance of evidence was clearly against him. On the issue as to a lease of the land to plaintiff, the direct express testimony was conflicting, and about evenly balanced; but the circumstantial evidence was altogether in favor of the plaintiff.

Counsel for appellant seem not to appreciate the force of the circumstantial evidence, the salient features of which are as follows: The defendant is a farmer, estimated to be worth sixty to seventy thousand dollars. In November, 1890, defendant's daughter Emma and plaintiff became engaged to be married, and plaintiff was then negotiating for a lease of land from a Mr. Curtis, on which he intended to live after marriage. About a week after the engagement, and only two weeks before the marriage of plaintiff to defendant's daughter, defendant dissuaded plaintiff from taking the lease from Curtis, and persuaded him to take and cultivate defendant's vineyard tract. As to the terms of the agreement then made, the evidence is conflicting, but sufficient to justify the finding of the court. On the part of the plaintiff it tends to prove that defendant told plaintiff that he had never been able to determine whether any profit could be made from the vineyard or not, but that, if plaintiff would take and run it carefully long enough to determine whether it could be made profitable (no definite time mentioned), defendant would guaranty that plaintiff should lose nothing by the experiment; that, before and frequently after the marriage, defendant told plaintiff and others that he intended to give the quarter section, including the vineyard, to plaintiff's wife for her home, and advised plaintiff to erect thereon all the improvements above mentioned. From the date of their marriage, in November, 1890, until the summer of 1891, plaintiff and his wife lived with defendant's family, working a part of the time for defendant, but most of the time on the improvements of the vineyard tract; that, besides his own personal labor, plaintiff expended during the years 1891 and 1892 about $2,900 of his own money on the improvements, and in carrying on the grape and raisin business, over and above all receipts from the produce of the vineyard; that on May 29, 1892, plaintiff's wife died; that, immediately after the harvest and marketing of the grape crop of 1892, plaintiff and defendant first attempted to settle the affairs of their business, when defendant demanded $1,000 for rent, and that plaintiff should leave the premises with all the improvements thereon constructed by him. With the aid of these circumstances, the evidence, though conflicting, is quite sufficient to justify the finding that there was no lease, and that it was not intended nor understood by either party that the plaintiff was to pay rent; but, on the contrary, that defendant expressly informed plaintiff that he intended to give the land to plaintiff's wife for her home, and intentionally induced plaintiff to make the permanent improvements thereon with the understanding that they should be occupied and used as his future home. In accordance with defendant's direction, plaintiff kept accurate accounts of the expenses and receipts of the vineyard during the two years, showing a loss of $62.60. The judgment for $2,104.65 is composed of three items, as follows: Labor and material in making the trays and boxes, $1,112.50; labor and materials in constructing buildings and fences, $2,302.28, less $1,372.73 paid by defendant,—$929.55; and loss in cultivating vineyard, $62.60. It does not appear that plaintiff was allowed any compensation for his labor in managing or cultivating the vineyard. The trays and boxes, as well as the fixtures, remain in possession of defendant, who forbade the removal thereof by plaintiff. I think the judgment should be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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109 Cal. 365

DUNLAP v. NEW ZEALAND FIRE & MARINE INS. CO. (No. 18,412.)

(Supreme Court of California. Oct. 5, 1895.)

MALICIOUS PROSECUTION — JUSTIFICATION — DILIGENCE IN ASCERTAINING FACTS—INSTRUCTIONS.

1. One who swears to a complaint for embezzlement, prepared by the district attorney, after he has fully and fairly stated to him the facts as he understands them, relying on the attorney's advice that the facts stated constituted the offense, is not liable for malicious prosecution, though he had not used due diligence in ascertaining the facts.

2. A judgment against defendant for malicious prosecution will be reversed, there being conflicting instructions,—one directing verdict for defendant if he fully and fairly stated to the district attorney the facts as he understood them, and in good faith acted and relied on the attorney's advice; the other being qualified with the condition that defendant used due diligence in ascertaining the facts.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Frank R. Dunlap against the New Zealand Fire & Marine Insurance Company and another. Judgment for plaintiff. Defendants appeal. Reversed.

W. S. Goodfellow and L. L. Cory (Gear & Gear, of counsel), for appellants. Frank H. Short, for respondent.

HARRISON, J. Action for malicious prosecution. The plaintiff was arrested upon a charge of embezzlement made by the defendant Borchers in behalf of the insurance company, his codefendant, and, at the hearing before the justice, was discharged. Thereupon he brought this action against the defendants for damages, on the ground that the charge was made maliciously, and without probable cause. Judgment was rendered in favor of the plaintiff, on which the defendants have appealed. At the trial it was shown that, before making the charge, Borchers consulted the deputy district attorney, and stated to him the facts upon which he desired to prosecute the plaintiff, and that that officer, after investigation and consideration, advised him that the plaintiff was guilty of embezzlement, prepared the complaint, which was sworn to by Borchers, and instituted the prosecution of the plaintiff. The court instructed the jury that, in order to render the advice of counsel a defense to an action for malicious prosecution, "the person relying upon the advice of counsel must show that after a full and careful statement of all the facts in such case as were, with due diligence, obtainable, they were advised by counsel that a criminal offense had been committed; and if such advice, after such statement of the facts, is not shown to have been given in this case, then any permission or consent of the deputy district attorney of this county to the prosecution of such criminal offense against the plaintiff herein would be no defense in this case." Other instructions of similar import, to the effect that the prosecuting witness must show that he had exercised due diligence in ascertaining the facts, were given to the jury, and an instruction asked by the defendant that if the jury believed from the evidence that Borchers fully and fairly stated the facts, as he understood them, to the deputy district attorney, and that the defendants relied upon that officer as to whether the facts stated constituted the offense, and that he prepared the complaint, and had Borchers swear to the same, they should find for the defendants, was modified by the court so as to require the jury to find that Borchers "used due diligence in ascertaining such facts." The defendants excepted to the giving of these instructions, and also to the modification of the instruction asked by them.

One who causes another to be prosecuted for a crime is not liable in damages therefor, unless he acts through malice, and without probable cause; and it is the policy of the law that, whenever a citizen shall have reasonable cause to believe that a crime has been committed, he shall be protected in his efforts to secure the punishment of the offender. Ball v. Rawles, 93 Cal. 222, 28 Pac. 937. If, in good faith, and without malice, he causes the arrest of the offender, he is not to be mulcted in damages because the defendant is able, at the trial, to establish his innocence. The facts within his knowledge may not, in point of law, constitute a crime; but, if they are of such a character as to induce in the mind of a reasonable man the honest belief that a crime has been committed, he is justified in seeking to have the crime punished. If, in addition to his own belief, he seeks the advice of one learned in the law, and, after a full and fair statement of the facts within his knowledge, is advised by him that they constitute a crime, his good faith in prosecuting the offender is corroborated. If, in addition to this, the person whose advice he seeks is the officer selected by the people to prosecute offenders against the laws, and he gives to that officer all the information that he possesses, and is then advised by him that a crime has been committed, and the prosecution is made upon a complaint prepared by that officer, his good faith is established. Accordingly, it is held that if the prosecuting witness seeks the advice of such officer, and lays before him all the facts within his knowledge relating to the alleged offense, and is advised by him that they constitute a crime, he is protected in prosecuting the same. Smith v. Insurance Co. (Cal.) 40 Pac. 540; Monaghan v. Cox, 155 Mass. 487, 30 N. E. 467. The defense of probable cause is sufficiently established if it be shown that he has laid before this officer a full, fair, and correct statement of all the facts that are known to him, or which he had reason to believe existed (Railroad Co. v. Hunt, 59 Vt. 294, 7 Atl. 277), without any suppression, evasion, or falsehood (Walter v. Sample, 25 Pa. St. 275), and as he believes them to be (Jones v. Jones, 71 Cal. 89, 11 Pac. 817), and that he has acted honestly upon the advice given him. As, in order to constitute this defense, there must exist in his mind, at the time of making the complaint, a probable cause for the prosecution, his belief in the truth of the facts stated by him to the officer is essential to his good faith. If there are any circumstances within his knowledge, or which he is chargeable with knowing, which would destroy the apparent effect of the facts stated by him, or if, after obtaining the advice of counsel, and before acting upon it, other facts should come to his knowledge, which he did not submit, his good faith in seeking advice, or in acting thereon, would be impeached, and the defense dependent upon such good faith would fail. So, too, if he should suppress some material fact, upon the mistaken belief that it was immaterial, the advice of counsel would be unavailing, for the reason that he had not laid before him all the facts within his knowledge. But assuming that in seeking the advice of counsel, and in acting thereon, he has acted in good faith, and has disclosed all the facts within his knowledge relating to the offense and the accusation, his defense of probable cause will be established, even though the defendant should show at the trial other facts sufficient to secure his acquittal, and which might have been ascertained by the prosecuting witness if he had made diligent inquiry therefor. It is not necessary, however, that he shall institute an investigation of the crime itself, or seek to ascertain whether there are other facts relating to the offense, or try to find out whether the accused has any defense to the charge. He is not required to exhaust all sources of information bearing upon the facts which have come to his knowledge, for that would be to require him to perform the office of the committing magistrate, and thus thwart the very purpose of the law in inducing him to seek its immediate vindication for crimes committed against it.

There are expressions in some opinions to the effect that, in addition to the facts within his knowledge, he must also have exercised reasonable diligence to ascertain whether there are any other facts bearing upon the charge; but, in an extended examination of the authorities, we have not been able to find any case in which it has been decided that such diligence must be exercised, or where the prosecuting witness has been held liable for failure to ascertain whether there were any other facts bearing upon the case.

This question was directly presented in Johnson v. Miller, 69 Iowa, 562, 29 N. W. 743, where the jury were told that one of the questions of fact for them to determine was whether the defendant made a full, fair, and honest statement to the district attorney of all the facts bearing upon the guilt of the plaintiff, of which they had knowledge, "and which they could have ascertained by reasonable diligence." The court held that this qualification was erroneous, saying: "He is not required to institute a blind inquiry to ascertain whether facts exist which would tend to the exculpation of the party accused, but, if he honestly believes that he is in possession of all of the material facts, and makes a full and fair statement of the facts to the counsel, and acts in good faith on the advice given him, he ought to be protected." It may be that the facts within his knowledge are such as to put him upon inquiry with reference to other facts by which he would be chargeable with a knowledge of all that such inquiry would have shown, or it may be that his own relation to the facts brought to his knowledge would make him presumptively cognizant of other facts. These circumstances, however, would bear upon his good faith in making the statement in that particular case, rather than establish the rule that he must in all cases exercise any diligence or effort for the purpose of ascertaining whether there are other facts than those which have come to his knowledge, and fall within the rule requiring him to state, without any suppression, all the facts actually or presumptively within his knowledge. As was said in Johnson v. Miller, supra, "It would be a very harsh rule, and one calculated to discourage entirely the making of complaint by private individuals, to hold that one who has acted on the advice of the district attorney, given upon a full and fair statement of all the material facts which he knew, or which he had reasonable ground to believe existed at the time, was not protected by the advice of the attorney, simply because he did not, before making the complaint, learn of other material facts, of the existence of which he might have learned by reasonable inquiry."

These instructions are also at variance with the following instruction, which was also given by the court: "If you believe that the defendant Borchers fully and fairly stated to the deputy district attorney the facts of the case against Hankins and Dunlap, as he understood such facts, and that the defendants, in good faith, acted and relied on the advice of the district attorney given thereon, your verdict must be for the defendants." In this latter instruction the jury are told that it was a sufficient defense if Borchers fully and fairly stated to the deputy district attorney the facts of the case, as he understood them, while in the other instructions they were told that, in addition to such statements, it must be shown that he stated all the facts which he could have ascertained by due diligence. The jury may have been misled by these differing instructions, and uncertain which to follow. The judgment is reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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109 Cal. 395

ERLANGER v. SOUTHERN PAC. R. CO.

(Sac. 26.)

(Supreme Court of California. Oct. 5, 1895.)

CONSENT JUDGMENTS—REVIEW.

A judgment appearing by the record to have been entered by consent will not be reviewed.

In bank. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by E. Erlanger against the Southern Pacific Railroad Company. Judgment for defendant. Plaintiff appeals. Appeal dismissed.

Lamberson & Middlecoff, for appellant. J. W. Ahern, for respondent.

McFARLAND, J. This is a motion made by respondent to dismiss the appeal in the above-entitled cause. One of the grounds of the motion is that the judgment appealed from was entered in pursuance of an express written stipulation of all the parties, including the appellant. It appears from the record that such a stipulation was made, and that the judgment was entered in accordance therewith, and that it was further expressly stipulated that no appeal should be taken from said judgment. It is well settled that judgments and orders by consent will not be reviewed. Francaise D'Epargnes v. Beardslee, 63 Cal. 160; Thompson v. Connolly, 43 Cal. 636; Mecham v. McKay, 37 Cal. 158, and cases there cited; Meerholz v. Sessions, 9 Cal. 278; Brotherton v. Hart, 11 Cal. 406. In the cases above cited there was no motion to dismiss, and the judgments were affirmed because the court would not review a judgment or order made by consent of the appellant. But in Oullahan v. Morrissey, 73 Cal. 297, 14 Pac. 864, the appeal was dismissed because the judgment was entered with the consent of the appellant; and in City and County of San Francisco v. Certain Real Estate, 42 Cal. 513, the court, per Crockett, J., said: "It is objected, in limine, that we ought not to entertain this appeal, for the reason that the judgment from which it was taken was entered pro forma, and by consent. If the record discloses this fact, it would be our duty to dismiss the appeal, as we have repeatedly decided that we will not review judgments or orders entered by consent." The motion to dismiss the appeal is granted, and the appeal is dismissed.

We concur: GAROUTTE, J.; HARRISON, J.; VAN FLEET, J.; HENSHAW, J.

109 Cal. 381

PEOPLE v. LOWEN. (Cr. 34.)

(Supreme Court of California. Oct. 5, 1895.)

CRIMINAL LAW — CONVICTION OF LESS DEGREE THAN SHOWN BY THE EVIDENCE.

Evidence which would have sustained a verdict of burglary in the first degree will sustain a verdict of an attempt to commit burglary in the second degree.

Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Edward R. Lowen was convicted of an attempt to commit burglary, and appeals. Affirmed.

Walter S. Hinkle, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

TEMPLE, J. The defendant was informed against for the crime of burglary, and convicted of an attempt to commit burglary of the second degree. The evidence showed without controversy that he was found in a boarding house in the nighttime, and in an attempt to escape therefrom with goods in his possession, which he had stolen while in the house. When caught, he gave a false account of how he got into the house. The only remaining question was whether he wrongfully entered the house with the intent to steal. Upon this subject one of the proprietors testified that he knew the defendant, and had invited him to come to the house. He told him to walk in at the door, and to proceed to his room, the location of which he described to him, and, if the witness was not there, to wait for him. All this the defendant did, except that he did not wait for the proprietor, but, on the contrary, he stole some jewelry, which he found in the room, and attempted to get away with it.

If the jury believed the witness Whitney, and that defendant entered the house in pursuance of the invitation, he was neither guilty of burglary nor of an attempt to commit burglary. If they did not believe Whitney, or believe that the defendant, nevertheless, entered the house with the intent to steal, he was guilty of burglary in the first degree. In no event was he guilty of burglary in the second degree merely, or merely of an attempt to commit burglary. The jury, probably, did believe Whitney, and did not believe that the defendant was guilty of burglary, or of an attempt to commit burglary; but as he was confessedly guilty of larceny, of which offense they could not convict him under the information, they thought he ought not to go free, and so found him guilty of the lowest offense included in the information. I think the verdict ought to have been set aside by the court, and the jury severely reprimanded for this disregard of their oaths. The fact that jurors so frequently disregard their oaths and the law, and attempt to realize in their verdicts what they think should be done, is a principal cause of the frequent miscarriage of justice in jury trials and in bringing the institution itself into disrepute. They should be taught that their function is to determine what is the truth as to certain disputed questions of fact, and that ordinarily beyond that they have no concern with consequences.

But it is a different question whether this court can reverse the judgment. We have no jurisdiction in criminal cases to review the evidence, although very often questions of law arise from the evidence of which we have jurisdiction. It has been held that evidence of burglary in the first degree will support a verdict of conviction of burglary in the second degree, because the defendant is not injured. People v. Barnhart, 59 Cal. 381. The commission of burglary implies an attempt to commit it. There was evidence here which would have sustained a verdict of burglary in the first degree, and, under the decisions, such evidence will support a verdict of an attempt to commit burglary in the second degree. The judgment and order are affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

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109 Cal. 373

SILVA et ux. v. SUPREME COUNCIL OF PORTUGUESE UNION OF STATE OF CALIFORNIA (DUTRA, Intervener). (No. 16,028.)

(Supreme Court of California. Oct. 5, 1895.)

MUTUAL BENEFIT ASSOCIATION —CHANGE OF BENEFICIARIES BY WILL.

A certificate in a mutual benefit association provided for payment of benefits to certain named beneficiaries. *Held*, that where there had been no revocation of the certificate, the insured had no interest which he could dispose of by will.

Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Manuel Joaquin Da Silva and wife against the Supreme Council of the Portuguese Union of the State of California on a mutual benefit life policy. Frank Silva Dutra intervened, claiming the amount due on the policy. From a judgment for the intervener, and an order denying a new trial, plaintiffs appeal. Reversed.

M. C. and E. C. Chapman and T. M. Bradley (M. F. Pixley, of counsel), for appellants. B. McFadden, for respondent. A. A. Moore and Fred V. Wood, for intervener.

GAROUTTE, J. This litigation arises over the disposition of a certain sum of money coming from the Portuguese Union of the State of California, a mutual benefit society. One Flores, now deceased, was a member of said society, and his beneficiaries, as named by him in his certificate of membership, were the plaintiffs herein. Flores made no attempt to substitute other and different beneficiaries during his lifetime, but by his will provided: "I also give to my son Frank the money which will become due from said Uniao Portugueza de Estado de California at my death, and that the necessary expenses of my sickness and burial shall be first paid out of said money." The son is now claiming the money under this provision of the will, and is the intervener and respondent.

The constitution of the society contains the following provision: "Any member of the Portuguese Union of the State of California, dying and standing clear on the books of the council to which he belongs, his heirs, or a person or persons whom he may have designated, shall be entitled to receive from the special fund of the union a sum equal to one dollar for each member in good standing in the union." There is no by-law or constitutional provision of the society or statute of the state providing for a change or substitution of beneficiaries in a certificate of membership issued by this society, and it is now contended upon the part of plaintiffs, such being the fact, that the present beneficiaries, plaintiffs, had a vested interest in the contract or certificate of insurance, the same as in the ordinary contract of life insurance, and that their consent was necessary to a valid substitution of a new beneficiary. This proposition of law is controverted by the other side, respondent insisting that, unless the right to change beneficiaries is restricted by some law of the order or statute of the state, the assured has the absolute right to make such change. And it may well be said respectable authority is found supporting both positions. Bacon, at section 304 of his work upon Benefit Societies, in speaking as to the difference between these two classes of contracts of insurance, says: "But, as in either case the rights of the beneficiary are dependent upon and fixed by the contract between the assured and the company or association, there seems to be no reason why the assured should have any greater power to change the beneficiary in one case than in the other, except as that power may be inherent in the nature of the association, or is reserved to him by the constitution or by-laws of the association, or by the terms of the certificate." Upon the same lines are Com. v. Wetherbee, 105 Mass. 160, and Weisert v. Muehl, 81 Ky. 340; but to the contrary we find the court saying in Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657: "Most of the decisions seem to concur in holding that in case of mutual benefit societies the beneficiary named in the certificate of membership acquires no vested right to the benefit to accrue upon the death of the member until such death occurs. The member may, therefore, during his lifetime, exercise the power of appointment without other limits or restrictions than such as are imposed by the organic law of the society, or the rules and regulations adopted in conformity therewith." To the same effect is Society v. Burkhart, 110 Ind. 189, 10 N. E. 79, and 11 N. E. 449. But the merits of the present appeal may be disposed of upon other grounds, and we therefore refrain from stating our conclusions as to the true doctrine.

Conceding, for the purposes of the case only, that the assured had the power to change his beneficiary, and, if it is necessary to go to that extent, conceding that he had the right to make such change of beneficiary in his will, still we see no change of beneficiaries in this case; and that brings us to a consideration of the provision of the will. Upon the most casual inspection, it is apparent that the testator attempted to deal with the prospective proceeds of the certificate of insurance as though it were money in hand, and his own; but it was neither. There was no money to bequeath, and the certificate of insurance at the time was the property of another, and not subject to his testamentary control. Therefore, looking at this provision of the will as an attempt to dispose of the money coming from the certificate of insurance, it was an entire failure. The provision was likewise barren of results, if we consider it an attempt to dispose of the certificate by his last will and testament, for, as long as any living person was named in such certificate as a beneficiary, no revocation having taken place, the testator had no property in the certificate, and no interest therein with which a will might deal. If the testator had a property right in this certificate, or its proceeds, which he could control by will, then, if he had died intestate, the same property right would have passed to his creditors or heirs. Yet it cannot be questioned but that, if in the case the assured had left no will, the certificate, with the proceeds thereof, would have passed to the beneficiaries named therein. This provision of the will can in no sense be construed as a revocation and substitution of beneficiaries. Such construction is wholly unwarranted by the language used. Even conceding such a thing could be done by the use of language in the testator's last will and testament, it would have to be held that the revocation and substitution took effect when the will was made, and not subsequent to the death of the testator, for the testator had no power to revoke and substitute after death. And, again, eo instanti, upon death, the proceeds of the certificate vested in the beneficiaries named therein. It would seem to follow that, if a revocation and substitution of beneficiaries could be made by will in a case like the present one, then the provision found in this will could only have life, and effect the purposes contemplated, when treated as an independent declaration in writing of the testator during life, and as of effect when made. Here there was no intention to accomplish such results. There is no language from which such conclusions might be drawn, but, upon the contrary, it is plain that the testator, by his will, attempted to make a disposition of this property, to take effect upon his death, and at the same time that the instrument would take effect upon other property belonging to him. The testator tried to make a testamentary disposition of this property, and this he could not do. These views are fully supported in Nibl. Ben. Soc. § 237. We see no satisfaction to be gained by respondent from the provision of the constitution of the society heretofore quoted, even conceding that it gave the right to the assured to designate or substitute other beneficiaries. No change or substitution was designated by the assured during life, and it is settled law that such a provision gives no right to make the designation by will. Mr. Niblack, in discussing this question at section 237, supra, says: "Where the contract provides that each member shall designate in writing some person as nominee for the benefit fund, and that upon the death of a member, the nominee so designated by him shall receive such fund, a designation of the beneficiary during the lifetime of the member is contemplated, and may not be made by will." For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; VAN FLEET, J.

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109 Cal. 378

MOLINEUX v. STATE. (No. 18,428.)

(Supreme Court of California. Oct. 5, 1895.)

INTEREST—ON COUPONS—LIABILITY OF STATE—RETROSPECTIVE EFFECT OF STATUTE.

The state not being subject to the general provision providing for interest on an indebtedness from its maturity (Civ. Code, § 1917), and there being no provision making it liable for interest on its interest coupons, Act Feb. 28, 1893, providing that, in case of judgment against the state, it shall be for the amount due, with legal interest from the time the obligation was due, cannot have the effect of authorizing interest on the coupons prior to the act; Const. art. 4, § 31, denying to the legislature the power to make any gift.

Department 1. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by Henry Molineux against the state of California. Judgment for plaintiff. Defendant appeals. Modified.

Atty. Gen. Fitzgerald, for the State. Mastick, Belcher & Mastick and Freeman & Bates, for respondent.

HARRISON, J. In 1851, certain Indian war bonds were issued on behalf of the state, by virtue of an act of the legislature, passed for that purpose (St. 1851, p. 520). The bonds themselves, and the coupons for the semiannual interest thereon, which matured prior to 1854, were paid by the United States in September, 1856. Plaintiff is the holder of certain coupons that had been detached from these bonds, representing the semiannual interest thereon that accrued prior to September 1, 1856, amounting in the aggregate to the sum of $4,500. On the 3d of March, 1894, he presented his claim against the state upon these coupons to the board of examiners, and demanded that they allow the claim, with legal interest on the coupons from their respective dates of maturity. The board refused to allow his demand, and thereupon the present action was commenced under the provisions of the act of February 28, 1893 (St. 1893, p. 57). Judgment was rendered in favor of the plaintiff for the amount of the coupons and interest as claimed by him, from which the defendant has appealed, and the error chiefly relied upon in the appeal is the allowance of interest.

The liability of the state to pay interest upon the matured coupons of its bonds was presented in Sawyer v. Colgan, 102 Cal. 283, 36 Pac. 580, and we there said: "Section 1917 of the Civil Code does not apply to an indebtedness of the state, and the state is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or some lawful contract of its executive officers. U. S. v. North Carolina, 136 U. S. 211, 10 Sup. Ct. 920; Carr v. State, 127 Ind. 204, 26 N. E. 778."

The respondent, however, contends that under the provisions of section 5 of the act of 1893, under which this action is brought, he is entitled to legal interest upon the coupons from their maturity. That section is as follows:

"Sec. 5. In case judgment be rendered for the plaintiff in any such suit, it shall be for the amount actually due from the state to the plaintiff, with legal interest thereon from the time the obligation accrued, and without costs."

The "legal interest" for which judgment is by this section authorized to be entered in favor of the plaintiff is only such interest as is authorized by law. If the plaintiff is not legally entitled to interest upon his claim, either by reason of the nature of the claim or the immunity of the state from an obligation to pay interest, this statute does not authorize its recovery; and, as we have seen that there was at that time no liability on the part of the state for interest upon the coupons, there was no "legal" interest for which a recovery could be had, irrespective of the provisions of the statute itself.

The claim by the respondent that the act is retrospective, and by its terms includes the right to recover legal interest from the maturity of the coupons, is met by article 4, § 31, of the constitution, which declares: "The legislature shall have no power * * * to make any gift, or authorize the making of any gift of any public money or thing of value, to any individual, municipal or other corporation whatever." Inasmuch as prior to the passage of the act there was no liability for interest on the part of the state, it was not competent for the legislature to create such liability by the passage of the act. To increase the existing obligation for the coupons, by adding thereto the right to recover interest thereon, would be to make a donation to the holder of the coupons of the amount of the interest. If it be conceded that the state was under a moral obligation to pay the same interest upon its indebtedness that is recognized as recoverable by law between individuals, such moral obligation does not render the statute constitutional, or make the interest so authorized other than a gift. Bourn v. Hart, 93 Cal. 321, 28 Pac. 951; Conlin v. Board, 99 Cal. 17, 33 Pac. 753.

The superior court is directed to modify the judgment appealed from by striking therefrom the words "nineteen thousand six hundred and seventy-two dollars," and insert in lieu thereof the words "forty-five hundred dollars"; and, as so modified, the judgment will stand affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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109 Cal. 360

FREEMAN v. CAMPBELL. (No. 18,447.)

(Supreme Court of California. Oct. 5, 1895.)

MORTGAGEE IN POSSESSION—LIABILITY FOR RENTS—COUNTERCLAIM.

1. A mortgagee not being entitled to possession unless expressly authorized by the mortgagor (Civ. Code, § 2927), is liable for money had and received to the use of the mortgagor's administrator, where, after the mortgagor's death, without any authority, he goes into possession and collects the rents; and it is immaterial that the mortgage included the rents, he having taken no steps to reach them through the intervention of the court, and having obtained judgment of foreclosure for the full amount of his claim under a complaint expressly waiving recourse against any other property of the deceased mortgagor than the mortgaged premises.

2. Where a mortgagee has, without authority, gone into possession, and collected the rents, the right of the mortgagor to recover them is not lost by failure to make a counterclaim therefor in the foreclosure suit.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by G. N. Freeman, administrator of A. G. Anderson, deceased, against J. B. Campbell. Judgment for plaintiff. Defendant appeals. Affirmed.

C. C. Merriam and J. P. Strother, for appellant. F. H. Short and G. C. Freman, for respondent.

HARRISON, J. Upon a former appeal between these parties (Campbell v. Freeman, 99 Cal. 546, 34 Pac. 113), it was held that the conveyance to Campbell of the land in this action, from the vendor, created a resulting trust in favor of Anderson, and that the only right which Campbell could assert against Anderson was that of a mortgagee. That action was brought by Campbell to foreclose the mortgage thus created, and judgment was rendered in his favor for the amount of the claim for which it was held as security. Prior to the commencement of the action, and after the death of Anderson, Campbell took possession of the mortgaged premises, and received as rents therefor, from a tenant to whom he had leased it, the sum of $1,013.68. The present action was brought to recover from him the amount of the rents thus received. Judgment was rendered in favor of the plaintiff, and the defendant has appealed.

As, by the express terms of the agreement under which the conveyance was made to Campbell, Anderson went into the possession and occupancy of the land, and remained there until his death, Campbell was not a "mortgagee in possession," in the meaning of that term as used in legal phraseology, and consequently was not entitled to receive the rents of the land. A "mortgagee in possession" is one who takes possession of the mortgaged land by virtue of an agreement between him and the mortgagor, and in recognition of the relation between them, and, on a bill to redeem brought by the mortgagor, must account for the income of the property. Section 2927, Civ. Code, declares, however: "A mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage; but after the execution of the mortgage, the mortgagor may agree to such a change of possession without a new consideration." The taking possession of the land by Campbell after the death of Anderson was not by virtue of any agreement between them, and consequently conferred no additional right upon him, as mortgagee. Such possession was not taken or held adversely, but for the protection of the property, as well in the interest of the mortgagor as of himself, and the rents were received by him in the quasi character of bailiff of the mortgagor. The present action is not brought to recover the rents and profits as damages for the withholding of the land by Campbell, but for moneys had and received by him to the use of the plaintiff. Their receipt by him constituted a transaction as independent of the mortgage as would have been the receipt by him of any other moneys belonging to the estate of Anderson; and as they were taken by him without any authority from Anderson, and without the implied power of a "mortgagee in possession" to apply them in reduction of the mortgage debt, he had no right, without the permission of the plaintiff, to make such application, and he was also at liberty to bring his suit for the foreclosure of the mortgage for the full amount of his claim without making any deduction therefor. It was evidently in recognition of this principle that Campbell, after taking possession of the land, and receiving a portion of the rents sued for herein, presented his claim against the estate of Anderson for the full amount of his demand, without giving any credit for the rents so received, and, after its allowance by the administrator, commenced an action for the foreclosure of his mortgage, and obtained judgment for the full amount of his demand. In his complaint in that action he "expressly waived any and all recourse against any other property of the estate of the said Anderson, deceased, save and except the land and premises in the complaint described." At the time the present action was tried, no sale had been had under the judgment recovered in that action; and Campbell claimed the right to retain the rents until such sale, and, in case of a deficiency in the proceeds of the sale, to apply them in reduction thereof. That the rents which he had collected formed a part of the estate of Anderson is without controversy, and it is not claimed by Campbell that, in the absence of the mortgage claim, he would have any right to retain them. After having solemnly waived all recourse against any other property of the estate, and, under such waiver, obtained a judgment for the full amount of his claim, he ought not to be permitted now to repudiate his waiver, and retain possession of the property of the estate, for the very purpose of satisfying the claim for whose satisfaction he had agreed to look to the mortgaged premises alone.

The plaintiff did not lose the right to recover these rents by reason of not having made a counterclaim therefor in the foreclosure suit. The cause of action for the rents did not arise out of the transaction set forth in the complaint in foreclosure, nor was it connected with the subject of that action. That "transaction" consisted of the dealings between the parties, resulting in the mortgage, and we have seen that the receipt of the rents by Campbell was a transaction independent of the mortgage. The subject of the action in that suit was the foreclosure of the mortgage for which the land was held as security, and the ascertainment of the amount for which it was so held. As the rents were not taken by Campbell by virtue of any agreement relating to the security, but at his own instance, their receipt by him constituted a cause of action in favor of the estate of Anderson, independent of the transaction connected with the mortgage, and which it was optional with the plaintiff herein to claim in that suit, or to recover in an independent action.

The claim that the mortgage included the rents, as well as the land, does not aid the appellant. As under section 2927, Civ. Code, he had no right to the possession of the mortgage security, his right to the rents was no greater than that to the land. A mortgage is a contract by which specific property is hypothecated. Civ. Code, § 2920. But such contract is independent of the fact of possession, and does not, of itself, confer the right of possession. If a receiver had been appointed to take possession of the mortgaged premises, the authority of that officer would have included the right to take possession of the rents, as well as the land, and the rents would then have been in the custody of the court, and subject to its direction; but, in the absence of some intervention by the court, the mortgagor has the right to these rents, even though they are included in the instrument of mortgage, and the mortgagee's right to them is limited to their disposition by the court, in the judgment or subsequent thereto. The judgment and order are affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

109 Cal. 384

PEOPLE v. HAMMOND et al. (No. 19,506.)

(Supreme Court of California. Oct. 5, 1895.)

SURETIES ON BOND—LIABILITIES—ESTOPPEL.

1. Where a bond was executed for the faithful performance of the duties of a public officer during his second term, but said officer failed to take the oath prescribed by statute at the inception of his second term, his sureties will be estopped from asserting that he did not hold by virtue of his second election, but held over from his first term, in an action on the bond for a defalcation occurring after the first term had expired.

2. Where a deficiency for one term of a public officer has been covered up by money received during the second term, the sureties in the bond for the second term are liable for that money.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the people of the state of California against El Hammond and others on a bond. Plaintiff had judgment, and defendants appeal. Affirmed.

Moye Wicks and Chapman & Hendrick, for appellants. H. C. Dillon, Dist. Atty., for the People.

PER CURIAM. This action is brought against the defendant El Hammond as principal, and the other defendants as sureties, upon an official bond given by said Hammond, as tax collector of Los Angeles county. Hammond was not served with process, and did not appear. Hammond was elected tax collector of said county at the November election in 1884, and gave bond and qualified as such and entered upon the duties of said office on the first Monday after the 1st day of January, 1885. The term for which he was elected and qualified was two years. At the general election held in November, 1886, he was re-elected to the same office for the statutory term commencing the first Monday in January, 1887, that being January 3, 1887. The bond here sued upon was given by Hammond on December 22, 1886, in the penal sum of $50,000, conditioned as follows: "The condition of the above obligation is such that whereas, the above-bound principal, El Hammond, was at a general election held in said state on the 2d day of November, 1886, duly elected to the office of county tax collector in and for Los Angeles county and state aforesaid: Now, therefore, the condition of this obligation is such, that if the said El Hammond shall well, truly, and faithfully perform all official duties now required of him by law, and shall well, truly, and faithfully execute and perform all the duties of such office of county tax collector required by any law to be enacted subsequently to the execution of this bond, then this obligation is to be void and of no effect, otherwise," etc. This bond was duly approved December 27, 1886, but Hammond did not at any time after his said second election take any oath of office.

At the expiration of his said first term on January 3, 1887, Hammond was a defaulter in the amount of $7,861.86, which moneys were collected by him as such tax collector during his said first term, upon the general tax roll; that is, said sum was not only not paid over, but was not in his hands as tax collector in any form, the same having been appropriated to his own use. Hammond held said office continuously from the time he first entered upon it, in January, 1885, until about March 21, 1887, when he absconded. At the beginning of his said second term, the delinquent tax list for the fiscal year 1886–87 was delivered to Hammond for collection, and he was then charged with the amount thereof, viz. $30,016.54. On January 22, 1887, the county auditor served upon him the following demand: "To El Hammond, Tax Collector: You will at once pay into the treasury $7,861.86, in settlement of the general taxes." On January 24, 1887, Hammond paid over to the treasurer said sum of $7,861.86, but the money so paid was money collected by him upon said delinquent tax list during his second term; that is to say, after January 3, 1887. The court found the following to be a statement of the condition of Hammond's account for the second term:

To amount of delinquent tax list..		$30,016 54
By taxes double assessed and sold to the state..	$2,472 70	
Paid to county treasurer February 7, 1887.....	3,202 76	
Paid to county treasurer March 7, 1887........	7,338 63	
Paid to county treasurer March 25, 1887.......	26 40	
Paid to county treasurer March 26, 1887........	66 66	
Paid to county treasurer March 29, 1887.......	4 30	
Paid to county treasurer May 2, 1887..........	3,941 25	17,052 70
Balance due and unpaid.......		$12,963 84

The said credits do not include the said sum of $7,861.86, paid to the treasurer on January 24, 1887, in compliance with the demand of the auditor.

The plaintiff had judgment for said sum of $12,963.70, and interest thereon from November 2, 1887 (at which date the action was commenced); and defendants appeal from said judgment, and from an order denying their motion for a new trial.

Upon these facts appellants contend: (1) That, Hammond not having taken the oath of office after his second election, his incumbency after January 3, 1887, was simply a holding over or continuance of his first term, under the provisions of section 879 of the Political Code, which provides as follows: "Every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified." That, not having qualified or entered upon said office under his second election, the bond in suit never became obligatory, and the action should have been upon the bond given under his first term. (2) That, if liable at all, they are not liable for the defalcation or embezzlement committed under the first term, and that, therefore, the $7,861.86, part of the sum collected under the second term, and paid to the treasury January 24, 1887, should be credited upon the collections made in the second term, and should be deducted from the $12,963.84 for which the court found them liable. (3) That the incumbent of an office is authorized to continue to discharge its duties until his successor is qualified, and that, if he does so after the expiration of his term, it is not a new term, but a continuation, in effect, of the term under which he entered the office, and that the sureties upon his bond are liable for any official delinquency occurring while he thus holds over his term, to the same extent as though the delinquency had occurred during the term for which he was elected, is conceded. Pol. Code, § 959. It is also conceded that the fact that Hammond was re-elected to the office of tax collector, and executed a bond for the faithful discharge of the duties of said office for the second term, did not entitle him to enter upon and hold said office for said second term under said second election without taking the oath of office within the time prescribed by law, and that, under such circumstances, a vacancy occurred under the provisions of subdivision 9, § 996, Pol. Code, which would have authorized the appointment of a tax collector upon the expiration of Hammond's first term. Such vacancy, however, is not of that absolute character such as would be caused by the death of the officer, but exists for the purpose of appointment, though there may be an occupant or incumbent of the office, whether such incumbent be a de facto officer merely, or one holding de jure after the expiration of his term and prior to the qualification of his successor. People v. Ward (L. A. 21; Cal.) 40 Pac. 538.

As Hammond was elected to succeed himself, there was no change in the person of the incumbent when the second term began; and hence, as a matter of fact, the personality of the incumbent after January 3, 1887, could not indicate whether he held over because of his own failure to qualify, or whether he assumed the duties of the office under his second election. If he assumed the office under color of his second election, he was an officer de facto, "and held a vested right to act as such until his right was questioned by some one in a proper proceeding for that purpose." Hull v. Superior Court, 63 Cal. 174, 177; People v. Toal, 85 Cal. 333, 338, 24 Pac. 603. That Hammond was regularly elected to the office of tax collector in November, 1886, is not questioned, and that he was so elected must have been generally known. His bond recited his said election, and was given for the term to which he had been elected, the statute fixing the term and its beginning. He is therefore estopped by the execution and delivery of his bond and its approval from asserting that he did not enter upon said second term by virtue of his said election, or that he simply held over under his first election because of his own failure to take the oath of office for the second term; and his sureties, as well as he, are estopped by the bond which they have executed for the purpose of enabling him to enter upon and exercise the duties of the office from alleging any deficiency in his title to the office, and are therefore estopped from denying that he was a de jure officer under and by virtue of his second election. Murfree, Off. Bonds, §§ 673, 674, and cases there cited. So in Mechem, Pub. Off. § 275, it is said: "But a bond, otherwise valid is not rendered void by the fact that the officer who gave it was not in all respects lawfully elected or inducted to the office. If he is an officer de facto, exercising the functions of the office, the bond given by him will be binding upon himself and his sureties." In People v. Jenkins, 17 Cal. 500, the court said: "The principal obligor and his sureties are in no condition to question the regularity of the election of the principal, or his responsibility for acts done in an official capacity. The principal had at least the color of office by his appointment, and the bond estops him and his sureties signing it from denying his official character." See, also, Moore v. Earl, 91 Cal. 632, 636, 27 Pac. 1087, and cases there cited. In State v. Rhoades, 6 Nev. 352, this question was very fully discussed, and many authorities cited in the opinion. Rhoades was elected state treasurer to succeed himself, received his certificate of election, and took the oath of office, but failed to execute his bond within the time required by law. It was contended for defendants that the term was forfeited under the statute; that Rhoades did not hold the office by virtue of his second election, but held it under the constitutional provision authorizing him to hold over until the qualification of his successor. In response to this contention the court held as follows: "(1) That Rhoades relinquished all right to hold office by virtue of his first election. (2) That afterwards he was an officer de facto under the election of 1866 (the second election). (3) Being an officer de facto, he and his sureties are estopped from denying that the bond was legally given; or rather that, so far as the officer and his sureties are concerned, he is to be held an officer de jure." So, in the case at bar, we think it must be held that, having executed and delivered his bond for the second term, Hammond relinquished all right or claim to hold the office of tax collector after January 3, 1887, by virtue of his first election, and that he and his sureties are estopped from denying that he was tax collector de jure, after the date last mentioned, by virtue of his second election.

2. The question of the liability of the defendant sureties for the $7,861.86, in which sum Hammond was a defaulter at the close of his first term, and which sum he covered into the treasury by the payments of moneys received by him during his second term, is scarcely an open one. Says Mechem (Pub. Off. § 287): "Where the officer has used moneys coming into his hands officially during the second or other subsequent term to make good a default committed by him in the first or other prior term, the sureties upon his bond for the second or other subsequent term will be liable; and the fact that the public officers charged with the duty failed to require the officer to account at the close of the prior term, or extended the time for such accounting, or that, with knowledge of his default, they accepted the bond for the subsequent term, will not relieve the sureties for the subsequent term." And says Throop (Pub. Off. § 219): "The general rule is that where a deficiency for one term has been covered up by money received during a second term, the sureties in the bond for the second term are liable for that money." The cases cited by these writers in support of their text are numerous and uniform, and, indeed, it is not easy to see on principle how a different rule could obtain. If Hammond, for example, had been elected to another office, as that of sheriff, and had used the moneys coming into his hands as such officer to cover his previous defalcation as tax collector, no one would doubt but that for such a misuse and conversion his bondsmen would be liable. The fact that he was elected to succeed himself as tax collector in no way lessened the criminality of his act, or modified his bondsmen's liability therefor. True, the sureties upon his bond for the second term were not liable for any defalcation which occurred during his first term, but they did guaranty to hold the state and county financially harmless against any wrongful act of their principal during his second term. It was the principal's duty, receiving funds during that second term, to make legal application of them. It was no more a legal application for them to apply them to the payment of an earlier defalcation than it would have been in the case instanced, had he done so when filling the office of sheriff. The moneys received by him, and so misappropriated, were received upon account of delinquent taxes. They should have been paid over by him upon that account. He did not do so, but, to the contrary, after demand requiring him to make good the previous shortage, he took the money which could be by him legally devoted only to payment upon the delinquent tax account, and applied it by his own affirmative act to covering that shortage. He was thus guilty of a second embezzlement or conversion, committed during his second term. "Sureties are not released because the collections covered by their bond have been paid into the treasury on account of the tax collector for the preceding years. Such a disposition was itself as much a misappropriation as if he had devoted it to his private debts." State v.

Powell, 40 La. Ann. 234, 4 South. 46. "If the funds received during the second term are misapplied to make up for a prior delinquency, the sureties would be liable for that misapplication." Pine Co. v. Willard, 39 Minn. 125, 39 N. W. 71.

The rule is different where the duty of the defaulting officer is limited merely to the payment over of moneys, and the superior officer makes disposition of the funds. In such cases, as the duty of the defaulting officer is fulfilled when he makes a general payment to the treasury, or to some superior officer, he cannot be said to have committed any new offense, because that officer, in the exercise of what he deems to be his discretion or power, makes some particular disposition or application of them. Therefore it is that, the delinquent officer in such cases having committed no wrong during his second term, his bondsmen do not become liable for any of his shortcomings committed during a preceding term. Says Murfree (Off. Bonds, § 637): "It is not competent for the superior officials to disregard this obvious rule of justice, and cover the defalcations of one year by appropriations from funds collected during a subsequent year;" and in support of the text is cited Porter v. Stanley, 47 Me. 515. There a tax collector was a defaulter, and the selectmen, his superiors, themselves appropriated, from moneys received from the tax collector on later assessments, sufficient to balance the earlier deficiencies; and this appropriation, so made by the superiors, was held to be manifestly inequitable. In recognition of the same principle was decided the case of U. S. v. Irving, 1 How. 250. There it was the duty of the collector to pay over funds, and the treasury department made disposition and application of them. Say the court: "It is true, if the collector shall misapply the public funds, his sureties are responsible; but that is not the question under consideration. The collector does not misapply the funds in his hands, but pays them over to the government, without any special direction, as to their application. Can the treasury officers say under such circumstances that the funds currently received and paid over shall be appropriated in discharge of the defalcation which occurred long before the sureties were bound for the collector, and by such appropriation hold the sureties liable for the amount? The statement of the case is the best refutation of the argument." But these cases and the principle recognized by them are not here in point, for, as has been said, the act was an affirmative act of misapplication, and wrongful appropriation committed, not by another or a superior officer, but by Hammond himself; and, wherever it appears that a new and independent wrong is committed by the officer during his second term, and financial loss follows, the bondsmen of that term are liable. The case of Water Co. v. Parker, 101 Cal. 483, 35 Pac. 1048, so far from being at variance with the principles above set forth, distinctly recognizes them. The judgment and order appealed from are therefore affirmed.

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109 Cal. 558

ROYAL v. DENNISON et al. (No. 19,482.)

(Supreme Court of California. Oct. 12, 1895.)

EXCHANGE OF LAND—RECISSION OF CONTRACT.

1. Where plaintiff and defendant agreed to exchange certain land, and defendant, before the conveyances were executed, conveyed his land to another, plaintiff cannot, by tendering a conveyance to defendant, demand the cash value of defendant's land, and rescind the contract for refusal to pay, without specifying the reason for declining to accept a conveyance of the land from defendant's grantee.

2. Though defendant, for the purpose of escaping judgments against him, transferred to his father land which he had previously agreed to convey to plaintiff in exchange for other land, and the transfer to defendant's father was subsequently set aside as in fraud of creditors, plaintiff cannot, by tendering a deed of his land, insist on having the cash value of defendant's land and rescind the contract for refusal to pay the same, unless defendant was unable to satisfy the judgment against him, and therefore unable to perform.

3. From the fact that defendant had not paid said judgment before the conclusion of the action, it should not be presumed that he was unable to do so when there was no finding that such was the fact.

4. Where plaintiff and defendant agreed to exchange certain land, and before the conveyances thereof were executed, plaintiff borrowed money from defendant, and orally agreed that the loan was to be secured upon the lots which defendant was to convey, plaintiff could not, on defendant's default, rescind the contract without offering to repay the loan. Temple, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Ejectment by A. W. Royal against G. L. Dennison and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

E. C. Bower, for appellants. Geo. W. Knox, for respondent.

BEATTY, C. J. The material facts of this case as found by the superior court are as follows: In August, 1887, the plaintiff, Royal, was the owner of a house and lot in Los Angeles, and the defendant G. L. Dennison had a contract upon which he had made a first payment for the purchase of a tract of land in or near Pasadena, which he had subdivided, or was about to subdivide, into town lots. Under these circumstances they made a verbal contract, by which Royal agreed to convey his house and lot in Los Angeles to Dennison in exchange for four of the lots in said tract. The house and lot were estimated at $4,000, and the lots at $1,000 each, but whether this was their true value does not appear. Shortly after making this contract of exchange, Dennison, with the knowledge of Royal, and apparently with his consent, took possession of the house and lot in Los Angeles, where he continued thereafter to reside, and upon which he expended money and made improvements to the value of $150. In January, 1888, Royal selected the four lots which he was to receive, but he took no actual possession of them. No time was fixed by the agreement for making the conveyances by which the exchange was to be effected. G. L. Dennison never completed the purchase of the tract at Pasadena, but in October, 1888, by his grant, bargain, and sale deed conveyed all his interest therein to his father, Lucius Dennison, who thereafter, and prior to July 8, 1890, made the final payments under the contract, and received a conveyance from the owner. Between December, 1887, and May, 1889, Royal applied to Dennison for various loans and advances which were made by Dennison to the amount of $750, and it was agreed that these loans should be secured upon the said lots which Dennison was to convey. On the 8th day of July, 1890, Royal tendered to G. L. Dennison a deed of conveyance of his house and lot in Los Angeles, but, instead of demanding from Dennison a conveyance of the four lots, he demanded payment of $4,000 in money, less $750 which he had received from Dennison. He made this demand upon the claim that he was to receive $4,000 in cash for his house and lot, and that the $750 which the court finds were loaned on the security of the lots were a part payment. Dennison, upon the claim, which is sustained by the finding of the court, that his agreement was only to convey the four lots, and that the $750 were in fact loaned, refused to pay the money demanded by Royal, but tendered him a deed of the four lots, which was duly executed and acknowledged by his father, Lucius Dennison, who, as above stated, had acquired the title from the former owner, and in whom it stood at that date, clear and unincumbered, so far as appears. Royal, however, refused to accept the deed tendered, or to deliver his deed, except upon condition that Dennison should pay him $3,250 in cash. This being refused, he thereupon demanded possession of his house and lot, and afterwards, in October, 1890, commenced this action of ejectment to recover the same. Dennison answered, defending upon the ground that he was lawfully in possession under his contract, which he had offered to perform upon his part by the tender of a deed conveying the title to the four lots, which tender he renewed in his answer. This is, in brief, the substance of all the material facts found by the superior court, except that judgments were rendered against G. L. Dennison in the superior court of Los Angeles county, where the four lots are situated, as follows: May 6, 1890, for $20; September 25, 1890, for $2,500; March 29, 1889, for $2,174.55; and that on September 27, 1890, a decree was obtained by one of his judgment creditors annulling the deed by which he had conveyed the four lots to his father, upon the ground that it was fraudulent as to creditors. Upon these facts the superior court gave judgment for the plaintiff, from which, and from an order denying his motion for a new trial, the defendant appeals.

The conditions to be performed under the contract between plaintiff and defendant were mutual and concurrent, and neither could be put in default except by a bona fide offer to perform upon the part of the other. Royal did offer to perform his part of the contract by tendering a deed of his house and lot, but the offer was coupled with a condition which he had no right to impose. His counsel concedes that for this reason his tender was insufficient in itself to give him a right of action, but he contends that no offer of performance upon his part was necessary for two reasons: First, because G. L. Dennison, by his grant, bargain, and sale deed to his father in October, 1888, by which he conveyed all his interest in the tract of which the four lots were a part, had put it out of his power to perform his part of the contract, and that he had thereby repudiated and abandoned it; second, because at the time of his tender G. L. Dennison was unable to perform, and therefore a tender was unnecessary. As to the first proposition, it is opposed to the decision of this court in Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320, which was approved in Shively v. Water Co., 99 Cal. 359, 33 Pac. 848, and in the case of Garberino v. Roberts (Cal.) 41 Pac. 857. This is really a stronger case against the proposition that the conveyance by the vendor to a third party of land contracted to be sold is necessarily an abandonment and repudiation of his contract than either of those cited, for it appears that the very object of the transfer by G. L. Dennison to his father of his right to the Pasadena tract was to get the title under his control, and that his father was ready and willing to convey the lots according to the terms of his contract with Royal. It follows that Royal was not excused from making a proper tender, unless it clearly appears that Dennison would have been unable to perform upon his part. It does appear that G. L. Dennison, at the moment Royal's demand was made, did not have the title to the lots; but it also appears that his father did have the title, clear and unincumbered, and that he was ready and willing to make, and that he did tender, to Royal a deed which would have transferred the title to him. This, however, Royal contends he was not bound to accept, because Lucius Dennison was a stranger to the contract, and because he was entitled, under the contract, to a deed from G. L. Dennison direct. As against this proposition appellant cites the case of Gaven v. Hagen, 15 Cal. 208, in which, he contends, this court made a decision to the contrary effect. That case, however, does not, in our opinion, clearly decide the proposition for which the appellant is contending. It is said in the opinion, and is undoubtedly true, that a conveyance by the grantee of a vendor of real property, together with an assignment of the vendor's covenants, gives to the vendee all that he would obtain by a literal performance of the vendor's contract; but it was not decided, and the case did not require a decision, that the vendee is obliged to accept such substantial performance in place of strict and literal performance. And, even if it had been so decided, section 1731 of the Civil Code, since enacted, prescribes the rule that "an agreement to sell real property binds the seller to execute a conveyance in form sufficient to pass the title to the property." Under this provision of the Code it may be that the vendee of real property is entitled, if he chooses to stand upon his strict legal right, to demand the literal performance of the vendor's contract to convey, and that he cannot be compelled to accept a substantial compliance by a conveyance from a third party. But, if this be conceded, we are also of the opinion that when in a case of this kind, where performance only becomes due upon demand and offer to perform concurrent conditions, and at the time the demand and offer are made by the vendee the vendor tenders the deed of a third party which will convey a perfect title, the objection to such deed should be specified by the vendee, in order that the vendor may have a reasonable opportunity of obviating it. Civ. Code, § 1501. For in such a case, where the holder of the title is willing and ready to convey to the vendee at the request of the vendor, it is to be presumed he would be equally ready and willing to convey to the vendor in order that he might literally comply with his contract. In this case it does not appear that Royal objected to the deed tendered because it was the deed of Lucius Dennison, and not the deed of G. L. Dennison, his vendor. On the contrary, it appears that he refused the deed because he was claiming payment in cash; and, having failed at that time to make his objection to the sufficiency of the tender, he ought not to be allowed to make it now, unless the circumstances have so changed as to give him an additional right. In other words, we hold that what occurred on July 8, 1890, did not entitle Royal to maintain this action, not only because his own offer to perform was coupled with a condition which he had no right to impose, but because he failed to specify the objection he now makes to Dennison's tender,—an objection which he could probably have obviated if made. It is contended, however, that since he could not have obviated this objection without taking a conveyance of the four lots from his father, they would have immediately become subject to the liens of the several judgments above enumerated, and that he would not have been able, therefore, to convey a clear title. But what we have said with respect to the other objection applies equally to this. It required to be specified in order that Dennison might have a reasonable opportunity to obviate it, for there is no conclusive presumption that he could not have paid and satisfied the judgments against him, and thereby cleared off the liens of his creditors. If we are correct in this view, it disposes of the further contention of respondent that the decree of September, 1890, annulling the deed of October, 1888, from G. L. Dennison to his father, on the ground that it was fraudulent as to creditors, put it out of the power of either of them to convey a clear title to the lots. Upon a proper demand and offer of performance by Royal, the Dennisons might have procured a satisfaction or release of the judgment liens, and they were entitled to an opportunity to do so. The only answer to this proposition that suggests itself is that the failure of defendants to satisfy these judgments before the conclusion of the trial of this action, so as to make their renewed and continuing tender of their deed good, is proof that they could not or would not clear the title. It may be that the circumstances are sufficient to prove the fact, but it is not found by the superior court, and ought not to be assumed in order to aid a recovery by a plaintiff, who has never offered to do what he was in equity bound to do. He, as appears by the findings, borrowed from Dennison $750, which he agreed should be secured on these four lots. The only construction to be placed upon this finding is that the parties to the original verbal contract for an exchange of lands, upon a new consideration, added another term to the contract, to the effect that Royal would not only convey his house and lot, but would repay the $750 before demanding a conveyance of the four lots. This he has never at any time offered to do, and the effect of the present judgment, if sustained, would be to restore to him his house and lot, and to leave Dennison without any security for his money. We think he should pay or tender this money, as well as a conveyance of the house and lot, in order to put Dennison in default. The judgment and order are reversed, and cause remanded.

We concur: McFARLAND, J.; VAN FLEET, J.

TEMPLE, J. (concurring). I concur in the judgment and in the opinion except in what is said in regard to the loan of $750. I think this was a distinct contract, and in no sense a modification of the contract for the exchange of land. It was an attempt to create a mortgage by parol upon the equitable title of Royal to the land which Dennison had agreed to convey. Not being in writing, it was void.

HARRISON, J. I concur in the above.

109 Cal. 282

ABBOTT v. SOUTHERN PAC. R. CO. (No. 19,431.)

(Supreme Court of California. Nov. 1, 1895.)

In bank.

Action by Louisa Abbott against the Southern Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Modified.

PER CURIAM. The opinion heretofore rendered in this cause by department 2 (filed October 1, 1895; 41 Pac. 1099) is hereby amended by striking and eliminating therefrom that portion of the opinion commencing with the words, "The objectionable evidence was called out by the defendant," etc., and continuing on and including the sentence commencing, "The latter,—that is to say, the value of the property," etc. And, as so amended, the petition for the rehearing of the cause in bank is denied.

109 Cal. 413

TERRILL v. TERRILL. (No. 18,410.)

(Supreme Court of California. Oct. 8, 1895.)

DIVORCE—FINDINGS—CROSS-EXAMINATION.

1. Where, in an action for divorce, findings are made on issues raised by specific denials of allegations in the complaint of desertion and failure to support for a year prior to the action, a separate finding is unnecessary on an allegation in the answer of defendant's willingness and offer to support the plaintiff during the time.

2. A reversal of a judgment of divorce cannot be had because a count in the complaint alleging nonsupport is insufficient where there is a finding of desertion on a sufficient count.

3. A witness who, on suit for divorce for nonsupport for a year prior to the action, testifies that he has supported the plaintiff during the time, cannot on cross-examination be questioned regarding separate property of the plaintiff of which he has had charge.

Commissioners' decision. Department 2. Appeal from superior court, Lassen county; G. G. Clough, Judge.

Action by Clara Terrill against George P. Terrill for divorce. From a judgment for plaintiff, defendant appeals. Affirmed.

E. Kingsbury, being sworn, testified on behalf of plaintiff: "Am the stepfather of plaintiff. Since October, 1890, she has resided at my house. During that time my wife and I have furnished plaintiff and her children with clothes, food, and the necessaries of life." On cross-examination he testified that, during the time plaintiff had been at his house, she had assisted in doing the housework and such other woman's work as there was to do about the place. Counsel for defendant then sought to show by further cross-examination of this witness that the plaintiff had a farm adjoining his which was her separate property; that he cultivated it for her, and gave her the proceeds. This evidence the court struck out as not proper cross-examination.

Shinn & Shinn, for appellant. Goodwin & Goodwin, for respondent.

HAYNES, C. Action for divorce. The plaintiff had judgment, and defendant appeals therefrom upon the judgment roll, containing a bill of exceptions. The complaint stated three causes of action: First, for willful desertion; second, failure to provide the common necessaries of life, because of defendant's idleness, profligacy, and dissipation; and, third, that defendant, having the ability to provide plaintiff with the common necessaries of life, has, for more than one year last past, failed to do so. The defendant denied all the material allegations of the several causes of action, and for separate defenses alleged that the plaintiff deserted and abandoned the defendant without cause and against his will, and that defendant has at all times been willing, and has repeatedly offered, and is now willing, to take plaintiff and the minor children, and provide for them the necessaries of life, and to perform and fulfill all the obligations of a husband and father. The court found that on or about the 19th day of October, 1890, the defendant willfully and without cause deserted and abandoned the plaintiff, and that he ever since has and still continues willfully and without cause to desert and abandon the plaintiff and to live separate and apart from her, without any sufficient cause or any reason, and against her will, and without her consent; that the defendant has the ability to provide plaintiff with the common necessaries of life, but for more than one year last past he has failed to do so; but that such failure was not caused by his idleness, profligacy, or dissipation. The court further found that there were two children, issue of said marriage, both girls, one aged five years and the other three years; and the custody of them was given to the plaintiff until the further order of the court, she having sufficient separate property to care for and educate them.

Appellant specifies as error for which the judgment should be reversed that the court failed to find upon the issue raised by the fourth count of defendant's answer, viz. whether defendant has at all times been willing and has repeatedly offered to take plaintiff and her minor children, and provide for them the necessaries of life, and perform and fulfill towards the plaintiff all the obligations of a husband. The fourth defense pleaded by defendant consisted of affirmative allegations inconsistent with the averments in the complaint charging desertion and failure to provide; and, as these allegations of the complaint were specifically denied in the first and second paragraphs of the answer, all the facts alleged in the fourth defense could have been given in evidence under said denials, and no new or additional issue was raised thereby. The findings upon the issues of desertion and failure to provide fully covered and included all facts alleged in said fourth defense.

The remaining specifications are to the rulings of the court upon the admission and exclusion of testimony. The objections to the questions put to plaintiff's witness E. Kingsbury, upon cross-examination, touching plaintiff's separate property, objected to by plaintiff as not proper cross-examination, were properly sustained. The defendant, however, was not prevented thereby from calling the same witness or other witnesses to the facts sought to be shown upon the cross-examination of this witness. The object of counsel in said cross-examination of the witness Kingsbury was stated by appellant's counsel to be that, "if she had any support from the proceeds of her own property, she is not entitled to a divorce"; and this point is strongly insisted upon in his brief.

The same question is made upon demurrer to the second and third counts of the complaint, each of which was based upon the failure of defendant to provide for the plaintiff. It is not necessary, however, to consider or decide whether the fact that plaintiff has sufficient means for the support of herself and children would constitute a defense to an action for divorce based upon the husband's failure to provide for either the plaintiff or her children, since a cause of action was stated upon the ground of desertion, and the court made a finding supporting that count of the complaint; and, if there is one good count of the complaint sustained by the findings, the judgment cannot be reversed because of the insufficient statement of other causes of action. Neither the wealth nor the poverty of either of the parties can affect the question of willful desertion. The judgment appealed from should be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

109 Cal. 500

HEIM et al. v. BUTIN. (No. 15,798.)

(Supreme Court of California. Oct. 10, 1895.)

AGREEMENT NOT TO ENTER DEFICIENCY JUDGMENT—CONSIDERATION.

A complaint to enjoin the collection of a deficiency judgment, alleging that plaintiffs, the mortgagors, relying on the promise of the mortgagee not to enter a personal judgment against them, made default in the foreclosure suit, and did not appear at the sale, is defective, as it does not show a consideration for said promise, nor that plaintiffs were injured by their reliance thereon. McFarland, J., dissenting.

In bank. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by Ella M. Heim and another against James M. Butin to enjoin defendant from enforcing a deficiency judgment. Defendant had judgment, and plaintiffs appeal. Affirmed.

William H. Jordan, for appellants. W. E. McConnell and J. A. Barham, for respondent.

BEATTY, C. J. This is an action to enjoin the defendant from enforcing a deficiency judgment, docketed against the plaintiffs, in a foreclosure suit, and the question to be decided is whether the complaint states facts sufficient to constitute a cause of action. It is alleged that in December, 1887, the plaintiffs, for a valuable consideration, made, executed, and delivered to the defendant their promissory note for $4,900, secured by mortgage; that they subsequently sold and conveyed the mortgaged premises to third parties, who assumed and agreed to pay the mortgage debt, but failed to do so; and that in September, 1891, the defendant, being requested by Ella M. Heim to foreclose, "did agree with her that he would commence an action for such foreclosure, and, upon obtaining judgment in said cause, and a decree of said court directing the sale of said property to satisfy said judgment, he (this defendant) would at such sale purchase the same for the amount of such judgment obtained, including interest and costs at that time accrued, and he (the said defendant) did expressly agree with the said plaintiff that no personal judgment in said action should ever be entered or docketed against plaintiffs, or against either of them." It is next alleged that thereafter, in September, 1891, the defendant commenced an action to foreclose said mortgage, and in January, 1892, obtained a decree for the sale of the mortgaged premises to satisfy the unpaid balance of the mortgage debt, amounting with costs, etc., to about $5,000; that the property was thereafter sold by the sheriff; that these plaintiffs, relying on the defendant's promise and agreement, failed to appear or answer in the foreclosure suit, though made parties thereto, and permitted their defaults to be entered therein, and afterwards abstained from being present at the sale, or taking any steps to obtain a purchaser for the mortgaged property, so that their interests in the judgment might be protected and exonerated, and for the same reason they refrained from bidding at the sale, although fully able to purchase the property; that the defendant, in violation of his promise, bid less than the amount of the judgment and costs, and purchased the property for a sum which left a deficiency of $918.43, which he procured to be docketed as a personal judgment against these plaintiffs, and is threatening to enforce by execution. Wherefore plaintiffs pray that the enforcement of said personal judgment be perpetually enjoined, etc. The defendant did not demur to the complaint, but answered, denying that he had ever made the promise or agreement alleged. At the trial, plaintiffs offered evidence tending to prove said agreement, but, upon objection of the defendant, the court excluded all such evidence, on the ground that the complaint was fatally defective for want of facts constituting a cause of action. Judgment of nonsuit followed, and plaintiffs appeal.

We think the ruling of the superior court was correct. The complaint not only fails to allege any consideration for the promise of defendant not to enter a deficiency judgment, but shows that there was no consideration. The defendant had a clear and undoubted right to such a deficiency judgment, and the plaintiffs neither gave, nor agreed to give or confer, any benefit in consideration of its release, nor did they agree to suffer any prejudice or forego any advantage. The promise of the defendant was, therefore, mere nudum pactum. But plaintiffs say they relied upon it, and acted upon it, and therefore the defendant is estopped from alleging or relying upon a want of consideration. This would be so if it appeared that their position was changed for the worse in consequence of their reliance on defendant's promise, but nothing to that effect is alleged. True, they suffered default, but they had no defense to the action; and they did not bid at the sale, nor provide a bidder, but they do not allege that the property was worth a dollar more than it sold for, or that they would have been willing to bid more for it, or that any one would have done so. In short, the complaint is fatally defective, and did not admit the proof of facts sufficient to warrant a judgment. The decision in Thompson v. Laughlin, 91 Cal. 317, 27 Pac. 752, does not conflict with this view. In that case the plaintiff had waived his motion for a new trial in another action in consequence of the promise of the adverse party to satisfy the judgment, and, after the time for moving had passed, an attempt was made to enforce the judgment. The enforcement of the judgment was enjoined, but it was because, in the opinion of the court, the plaintiff would have been entitled to a new trial if he had moved for it. The judgment and order appealed from are affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.; HENSHAW, J.

I dissent: McFARLAND, J.

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109 Cal. 417

MADDOCK v. RUSSELL et al. (two cases. Nos. 19,408, 19,464).[1]

(Supreme Court of California. Oct. 8, 1895.)

ADMINISTRATION — POWER OF ADMINISTRATOR TO EXTEND PAYMENT OF CLAIM—VENDOR AND PURCHASER—RESCISSION.

1. Where, after conveyance of land, the grantor, on being sued for part of the land conveyed, contracts to indemnify the grantee for any of the land lost to him through the suit, and, pending the suit, the grantor dies, the extension by his administratrix of purchase notes given by the grantee "in consequence of the pendency" of the suit will not bind the estate.

2. Where, after a grant of land without warranty, the grantor, on being sued for part of the land, contracts to indemnify the grantee for any of the land lost to him by the suit, without any modification of the terms of the conveyance, and, pending such suit, the grantor dies, the contract of indemnity constitutes a claim against the estate.

3. In an action for the purchase price of lands, wherein defendants asked for a rescission of the sale because the land conveyed is not the land they agreed to purchase, where it appears that defendants took possession of the land described in the deed, and did not offer to surrender possession, or to account for the profits while in possession, they are not entitled to a rescission.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by John Maddock, administrator, against W. H. Russell and others on promissory notes given for the purchase price of land. Defendants set up a counterclaim in the nature of a set-off. There was judgment for plaintiff for the amount of the notes less the set-off claims, from which the plaintiff appeals. The defendants also appeal from the judgment and an order denying a new trial. On defendants' appeal, affirmed. On plaintiff's appeal, modified.

C. M. Stephens and Albert M. Stephens, for appellant. Chapman & Hendrick, for respondents.

BRITT, C. There are two appeals in this case,—one by plaintiff from the judgment, the other by defendants from the judgment and order denying their motion for new trial; plaintiff claiming that the court allowed him to recover less than he was entitled to have, and the defendants insisting that he should have recovered nothing at all. Lawrence Welch was the owner of a tract of land containing about 52 acres in Los Angeles county. On May 19, 1887, he and his wife, Martha A. Welch, made a deed purporting to "grant, bargain, sell, and convey" to defendants a part of the said tract, containing 33.29 acres. The price was $6,600, and defendants then paid a portion of the purchase money, and for the balance unpaid executed to said Lawrence their two promissory notes for the sum of $2,800 each, one to become due on May 19, 1888, and the other on May 19, 1889. These were secured by mortgage, of same date as the deed, on the premises described in the deed. Said deed was duly recorded in the proper office on the day of its date. On July 9, 1887, one E. J. Baldwin commenced an action in the superior court of said county against Lawrence Welch for the recovery of certain lands, including (as the court found) some part of the tract previously conveyed by said deed to defendants. November 7, 1887, Lawrence Welch and his said wife entered into a written agreement with defendants, reciting the execution of said deed and notes, and the pendency of said action brought by Baldwin, and providing that the grantors in the deed —Welch and wife—would defend the same, and that "in case they should not be successful in defending said action, and any portion of said 33 acres should be lost" to the defendants here, then said Welch and wife would reimburse them for all the said 33 acres which might be lost to them at the rate of $200 per acre, with interest at 10 per cent. per annum from May 19, 1887, to such time as it should be finally decided that the title of the parties to such agreement is not good. Lawrence Welch died December 24, 1887, and his widow, said Martha A. Welch, in January, 1888, received letters of administration on his estate from the superior court of Los Angeles county. On December 18, 1888, in consequence of the pendency of the Baldwin suit, the administratrix indorsed on each of said notes the following: "For valuable consideration I hereby extend the payment of the within note till the 19th of May, 1892. Martha A. Welch." No order of court was obtained authorizing or approving such extension of time. On November 20, 1889, judgment was entered in said case of Baldwin v. Welch, whereby Baldwin was adjudged to recover of Welch 10.83 acres of the land described in the mortgage. From the time of the execution of the said deed to defendants, however, until the present, defendants have had exclusive and undisturbed possession of the whole of the mortgaged land. The administratrix caused notice to creditors of said deceased to be first published on January 28, 1888, and the time for presentation of claims against the estate had expired before the commencement of this action. The defendants presented no claim, on account of the said agreement of November 7, 1887, for allowance against the estate. Mrs. Welch resigned her office of administratrix in May, 1890, and thereupon Maddock, the present plaintiff, received letters of administration in her stead. This action to foreclose the mortgage was begun June 26, 1890. Defendants pleaded in defense the matters above outlined, relating to the extension of time of payment and the Baldwin suit, and on October 31, 1892, after the trial of this action was partly had, filed an amendment to their answer, alleging that the land described in the deed of Welch and wife to them, and in the mortgage, is not the land which Welch pointed out to them before the sale, and which they supposed they were purchasing; that it was a case of mutual mistake arising from the location of the land with reference to a certain fence; that Welch showed them land lying south of the fence, and they supposed themselves to be purchasing the land thus shown, but that the land described in the deed lies north of the fence; that Welch did not have the title to the land that he showed them, and the deed conveyed no interest therein; that they did not discover such mistake until after the commencement of the trial. They offer to reconvey such interest as passed to them under the deed upon repayment to them of the sum paid on the purchase of the land, or without repayment, if the estate has not means for that purpose, and crave a rescission of the sale. It is not alleged that defendants did not receive from Welch possession of the tract he assumed to sell them, or that they have been disturbed in such possession. Defendants paid the interest on both the said notes to May 19, 1890, and also $900 on the principal of the one first maturing. By its judgment the court directed the sale of the mortgaged land, less 10.82 acres thereof, included in the recovery in Baldwin v. Welch, and the application of the proceeds to the payment of the amount due on the notes and mortgage; deducting therefrom, however, the sum of $2,164 and 10 per cent. annual interest thereon from May 19, 1887 (in all, $3,374.33), on account of the agreement of Welch and wife to reimburse defendants at the rate of $200 per acre for the land lost in the suit of Baldwin. The net sum thus ascertained to be due to plaintiff was $2,097.67, besides counsel fees and costs.

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[1] Rehearing denied.

1. The first question arising on the record is upon the effect of the extension of time of payment allowed by the administratrix; defendants maintaining that it results therefrom that the action, commenced by her successor nearly two years before the expiration of the time as thus extended, is prematurely brought, and should be dismissed. When we recall the early practice which obtained in the administration of the effects of a decedent,—that it was considered that the persons most fit to have in trust the goods of the deceased were those who in his lifetime administered to the needs of his soul, and hence that control of his personal assets was committed to prelates, who might seize the same, and (excepting the "reasonable parts" of the wife and children, if he had any) might give, alien, or sell them at will, and apply the same or the proceeds thereof to pious uses, without any liability to account for their conduct save to God and their consciences (2 Steph. Comm. 230); that by the common law the administrator has absolute power of disposal, other than testamentary, over the personal effects of his intestate, and may even pledge or mortgage them, without restriction, so long as his acts are not actually or constructively fraudulent (Williams, Ex'rs, pp. 564, 801, et seq.),—it must be conceded, we think, that the extension of time granted by the administratrix in this case was valid and effectual, if her authority had no limitations beyond the rules of the common law; she being liable to the estate as for waste if the power was indiscreetly exercised (Berry v. Parkes, 3 Smedes & M. 625, 640). An English statute, passed in 1881, expressly provides that an administrator may allow any time for the payment of any debt without being responsible for loss occasioned by his act done in good faith (44 & 45 Vict. c. 41, § 37); and this, to the extent that it defines his authority, seems to be merely declaratory of the law. But in this state, it has been said, proceedings for the administration of the estates of deceased persons are purely statutory (Smith v. Westerfield, 88 Cal. 378, 26 Pac. 206; Buckley v. Superior Court, 102 Cal. 8, 36 Pac. 360); and while it is not meant by this remark that the authority of those charged with the conduct of such proceedings is regulated solely by statute (Moulton v. Holmes, 57 Cal. 337), yet the letter and the spirit of the system established by legislation are to be first consulted as the repository of the law on the subject, and their rule, if they furnish any, must be followed in any case, before we resort for guidance to the precepts of the common law. See People v. Senter, 28 Cal. 505. Accordingly, it is provided that the property in all assets of a decedent

passes to his heirs, subject to a right of possession in the administrator for purposes of administration only. Civ. Code, § 1384. The object of probate proceedings is to administer, settle, and distribute the estates of deceased persons (In re Burton, 93 Cal. 463, 29 Pac. 224); and it may be added that our system contemplates that these objects shall be accomplished with reasonable dispatch (In re Moore's Estate, 72 Cal. 342, 13 Pac. 880). To this end the administrator must collect all debts due to the estate. Code Civ. Proc. § 1581. He is answerable for the amount of any debt which remains uncollected unless he can show that he is without fault in failing to collect. Id. § 1615; In re Sanderson, 74 Cal. 199, 15 Pac. 753. The debts of the decedent, if there are funds for the purpose, are to be paid within a comparatively brief period after the administration of the estate begins. Code Civ. Proc. §§ 1622, 1628, 1647. As soon as the estate is in proper condition to be closed, the administrator must render a final account and pray a final settlement. Id. §§ 1651, 1652. After a lapse of one year from the issuance of letters, any heir may have distributed to him his share of the estate, if the interests of creditors are not jeopardized, upon complying with the requirements of section 1663, Code Civ. Proc. Other sections might be cited, but these illustrate the view we entertain of the matter. All look to a speedy close of administration. An administrator, having notice of a debt due to the estate, is bound to exercise active diligence for its collection. Harrington v. Ketaltas, 92 N. Y. 40. Evidently such a duty is inconsistent with a power, by his contract, to incapacitate himself and his successors in the trust estate he represents from proceeding to enforce collection for a series of years. There may be instances where, for the purpose of getting a claim secured, as in Berry v. Parkes, 3 Smedes & M. 625, above cited, or for other purpose beneficial to the estate, the administrator might, in the exercise of his power to compromise disputes, make a valid agreement to extend the time of payment of an obligation due to the estate; but this case presents no such feature. It is alleged in the answer that the defendants were "about to take steps to protect themselves against said notes for the unpaid purchase money," and thereupon the administratrix, "in order to settle said controversy, and in consideration thereof, agreed to extend the payment," etc., and the court found that the extension was granted till May 19, 1892, "in consequence of the pendency of the Baldwin suit"; but there is no compromise of conflicting claims alleged or found. Defendants did not abate or agree to abate any part of their contingent demand against the estate. The most that can by inference be extracted from the finding is that the administratrix agreed to delay collection of the entire debt for a period of three years, in order to see if a contingent right of set-off in the defendants would become absolute; and this was done at a time when the administration had been in progress nearly a year, when the contingent demand of the defendants had not been allowed as a claim against the estate, and thereby the mortgage security, at least, of the first note was brought within the danger line of the statute of limitations. We think it plain that she did not bind the estate. It was an unwarranted attempt to tie the hands of the heirs and other persons interested in enforcing collection of the debt. In re Page's Estate, 57 Cal. 238; In re Moore's Estate, 72 Cal. 342, 13 Pac. 880, and cases cited; In re Loper's Estate, 2 Redf. (Sur.) 545; Woerner, Adm'n, §§ 353, 356; Landry v. Delas, 25 La. Ann. 181.

2. The deed to defendants contained no warranty beyond that implied from the operative word "grant" used therein (Civ. Code, § 1113; Bryan v. Swain, 56 Cal. 616); and this did not extend to the claim of Baldwin. Hence, the partial defense to the notes, sustained by the court, rests on the agreement of indemnity against loss executed by the Welches November 7, 1887. It is not clear that loss accrued from the judgment recovered by Baldwin to which defendants were not parties; but, however this may be, that agreement contained nothing to show that it modified the obligation of defendants on their notes and mortgage. It was the mere personal promise of Welch and his wife to "reimburse" the defendants at the rate of $200 per acre for so much of the land as might be lost in the Baldwin suit. When the notes fell due, they were payable according to their terms, notwithstanding the agreement for indemnity, unless there had then occurred a loss within its meaning, in which event, perhaps, a right would arise thereon in the nature of set-off against the notes. As a contract creating a contingent liability, therefore, it should have been presented to the administratrix for allowance as a claim against the estate, and, not having been so presented, by the terms of the statute, so far as the estate is concerned, it "is barred forever," and the court erred in considering it a proper ground for rebate from the amount due plaintiff on the notes. Code Civ. Proc. § 1493; Verdier v. Roach, 96 Cal. 467, 31 Pac. 554; McDonald v. McElroy, 60 Cal. 496; Shelton's Adm'r v. St. Clair, 64 Ala. 565.

3. Some of the findings of the court concerning the location of the land, and the alleged mistake in that behalf, are contradictory and unintelligible; and the finding numbered X, as it appears in the copy of the transcript furnished to us, has a meaning diametrically opposed to that of the same finding in the original transcript on file. The matters appearing in these findings, however, are not essential to the disposition of the case, for other facts are found, and not disputed, which show that no case for rescission

is made. It thus appears that, at the time of the purchase of the land described in the mortgage, the defendants "entered into the possession of the said lands, and ever since have been and now are * * * in the undisturbed possession of the whole thereof." Two views of this finding are possible: (1) If the land thus possessed by defendants is located as the defendants say the description in the deed and mortgage does locate it, —i. e. elsewhere than at the place shown to them by Welch,—then of course the circumstance of possession, as found, negatives the idea of any mistake as to its situation. There could be no mistake if they received actual possession of the land which the deed actually conveyed. (2) But if, as was probably the fact, and as the evidence tends to show, the defendants received and yet hold possession of the land which Welch pointed out to them, and which they believed they were purchasing from him, then, though it be conceded that the deed and mortgage do not describe that tract, yet the defendants have not taken the steps requisite to entitle them to rescind. They show no offer to restore everything of value received under the contract. This was of course necessary. Civ. Code, §§ 1691, 3407. True, the answer of defendants alleges that they "are now ready and willing, and offer, to reconvey * * * all of the right, title, and interest that they have acquired * * * by reason of said conveyance, made by said Welch and wife to these defendants," etc.; but, according to their allegations, nothing passed by said conveyance. They allege no offer at any time to redeliver possession of the land they actually received, nor to account for the profits thereof, nor any showing that the use of the same was of no value. The court did not err in refusing a rescission. Fratt v. Fiske, 17 Cal. 380; Haynes v. White, 55 Cal. 38; Bryan v. Swain, 56 Cal. 616; Alden v. Pryal, 60 Cal. 215; Hammond v. Wallace, 85 Cal. 532, 24 Pac. 837.

The order denying defendant's motion for new trial should be affirmed, and the cause should be remanded, with instructions to the court below to modify its conclusions of law on the findings so as to omit therefrom any deductions in the nature of set-off against the amount found due to plaintiff on the notes in suit, and to modify the judgment so as to direct the recovery by plaintiff of the full amount found due to him, without abatement on account of said deductions, and, so modified, the judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying defendants' motion for new trial is affirmed, and the cause is remanded, with instructions to the court below to modify its conclusions of law on the findings so as to omit therefrom any deductions in the nature of set-off against the amount found due to plaintiff on the notes in suit, and to modify the judgment so as to direct the recovery by plaintiff of the full amount found due to him, without abatement on account of said deductions, and, so modified, the judgment is affirmed.

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109 Cal. 529

WEINSTOCK, LUBIN & CO. v. MARKS.

(No. 18,375.)

(Supreme Court of California. Oct. 12, 1895.)

TRADE-NAMES—MANDATORY INJUNCTION.

1. A tradesman, by the adoption of the name "Mechanics' Store" for his place of business, may acquire a property right therein as a trade-name, so that equity will enjoin the use by another of the name "Mechanical Store" in such a way as to induce persons to purchase goods from the latter under the belief that they are purchasing from the former.

2. A merchant erected a building of peculiar architecture adjoining a similar building occupied by an old firm engaged in a similar business, and, for the purpose of deceiving the customers of such firm, adopted a similar name, and refrained from using any sign about the building to designate the proprietor. *Held*, that equity could not compel the merchant to designate by signs within and without the building who was the proprietor thereof, but should require him to distinguish his store from the other in some other way that would be a sufficient indication to the public that his store is a different place of business from that of the other.

Department 1. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

Action by Weinstock, Lubin & Co., a corporation, against H. Marks. There was a judgment for plaintiff, and defendant appeals. Reversed in part.

Holl & Dunn, for appellant. Johnson, Johnson & Johnson, for respondent.

GAROUTTE, J. Plaintiff is a corporation carrying on a large clothing and dry-goods business in the city of Sacramento. Defendant is also a dealer in clothing of the same general character, and is carrying on business in a building adjoining plaintiff's place of business. The present action is one of injunction, and by its decree, among other things, the court ordered defendant to refrain from further use of the name "Mechanical Store" as the designation of his place of business, and further decreed that defendant maintain and place in a conspicuous part of his store, and also in a conspicuous place on the outside or front thereof, a sign showing the proprietorship of his said store, in letters sufficiently large to be plainly observable by passers-by and customers entering therein. Defendant appeals from the foregoing portions of the judgment.

The judgment is based upon certain findings of fact made by the trial court upon the evidence offered at the trial, and no complaint is now heard that this evidence does not fully support these findings. It therefore follows that the merit of this appeal presents itself upon a consideration of those findings and the decree based thereon. These findings of fact are full and in detail, and, for present purposes, we deem it sufficient to state the general tenor and effect of some of them. (1) The court finds that on or about the 8th day of October, 1874, H. Weinstock and D. Lubin entered into a copartnership under the firm name and style of Weinstock & Lubin, of the city of Sacramento, and, as such partners, engaged in the business of dealing in wearing apparel for men, women, and children, and that said Weinstock & Lubin selected as the name of their place of business "Mechanics' Store," and designated the same by that appellation, by which name their said store thenceforth was continually known; that, in the management and conduct of their business, they fixed a price upon each and every article carried by them in the stock of said store, and marked the said prices in figures upon each article, and sold such articles at the prices so marked, and never deviated therefrom; and they advertised the said method of doing business extensively throughout the entire Pacific coast by means of newspapers, etc., by means whereof their said method of doing business became widely known to the trade and public throughout the entire Pacific coast, and by reason whereof it became and was well known to the trade and public in California and the other states and territories of the Pacific coast that at the store of said Weinstock & Lubin only one price was charged for goods sold therein, and that no deviation from said price was permitted. (2) That, by care, attention, skill, and strict adherence to business and the rules as aforesaid, this plaintiff has materially increased the volume and importance and value of said business, and enhanced the good will thereof, and the said plaintiff has established for the said store and business throughout the said states and territories a wide and honorable reputation, and thereby said business has become extensive and valuable and profitable, and the public have become accustomed to plaintiff's said method of doing business, and have been induced to rely, and do rely, upon the good faith of the plaintiff in managing and conducting its business in the manner aforesaid, and by reason thereof have been induced to bestow and do bestow upon the plaintiff their custom, trade, patronage, and business. (3) That on or about 1885 the defendant, who had previously been engaged in business elsewhere, and was without any established reputation of his own, and whose business was unknown to the trade and general public, removed his business from the place he then occupied to the premises on the east of and near the premises of this plaintiff; and the defendant then and there engaged in a similar line of trade as this plaintiff, and ever since then he has maintained and conducted, and still maintains and conducts, the said store at said place, and carries on the said business therein; and he named his store in the year 1887 or thereabouts the "Mechanical Store." (4) That the defendant, well knowing the foregoing facts, and contriving, intending, and designing fraudulently to injure this plaintiff, and to obtain undue advantage of plaintiff, and to deprive the plaintiff of its business, and fraudulently and unlawfully to increase his own business, and to pirate and make use of and appropriate to himself the good will of the plaintiff's business, and the said reputation and honorable esteem and confidence that the plaintiff enjoyed in the minds of the people of the Pacific coast, and in order to create confusion in the public mind, and to take advantage of the standing that the plaintiff by its aforesaid acts had acquired in said territory, and fraudulently designing to deceive the public and people intending to trade with the plaintiff, and to divert the custom of the plaintiff to himself, and to deprive the plaintiff of its customers and of the trade, and to induce the people to trade with the defendant under the belief that they were trading with the plaintiff, and for the purpose of deceiving plaintiff's customers and persons intending to trade with plaintiff into believing that the defendant's store was that of the plaintiff, and thereby inducing them to enter said store of defendant to trade with said defendant, to his profit, and in order to carry out his fraudulent and corrupt designs as aforesaid,—the defendant has persistently carried out a system of deceit and misrepresentations concerning his store and its ownership, in connection with plaintiff's store and business, as follows: That in 1891 plaintiff, at its place of business, erected a store, the front of which is of peculiar architecture, containing arches and alcoves, of which there was none other similar in the city of Sacramento; that afterwards the defendant, at his said place of business, and adjoining plaintiff's store, erected a building which, so far as the first or lower story is concerned, was and is similar in architecture in every respect to the store of plaintiff, so much so that passers-by were liable to go into the store of defendant thinking that they were entering the store of plaintiff, and that customers of plaintiff in many instances did so enter the store of defendant thinking they were in the store of plaintiff; that defendant had no sign inside of his store or on the outside of his store by which customers could for themselves ascertain the true proprietorship thereof; that the erection of the defendant's building exactly the same as plaintiff's building in every particular, and the adoption of the use of the words "Mechanical Store," and the absence of any name or sign upon or in defendant's store designating the true proprietorship of defendant's store, were all done by the defendant for the purpose of deceiving the public, and more especially plaintiff's customers, and enticing and pirating and securing the patronage of said customers from plaintiff to defendant. (5) That, by the aforesaid means the defendant has diverted from the plaintiff a large part of plaintiff's trade and custom;

has induced many persons to trade with the defendant who otherwise would have traded with the plaintiff; has sold large quantities of goods in his said store to persons who, but for said acts of defendant, would have purchased said goods of the plaintiff; has deprived the plaintiff of a large share of its legitimate profits; has injured the business and reputation of the plaintiff; has impaired the confidence of the public in the plaintiff and its method of doing business; and has deprived the plaintiff of a large number of its customers and patrons.

The foregoing chapter of facts makes interesting reading, and we first turn our attention to that portion of the judgment restraining defendant from the further use of the words "Mechanical Store" as a designation of his place of business. We see but little difficulty in arriving at a conclusion upon this branch of the case. Defendant assails the judgment in this particular with but a single weapon. He insists that the words "Mechanics' Store" are not the subject of trade-mark, and that, therefore, plaintiff can have no exclusive right to them. As we view the picture presented by the findings of fact, the question as to what may or may not be the subject of trade-mark is not the problem to be solved. That these words are of a kind that may be used as a trade-name we have no doubt, and, having established that fact, we are required to pursue the investigation no further. That certain names and designations which may not become technical or specific trade-marks may become the names of articles or of places of business, and thereby the use thereof receive the protection of the law, cannot be doubted, for the cases everywhere recognize that fact. The learned judge said in Lee v. Haley, 5 Ch. App. 155: "I quite agree that they [the plaintiffs] have no property right in the name, but the principle upon which the cases on this subject proceed is not that there is property in the word, but that it is a fraud on a person who has established a trade, and carried it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name." A similar doctrine is declared in Manufacturing Co. v. Hall, 61 N. Y. 226, and also in the late case of Coats v. Thread Co., 149 U. S. 562, 13 Sup. Ct. 966. This court said in Pierce v. Guittard, 68 Cal. 71, 8 Pac. 645: "We are of opinion that it is not necessary to decide whether the plaintiff's label, with the accompanying words and devices, constituted a trade-mark, and, as such, the exclusive property of the plaintiff, for the reason that it is a fraud on a person who has established a business for his goods, and carries it on under a given name or with a particular mark, for some other person to assume the same name or mark, or the same with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with a person who has given a reputation to that name or mark." The same general principle is also recognized and approved in Schmidt v. Brieg, 100 Cal. 672, 35 Pac. 623. While in these two cases the fact appears that the defendants were selling an inferior article, and thereby deceiving and defrauding the public, it is not apparent that such fact was a necessary element in pointing the judgment. Neither do we consider it so upon principle; and in cases without number, restraining defendants from trespassing upon the good will of plaintiff's business, such fact was an element foreign to the litigation. It may be said that the adjudged cases for relief are based solely upon the ground of loss and damage to the tradesman's business, by unlawful competition. In Levy v. Walker, Cox, Man. Trade-Mark Cas. No. 639, the learned judge declared: "The court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything."

While our statutes attempt to deal with trade-marks, and provide for the filing thereof with the secretary of state, with accompanying affidavits, etc., yet trade-names are equally protected upon analogous principles of law. And that the words "Mechanics' Store" may be made a trade-name, and the user thereof become entitled under the law to protection from pirates preying upon the sea of commercial trade, we have no doubt. We think the defendant should be restrained from the use of the words "Mechanical Store." The court has declared the fact to be, and it is not challenged by defendant, that these words were used as a designation of his store for the purpose of deceiving the public, and especially plaintiff's customers, and thereby securing the advantages and benefits of the good will of plaintiff's business. To say that such conduct upon the part of defendant is unfair business competition is to state the fact in the mildest terms. In Celluloid Manuf'g Co. v. Cellonite Manuf'g Co., 32 Fed. 97, Justice Bradley, of the supreme court of the United States, in speaking to the question of similarity in name, said: "It was not identical with the plaintiff's name. That would be too gross an invasion of the complainant's rights. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer, is obnoxious to the law." In this case the trial court determined that there was a sufficient similarity in the names to deceive the public; that the defendant adopted the name for the purpose of deceiving the public and securing plaintiff's business; and that such results had followed. These things being true, the decree must go against him.

The remaining branch of the case presents a novel and original proposition of law. In its facts we apprehend no case like it can be found, either in this country or England. The decree orders the defendant to place, both upon the outside and inside of his store, a sign, plainly legible to customers and passers-by, indicating his proprietorship; and, while the power of the court to issue mandatory injunctions in many cases must be conceded, yet cases where such power has been exercised have generally involved matters of nuisance, or at least cases where courts have ordered the subject-matter of the litigation to be placed in its original condition; as, for instance, the removing of obstructions to ancient lights. But let us for a moment turn our attention to the facts of this case. The store of plaintiff was known as the "Mechanics' Store." By various kinds of advertising, and attention, honesty, and skill in the conduct of the business, it increased the volume thereof and enhanced its good will, and throughout the Pacific coast established for it a wide and honorable reputation as a fair and reliable house with which to deal. Plaintiff erected a store building of peculiar architecture, there being none like it in the city of Sacramento; and defendant thereupon erected a store building, immediately adjoining that of plaintiff's, in every respect of similar architecture. It further appears that defendant erected this particular kind of building for the purpose of deceiving the public, and securing the patronage of plaintiff's customers; and for the same purpose he refrained from placing any sign in or upon the building indicating the proprietorship of the business, or designating it in any way so that it might be distinguished from the store of plaintiff. And, by reason of these acts of defendant, many of plaintiff's customers were deceived into purchasing goods in defendant's store, believing that they were trading in plaintiff's store; and defendant thus diverted from the plaintiff a large part of its trade and custom, and thereby injured its business and curtailed the value of its good will. Upon this bald statement of facts, it cannot be gainsaid that defendant has done the plaintiff wrong; and it is said that for every wrong there is a remedy. These facts certainly indicate a case of unlawful business competition, and courts of equity have ever been ready to declare such things odious. It is strange if plaintiff may be deprived of the fruits of a long course of honest and fair dealing in business by such wicked contrivances, and, upon appeal to the courts for relief, should be told there was no relief. This cannot be so, for the whole law of trademarks, trade-names, etc., is recognized, approved, and enforced for the very purpose of protecting the honest tradesman from a like loss and damage to that which threatens this plaintiff; and the fact that the question comes to us in an entirely new guise, and that the schemer has concocted a kind of deception heretofore unheard of in legal jurisprudence, is no reason why equity is either unable or unwilling to deal with him. It has been said by some judge or law writer that "no fixed rules can be established upon which to deal with fraud, for, were courts of equity to once declare rules prescribing the limitations of their power in dealing with it, the jurisdiction would be perpetually cramped and eluded by new schemes which the fertility of man's invention would contrive." By device, defendant is defrauding plaintiff of its business. He is stealing its good will, —a most valuable property,—only secured after years of honest dealing and large expenditures of money; and equity would be impotent, indeed, if it could contrive no remedy for such a wrong.

The fundamental principle underlying this entire branch of the law is that no man has the right to sell his goods as the goods of a rival trader. Mr. Browne, in his work upon Trade-Marks, declares the wrong to be, "not in imitating a symbol, device, or fancy name, for any such act may not involve the slightest turpitude; the wrong consists in unfair means to obtain from a person the fruits of his own ingenuity or industry,—an injustice that is in direct transgression of the decalogue, 'Thou shalt not covet * * * anything that is thy neighbor's.' The most detestable kind of fraud underlies the filching of another's good name, in connection with trafficking." We think the principle may be broadly stated that when one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman, thereby deceiving the people by causing them to trade with him when they intended to and would have otherwise traded with his rival, a fraud is committed, —a fraud which a court of equity will not allow to thrive. In Howard v. Henriques, 3 Sanf. 725, the court, in speaking of the competitor in business, said: "He must not by any deceitful or other practice impose on the public, and he must not by dressing himself in another man's garments, and by assuming another man's name, endeavor to deprive that man of his own individuality and of the gains to which by his industry and skill he is fairly entitled." It may well be said that the defendant, by duplicating plaintiff's building, with its peculiar architecture and immediately adjoining, entering into the same line of business, with no mark of identification upon his store, has dressed himself in plaintiff's garments; and, having so dressed himself with a fraudulent intent, equity will exert itself to reach the fraud in some way. In the leading case of Lee v. Haley, supra, the whole question is condensed by the final conclusion of the court into the principle of law "that it is a fraud on the part of a defendant to set up a business under such a designation as is calculated to lead and does lead other people to suppose that his business is the business of another person." If the same evil results are accomplished by the acts practiced by this defendant which would be accomplished by an adoption of plaintiff's name, why should equity smile upon the one practice and frown upon the other? Upon what principle of law can a court of equity say, "If you cheat and defraud your competitor in business by taking his name, the court will give relief against you, but, if you cheat and defraud him by assuming a disguise of a different character, your acts are beyond the law?" Equity will not concern itself about the means by which fraud is done. It is the results arising from the means—it is the fraud itself—with which it deals.

The foregoing principles of law do not apply alone to the protection of parties having trade-marks and trade-names. They reach away beyond that, and apply to all cases where fraud is practiced by one in securing the trade of a rival dealer; and these ways are as many and as various as the ingenuity of the dishonest schemer can invent. In Glenny v. Smith, reported in the Jurist of 1865 (page 965), the court held: "Where a tradesman, in addition to his own name upon his shop front, placed upon his sunblind and upon his brass plate the words 'From Thresher & Glenny' (in whose employment he had been), the court, being of opinion that this was done in such a way as to be likely to mislead, and there being evidence that persons had been actually misled, granted an injunction to restrain such a use of the name of the firm Thresher & Glenny." In Knott v. Morgan, 2 Keen, 213, the "London Conveyance Company" had its omnibuses painted green, and its servants clothed in the same colors. Another adopted the same name, and likewise its vehicles were so painted and its servants so clothed. It was conceded that plaintiff could have no exclusive property right in any of these things, but the court issued its injunction, declaring that plaintiff had "a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representation that carriages really the defendant's belong to and are under the management of the plaintiffs." The author, by a note, approves the doctrine here declared, saying: "There was an obvious attempt to trade upon the plaintiff's reputation,—a constructive fraud,—coupled with pecuniary loss, which was made the ground for the issuance of a broad injunction." The same principle is reiterated by the same learned judge in Croft v. Day, 7 Beav. 84, in the following words: "It has been very correctly said that the principle of these cases is this: That no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person or that he is connected with and selling the manufacture of such other person while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud." In the very recent case of Coats v. Thread Co., 149 U. S. 566, 13 Sup. Ct. 966, the court said: "There can be no question of the soundness of the plaintiff's proposition that, irrespective of the technical question of trade-mark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and induce him to believe he is buying those of the plaintiffs. * * * They have no right by imitative devices to beguile the public into buying their wares under the impression they are buying those of their rivals." To the same point, see System Co. v. Le Boutillier (Super. Ct.) 24 N. Y. Supp. 890; Appolinaris Co. v. Scherer, 27 Fed. 18; Burgess v. Burgess, 3 De Gex, M. & G. 896; Von Mumm v. Frash, 56 Fed. 830.

Having decided that defendant's acts constitute a fraud upon plaintiff, and that a court of equity will administer relief, the question then presents itself, what shall be the form of the decree? How may the court reach the wrong? The defendant had the right to erect his building, and erect it in any style of architecture his fancy might dictate. He had the right to erect it in the particular locality where it was erected. He had the right there to conduct a business similar to that of plaintiff. He had a right to do all these things, for, of themselves, they did not offend against equity; but when they were done with a fraudulent intent, when they were done for the purpose of tolling away the customers of plaintiff by a deception, a fraud is practiced, and equity will do what it can to right the wrong. The decision of the trial court in effect ordered defendant to place signs both inside and outside his building, showing to the world the proprietorship thereof. We think this decree holds defendant to a rule too strict, in that it requires the proprietorship of the store to be shown. In this particular we think the decree should be modified so as to require that the defendant, in the conduct of this business, shall distinguish his place of business from that in which the plaintiff is carrying on its business, in some mode or form that shall be a sufficient indication to the public that it is a different place of business from that of the plaintiff. For the foregoing reason, the judgment in this respect only is reversed, and the cause remanded, with directions to the trial court to modify the same, as heretofore suggested; and thereupon it is ordered that said judgment stand affirmed. Appellant is to pay the costs of this appeal.

We concur: HARRISON, J.; VAN FLEET, J.

109 Cal. 602

DUNCAN v. TIMES-MIRROR CO. et al.

(L. A. 101.)

(Supreme Court of California. Oct. 22, 1895.)

UNDERTAKING ON APPEAL — SUFFICIENCY — DISMISSAL OF APPEAL.

1. Where an appeal is taken from the judgment, and also from the order denying a new trial, an undertaking which fails to recite or allude to such order is ineffectual as to the appeal therefrom.

2. An undertaking which binds the sureties to pay all damages and costs which may be awarded against appellant on appeal, but fails to contain the words "or on a dismissal thereof," as required by Code Civ. Proc. § 941, is insufficient.

3. An undertaking in double the amount of the judgment appealed from, given to secure a stay of execution, will not be construed to include the $300 undertaking on appeal, required by Code Civ. Proc. §§ 940. 941.

4. Under Code Civ. Proc. § 954, providing that an appeal shall not be dismissed for insufficiency of the undertaking if a sufficient undertaking be filed "before the hearing upon motion to dismiss," an amended undertaking cannot be filed after appellant has replied to respondent's brief on motion to dismiss.

5. The certificate of the clerk of the court below that the undertaking on appeal is in due form is not conclusive in the appellate court.

In bank. Appeal from superior court, Los Angeles county.

Action by Blanton Duncan against the Times-Mirror Company and others. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Appeals dismissed.

Blanton Duncan, in pro. per. White & Monroe and Henry T. Gage, for respondents.

TEMPLE, J. This is a motion to dismiss the appeal on the following grounds: (1) That no undertaking on appeal has been filed as required by section 940, Code Civ. Proc., nor as required by sections 941, 954, Id.; (2) the undertakings do not allude to the appeal from the order denying a new trial; and (3) the undertakings purport to be in a different action, and not in this case.

The undertaking filed is as follows: "Whereas, the plaintiff in the above-entitled action, Blanton Duncan vs. The Times-Mirror Co., appeals to the supreme court of the state of California from judgment made and entered against plaintiff in said action in the said superior court in favor of the defendant in said action on the —— day of March, 1895, for one hundred and eighty-five-100 dollars costs of suit, and one hundred dollars attorney's fee: Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, Mary T. Duncan & F. N. Myers, of Los Angeles county and state of California, do hereby jointly and severally undertake and promise, on the part of appellant, that the said appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound. And whereas, the appellant, Blanton Duncan, is desirous of staying the execution of the defendant so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further and jointly and severally bound, in the further sum of five hundred and ninety-one-hundredths dollars, being double the amount named in the said judgment, that if the said judgment appealed from, or any part thereof, be affirmed or the appeal be dismissed, the appellant shall pay defendant, the Times-Mirror Company, the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal; and if the appellant does not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of respondent in its favor against the said sureties for such amount, together with the interest that may be due thereon, and the damages and costs that may be awarded against the appellant upon the appeal herein. Mary T. Duncan. [Seal.] F. N. Myers. [Seal.]"

The undertaking does not recite or allude to the order denying a new trial, and is plainly ineffectual as to that appeal. Berniaud v. Beecher, 74 Cal. 617, 16 Pac. 510; Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657; McCormick v. Belvin, 96 Cal. 182, 31 Pac. 16; Paving Co. v. Bolton, 89 Cal. 155, 26 Pac. 650. The trouble with the undertaking on the appeal from the judgment is that it does not contain the words, "or on a dismissal thereof," as required by the statute. It does contain a stipulation that the sureties will pay all damages and costs which may be awarded against the appellant on the appeal; but, if the appeal be dismissed, costs are an incident as a matter of law, and are not awarded on the appeal. The undertaking is in two parts, which might have been contained in two undertakings. The last is to secure a stay of execution, and not in consideration of the appeal. This undertaking contains the condition which ought to have been in the undertaking given to secure the appeal. By this first undertaking the sureties became bound for $300, and by the second for $500. There can be no doubt that in case of a dismissal the sureties on the second undertaking would be liable for the costs and damages in the same manner in which they would have been liable on the first undertaking had it contained the required stipulation. It is contended that this is a substantial compliance with the statute. This is not a new question here. The point was discussed and decided adversely to appellant in Duffy v. Greenebaum, 72 Cal. 157, 12 Pac. 74, and 13 Pac. 323. In addition to the reasons there given for the ruling, it may be suggested that $300 is not always sufficient to secure to a respondent his costs and damages, and it was competent for the legislature to require further security in case a stay of execution was desired; and further, there is no effectual provision for the justification of the sureties on the undertaking for the appeal, for, although they may be required to justify under section 948, Code Civ. Proc., yet, if they fail to justify, the only consequence is that the execution is no longer stayed. Swasey v. Adair, 83 Cal. 136, 23 Pac. 284. The appeal would therefore be effectual although the sureties may be found worthless. True, if the sureties are the same on each bond, it would not help the matter unless a new undertaking were given; but to secure a stay new sureties must be provided, and this may be why the stipulation must be in each undertaking. At all events, such are the requirements of the Code, and there can be no question of the power of the legislature to prescribe any reasonable condition to the exercise of the right of appeal.

Appellant offers, if authority to file an amended undertaking exists, to give an undertaking conforming in every respect to the statute. The motion to dismiss was made upon due notice, and a brief on the part of the moving party was also submitted, to which a reply was made by appellant. In the notice and printed brief the defects in the undertaking were pointed out. Section 954, Code Civ. Proc., reads as follows: "If the appellant fails to furnish the requisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking thereon if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal." Had there been no statute upon the subject, we might, perhaps, where an undertaking has been filed in due time, and evidently with an honest intent to comply with the law, but which is defective, allow a new undertaking to be filed. But here an opportunity is afforded to an appellant to correct any such mistake. The Code expressly provides when the appellant must avail himself of the privilege. He must do so before the hearing of the motion to dismiss. He cannot contest the motion, and then claim the privilege, if the motion is decided against him. This express provision is a limitation upon the discretion of the court. The transcript on appeal in this case contains a certificate to the effect that "an undertaking on appeal in due form has been properly filed," as required by section 953, Code Civ Proc. It is contended that this certificate is conclusive; that, in case the certificate is untrue, the respondent has his remedy against the clerk, who is liable on his official bond. This proposition has been frequently suggested here on the consideration of similar motions, and, although it has not been discussed in any reported decision, the court has constantly and frequently permitted parties to go behind this certificate. It could not have been intended that the judgment of the clerk should be final in this matter. "For all purposes connected with the appellate jurisdiction, the appellate court has the same power over the clerk of the court below as it has over its own clerk." People v. Center, 54 Cal. 236; Winder v. Hendrick, Id. 275. We do not claim any authority over him while performing his customary duties as clerk of the lower court, but duties connected with our appellate jurisdiction we can require him to perform. That we are not bound by his certificates as to the correctness of a record has been repeatedly decided. On the contrary, when necessary, we may compel him to correct his certificate, and transmit to this court a proper record. Section 953 places the certificate of the attorneys upon the same plane as the certificate of the clerk. Such a certificate was considered in Perkins v. Cooper, 87 Cal. 241, 25 Pac. 411. In that case the court permitted the respondent to prove, against the certificate of his attorneys, that no undertaking on appeal had in fact been filed. The rationale of that decision is that, to give this court jurisdiction, there must be in fact an undertaking, or a waiver of it. A false certificate, stating that an undertaking had been filed, does not confer jurisdiction. In the above case the certificate of counsel was made after the time for filing the undertaking had expired, and therefore it could not be construed as a waiver. The case seems in point here. The appeals, both from the judgment and from the order refusing a new trial, are dismissed.

We concur: BEATTY, C. J.; HARRISON, J.; HENSHAW, J.; VAN FLEET, J.; McFARLAND, J.; GAROUTTE, J.

DUNCAN v. TIMES-MIRROR CO. et al.
(L. A. 101.)

(Supreme Court of California. Oct. 22, 1895.)

In bank.

Action by Blanton Duncan against the Times-Mirror Company and others. From a judgment for defendants, and an order denying a new trial, plaintiff appealed. The appeals were dismissed, and respondents moved to strike appellant's brief from the files. Denied.

Blanton Duncan, in pro per. White & Monroe and Henry T. Gage, for respondents.

PER CURIAM. Respondents have moved to strike from the files the brief of appellant filed herein. Consideration of this motion is made unnecessary by the judgment of this court, filed this day, dismissing the appeals. 42 Pac. 147. The appeals having been dismissed, the brief in question ceases to be a record or file of this court.

109 Cal. 396

CITY OF LOS ANGELES v. STATE LOAN & TRUST CO. (No. 19,452.)

(Supreme Court of California. Oct. 8, 1895.)

SAVINGS AND LOAN ASSOCIATIONS—TAXATION.

1. Pol. Code, § 3617, provides that demands due on account of money deposited with savings and loan corporations shall, for taxation purposes, be treated as an interest in the property, and shall not be assessed to the owner thereof. *Held*, that a corporation authorized by its charter to do a general loan and trust business, but which also conducted a "savings department," and paid a stipulated rate of interest on deposits in that department, though the depositor did not otherwise participate in the corporation's earnings, was subject to taxation on the amount deposited in said department.

2. Whether or not a corporation was engaged in the transaction of a savings and loan business is not, for the purpose of taxation, conclusively determined by its articles of incorporation.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the city of Los Angeles against State Loan & Trust Company to recover certain taxes levied and assessed against defendant. Defendant had judgment, and plaintiff appeals. Reversed.

C. McFarland, for appellant. W. P. Gardiner, for respondent.

HAYNES, C. This is an agreed case submitted to the superior court under section 1138 of the Code of Civil Procedure, and the controversy involves the question whether the defendant is liable for certain taxes levied and assessed against it by the city assessor for the year 1892, amounting to $900. On the first Monday in March, 1892, the total deposits held by defendant amounted to $358,847. Of this sum $249,939.01 consisted of ordinary deposits subject to check, or represented by certificates of deposit, while the remainder, amounting to $108,907.99, was composed of interest-bearing deposits, the accounts of which were kept in separate ledgers, one denominated "Savings Deposits," and the other "Term Savings Deposits"; and it was upon said sum of $108,907.99 that said tax was levied and assessed. The city assessor claimed that, as to these last-named deposits, the defendant was either de jure or de facto a savings and loan corporation, and therefore liable for said tax under subdivision 6 of section 3617, Pol. Code. Said subdivision, after defining the terms "credits and debts," provides as follows: "But credits, claims, debts and demands due, owing or accruing for or on account of money deposited with savings and loan corporations shall, for the purposes of taxation, be deemed and treated as an interest in the property of such corporation, and shall not be assessed to the creditor or owner thereof." The purposes for which the respondent was incorporated, as appears from its articles of incorporation, were in substance to accept and execute trusts of every nature; to attend to the management and settlement of estates, guardianships, assignments, receiverships, and other trusts; to act as executor and guardian of estates; to do a safe-deposit business; to receive on deposit from others trust funds or moneys belonging to states, counties, and other municipal corporations; to do a general banking business; to issue certificates of deposit or indebtedness, upon interest or otherwise, and with or without conditions as to time of payment; to invest or loan money upon commission or otherwise, and to purchase, hold, sell, mortgage, and convey such real estate as may be necessary for carrying on the business of the corporation, and such other real property as may be taken in security for or in payment of debts owing to the corporation. The agreed case further shows that, while the accounts of the alleged savings deposits are kept in separate books from the other business of the bank, there is no separation of the moneys received from the different sources, and that the interest paid on these deposits is at an absolute rate, agreed upon at the time the deposit is received. There are also in the statement two exhibits of depositors' pass books, one for "Savings Deposits" and the other for "Term Savings Deposits," and upon the covers are printed the usual rules adopted by savings banks regulating the deposit and withdrawal of money, and on the inside of the cover is stamped the following: "Savings Department. Office hours, 10 a. m. to 3 p. m. Saturdays, 10 a. m. to 12 m." Upon these facts the court below held that the defendant was not a savings and loan association, either de jure or de facto, and that the deposits in question should not be assessed or treated as the property of the bank, but should be taxed to the several depositors as ordinary commercial deposits.

Appended to respondent's brief is found the opinion of the learned judge who heard the case, and in which the ground upon which the decision is based is very clearly and forcibly stated. The logic of the opinion is faultless. If the major premise be conceded, the conclusion is inevitable. It is assumed that the distinction between commercial banks and savings and loan associations is that in the former the money deposited becomes the property of the bank, and the relation of debtor and creditor is created, while in the latter the deposit remains, in a certain sense, the money of the depositor; and the court quotes from Morse on Banks (section 617) as follows: "The depositors are the bank; the trustees and officers are their agents for receiving and loaning their money, and the profits belong to the depositors;" and counsel for respondent cites many authorities giving a like definition of a "savings bank,"—that is, that the bank is a mere agency; that whatever profits are made upon the deposits belong to the depositors, the bank deducting therefrom only its necessary expenses incurred in conducting the business for the depositors; and that hence the title to the money deposited remains in the depositor. It may be at once conceded that, if only those banks coming within the above definition are savings banks, the judgment was right, and must be affirmed; for in this case it is clear that these deposits became the property of the bank, and the bank could only be required to account for the sum deposited, with interest thereon at an agreed rate, whether such a rate was more or less than that received by the bank. But that a bank conducting its business as that portion of defendant's business was conducted which is here under consideration is also a savings bank is clear. In Huntington v. Bank, 96 U. S. 388, cited and quoted by counsel for respondent, the court, after stating the characteristics of savings banks as they existed in England, and quoting from text writers to the effect that savings banks derive no benefit whatever from any deposit, said: "Very many such exist in this country. Among the earliest are some in Massachusetts, organized under a general law passed in 1834, which contained a provision, like the one in the act of congress, that the income or profit of all deposits shall be divided among the depositors with just deduction of reasonable expenses. They also exist in New York, Pennsylvania, Maine, Connecticut and other states. Indeed, until recently, the primary idea of a savings bank has been that it is an institution in the hands of disinterested persons, the profits of which, after deducting the necessary expenses of conducting the business, inure wholly to the benefit of depositors, in dividends or in a reserved surplus for their greater security." The expression "until recently" indicates that the court was distinguishing the bank under consideration from other savings banks which did not have the features which existed in that case. The case is therefore not a conclusive authority for respondent. So, too, such corporations formerly had no stock and no capital. They were purely agencies for receiving and loaning money on account of their owners. In case of loss by the embezzlement of the funds, as in Bunnell v. Society, 38 Conn. 203, such loss is charged up to the depositors, as the officers are the agents of the depositors, and the depositors, being members, are the corporation, and must bear the loss; but with us, while our statute is broad enough to authorize savings corporations without capital stock, they are also authorized to be formed having a capital stock, and in such case the depositors are not the corporation, but the capital stock is a security to depositors as well as to stockholders, depositors having the priority.

A brief review of the provisions of the Civil Code under the title of "Savings and Loan Corporations" will show that California, at least, is not restricted to the original idea of savings banks. That such corporations may be formed with or without capital stock, see section 572 and subdivision 6 of section 574. That the directors may agree with depositors as to interest is clear under section 573. The same section also provides: "The directors must not contract any debt or liability against the corporation or its depositor for any purpose whatever, except for deposit." It is therefore apparent that a deposit in a savings bank having a capital stock may be a debt against the corporation, and, indeed, must be, since the corporation is formed by the stockholders, and the depositor deals with the corporation, not as his agent, for whose mistakes or defalcations he is responsible, but as a principal, pledging its stock and assets for the security of the depositor. Not so, however, with the savings bank of the other class, which has no capital stock, and in which the depositors are members of the corporation. Section 577 provides, among other things, as follows: "The directors of any such corporation having no capital stock must retain, on each dividend day, at least five per cent. of the net profits of the corporation, to constitute a reserve fund, which must be invested in the same manner as the other funds of the corporation and must be used toward paying any losses which the corporation may sustain in pursuing its lawful business. * * *" From this review of the provisions of the Civil Code it clearly appears that there are at least two plans or systems upon which savings banks may be organized and conducted, and that the manner in which the defendant conducted one branch of its business conforms to one of these systems. The distinction between these two classes or kinds of savings banks was clearly recognized in Trust Co. v. Hinton, 97 Cal. 214, 221, 32 Pac. 3. It is there said: "It is, however, contended that appellant does not come within the provisions of section 3617 of the Political Code, because the debts in question are not ordinary deposits in savings banks, but debts for borrowed money, repayable in the exact sum borrowed, with interest thereon, irrespective of the profits or losses that may accrue to the bank. The learned counsel distinguishes between savings and loan associations which distribute to depositors the net profits realized by the banks in proportion to their several deposits and those which pay to depositors a specified rate of interest on time deposits; that in the former class the depositors are, in effect, members of the corporation and interested in its profits, while in the latter class they are creditors, and have no interest in the profits. The language of section 3617, however, is comprehensive enough to include both classes, and we see no ground upon which we can say that the latter class was not intended to be included. All are organized under title 10 of the Civil Code."

Respondent contends, however, that the mode or manner in which the business is conducted does not determine the fact whether it is or is not a savings bank, either in toto or pro tanto, and cites People v. Binghamton Trust Co., 139 N. Y. 185, 34 N. E. 898. That action was to recover a penalty for an alleged violation of the banking act of 1882, which makes it unlawful for any bank, banking association, or individual to advertise or put forth a sign as a savings bank, or in any way to solicit or receive deposits as a savings bank. 2 Rev. St. N. Y. (8th Ed.) p. 1574, § 283. It appeared in that case that a set of pass books issued by the defendant contained a set of interest rules similar to those used by savings banks. The court, after referring to the powers of the defendant corporation, which were in many respects similar to those of the respondent here, said, in substance, that the statute had not prescribed a set of rules for one or the other class of corporations, and that it knew of no principle of law which, as to commercial transactions within their chartered powers, and involving the receipt or borrowing of moneys and its obligation to repay the same, denies the entire freedom to regulate them by such a contract as the parties are willing to enter into; but in referring to the printed matter upon the pass books the court said: "It explicitly says that it 'differs from a savings bank in that it has a large capital invested that is pledged as security to its depositors;' " and concluded that it did not hold itself out as a savings bank, and that the whole object of the provision was to prevent a deception being practiced. But here, as in the case above cited, we find that savings banks are not restricted by statute or any principle of law to a particular method of business which must be pursued as between the bank and the depositor. Section 576 of the Civil Code does not confine the mode to pass books, but provides that "savings and loan corporations may issue general certificates of deposit, which are transferable, as in other cases, by indorsement and delivery." It is not necessary to determine in this case whether this part of respondent's business was within its chartered powers, and therefore no opinion is expressed upon that question, further than to say that, in order to be a savings and loan corporation, it is not necessary that the name of the corporation should in any manner express the fact that it is such. Nor need we inquire whether the funds received as savings deposits have been loaned or invested in accordance with the requirements imposed upon savings and loan corporations specially incorporated as such. Such requirements of the statute are solely for the protection of the depositor, and, if the respondent has violated its duty in that regard, it cannot be urged as a reason why it should be relieved from taxation upon the deposits so received. Respondent saw proper to classify its business, and designated one part as the "Savings Department," and named certain hours for that business. It received a large amount of deposits in that department, in full accordance with one of the modes of conducting a savings and loan corporation as authorized by the statute. It gave to the depositor a pass book which denominated the deposits therein entered as "Savings Deposits." It assumes to be a savings bank pro tanto, at least, in obtaining the deposits, and should not be heard to say that it is not when the question of taxation arises, whether it arises between the bank and the state or between it and the depositor.

Respondent contends that the liability to taxation does not depend upon the character of the deposit, but upon the general character of the corporation receiving the deposit, and that such character must be determined from the articles of incorporation, and cites Mitchell v. Beckman, 64 Cal. 117, 122, 28 Pac. 110. That was a suit by a depositor against a stockholder in the Odd Fellows' Savings & Commercial Bank. The money sued for had been deposited by the plaintiff in the Odd Fellows' Bank of Savings in 1873. In 1875 all the assets of that bank were transferred to the Odd Fellows' Savings & Commercial Bank, and the latter assumed all the liabilities of the former. It was contended that the deposit sued for was in a savings bank which was the agent of the plaintiff to invest her money, and, inasmuch as it was lost through the instrumentality of her agent, she could not maintain this action against the stockholders. It was in reply to this contention that it was said that the new bank was a commercial, and not a savings, bank, and that "this is plainly shown by the articles of incorporation." There the question was as to the true legal relation between the depositor in the former corporation, whose deposit had passed to and been assumed by the new, and a stockholder in the new corporation, and upon such question it might well be that the articles of incorporation were conclusive; notwithstanding it was afterwards held in Green v. Bank, 65 Cal. 71, 2 Pac. 887, that upon the transfer to it from the former corporation it "commenced to carry on and until some time in September, 1878, continued to carry on the business of a savings and loan corporation." In the first of these cases the point decided was as to the true nature and powers of the corporation, and in the second the character of the business actually conducted by it.

Respondent further contends that the stipulation of the parties narrows the controversy down to a single point, viz. "whether respondent was in fact a savings and loan corporation," and quotes from the "statement of facts" a paragraph which, taken literally, gives color to his contention. But in the statement of the controversy it is said: "The question in difference and to be determined by said court under the agreed statement of facts herewith submitted is as follows, to wit: Is the defendant State Loan and Trust Company liable and indebted to the plaintiff for the sum of $900, claimed by plaintiff as an assessment for the fiscal year 1892–93 upon solvent credits alleged by plaintiff to have been owned by defendant on the first Monday in March, 1892, and described in the statement of facts hereinafter set forth?" The whole statement shows quite clearly that the con troversy related to only a part of the business of the respondent, and the question was whether as to that part it was in fact a savings and loan corporation.

Our conclusion is, without deciding whether the respondent was legally authorized to transact the business of a savings corporation, that as to the part of its business in controversy it was de facto a savings corporation, and that the taxes in question were properly levied and assessed. The said taxes having been collected by the city, the judgment appealed from should be reversed, and the agreed case dismissed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with directions to dismiss the case.

109 Cal. 481

WOODSIDE et al. v. HEWEL. (No. 18,432.)

(Supreme Court of California. Oct. 10, 1895.)

RESULTING TRUST—SUFFICIENCY OF EVIDENCE—PAYMENT OF PURCHASE PRICE.

1. To authorize the imposition of a resulting trust on land in proportion to the consideration furnished by plaintiff, the evidence must show the precise amount paid by him, as well as the total consideration.

2. There is no resulting trust in favor of the wife in land purchased by the husband, on his credit, though part of the purchase price was paid with money subsequently borrowed from her.

Department 1. Appeal from superior court, Stanislaus county; W. O. Minor, Judge.

Action by one Woodside and others against one Hewel, executor, etc., of Thomas E. Tynan, deceased. There was a judgment for plaintiffs, and defendant appeals. Reversed.

D. M. Delmas, L. W. Fulkerth, and W. H. Hatton, for appellant. J. H. Budd and L. J. Maddux, for respondents.

HARRISON, J. In 1862, Thomas E. Tynan married the widow of Eli E. Marvin, and they lived together as husband and wife until her death, in 1881. At the time of their marriage, Mrs. Marvin was the owner of certain real estate in Stanislaus county, and also of an hotel and ferry which were conducted by her at Empire City, in said county, and Tynan was a practicing physician in that county, and also the owner of certain real estate therein. During the marriage certain real and personal property was purchased in the name of Dr. Tynan, and, after the death of his wife, he purchased other property in the city of Modesto. The plaintiffs are the children of Mrs. Marvin by her former husband, and, at the death of their father, became the owners of one-half of his estate, which they subsequently conveyed to their mother. In 1892 they brought the present action against Dr. Tynan for a conveyance to them of the property purchased by him after his marriage with their mother, as well that purchased before her death as that subsequent thereto, alleging that it had been purchased with the proceeds of her separate estate, and was held in trust by him. Tynan answered the complaint, denying these allegations; but, before the case came on for trial, he died, and his executor was, upon his own motion, substituted as defendant. The court found "that three-fifths of the purchase price of each of [certain described parcels of land] was furnished from the rents, issues, and profits of the separate property of Mrs. Tynan, and the same were invested by her husband therein as her agent and trustee, and as the agent and trustee of the plaintiffs," and rendered judgment that the plaintiffs are the equitable owners of an undivided three-fifths of the property. From this judgment and an order denying a new trial, an appeal has been taken.

The theory upon which the plaintiffs seek to maintain this action, both in their complaint and by the evidence presented at the trial, is that, inasmuch as the consideration for the purchase of the land was moneys belonging to their mother or to her estate, a resulting trust was created in her favor, which they, as her heirs at law, are entitled to assert against Dr. Tynan, and that, at the commencement of this action, the property so purchased was held by him in trust for them to the extent that the moneys of their mother contributed to the purchase. The equitable principle that when, upon the purchase of lands, the consideration therefor is furnished by one person, and the conveyance is taken in the name of another, a resulting trust in the lands is created in favor of the one from whom the consideration came, is well recognized, as is also the rule that a resulting trust is created pro tanto where only a specific part of the consideration was so furnished. It is also a familiar rule that it is incumbent upon him who would claim that a trust exists in his favor to establish the fact by clear, convincing, and unambiguous testimony; that the presumption that the person in whose name the legal title to land is vested is the absolute owner thereof is not to be overcome by surmise or conjecture, or by any evidence that fails to afford satisfactory proof of the fact to the tribunal before which it is presented; that it is essential that one who would claim an interest in real property by reason of having paid the consideration for its purchase must show that such payment was made at or prior to the time the purchase was made, and for the purpose of making the purchase; and that, if he would claim an interest pro tanto according to the proportion of the consideration furnished by him, he must show the precise amount paid by him, as well as the amount for which the purchase was made, in order that the court may determine the respective rights of the parties in the property purchased. The presumption of ownership arising from the legal title will not be overcome unless the interest of the claimant can be determined; and the testimony presented in support of the equitable claim must clearly show, not only the existence of the trust, but also the extent to which the property is held in trust; otherwise, the legal title will prevail. "The trust must have been coeval with the deed, or it cannot exist at all. After a party has made a purchase with his own moneys or credit, a subsequent tender, or even reimbursement, may be evidence of some other contract or the ground for some other relief; but it cannot, by any retrospective effect, produce the trust of which we are speaking. There never was an instance of such a trust, so created, and there never ought to be, for it would destroy all the certainty and security of conveyances of real estate. The resulting trust, not within the statute of frauds, and which may be shown without writing, is when the purchase is made with the proper moneys of the cestui que trust, and the deed not taken in his name. The trust results from the original transaction at the time it takes place, and at no other time; and it is founded on the actual payment of money, and on no other ground." Botsford v. Burr, 2 Johns. Ch. 415. "There is no doubt that payment of part of the purchase money will create a resulting trust to the extent of that payment, but the amounts paid by the different parties must be shown with certainty; and a resulting trust will not be held to arise upon payments made in common by the one asserting his claim and the grantee in the deed, when the consideration is set forth in the deed as moving solely from the latter, unless satisfactory evidence is offered exhibiting the portion which was really the property of each, and establishing the fact that the payment was made for some specific part or distinct interest in the estate." Cutler v. Tuttle, 19 N. J. Eq. 561. "There must be no uncertainty as to the proportion of the property to which the trust extends." Olcott v. Bynum, 17 Wall. 59. See, also, White v. Carpenter, 2 Paige, 240; Baker v. Vining, 30 Me. 127; McGowan v. McGowan, 14 Gray, 119; Reynolds v. Morris, 17 Ohio St. 510; Robles v. Clarke, 25 Cal. 326. "To follow money into land, and impress the land with a trust, the money must be distinctly traced and clearly proved to have been invested in the land. The conversion of the trust money specifically, as distinct from other money of the trustee, into the property sought to be subjected to the trust, must be clearly shown. It does not suffice to show the possession of the trust funds by the trustee, and the purchase by him of property; that is, payment for property generally by the trustee does not authorize the presumption that the purchase was made with trust funds." Ferris v. Van Vechten, 73 N. Y. 119; Phillips v. Overfield, 100 Mo. 474, 13 S. W. 705.

Tested by these principles, the evidence in the present case fails to sustain the finding of the court, that three-fifths of the purchase price of the property set forth therein was furnished from the separate estate of Mrs. Tynan. This property may be divided into three classes,—that purchased by Dr. Tynan in the lifetime of his wife, that purchased by him after her death, and certain personal property in his possession at the commencement of the action. Bearing in mind that it is to be presumed that the property purchased during the existence of the marriage was community property, and that, upon the death of his wife, it vested absolutely in him, it was necessary for the plaintiffs, in order to overcome this presumption, to show that the whole or some definite portion of the consideration for the property purchased by him came from the separate estate of their mother by more clear and satisfactory evidence than would have been required had he not sustained that relation at the times of the several purchases. The property in the city of Modesto was all purchased by him after her death, and there is an entire absence of evidence tending to show that any portion of her estate was invested in these lands. The plaintiffs themselves were the chief witnesses in support of their claim, one of whom was seven years of age, and the other five, at the time of their mother's marriage to Dr. Tynan; and the testimony given by them consisted chiefly of their remembrance of conversations between him and their mother, and of acts which they had witnessed. They were unable to specify any sum of money that had been given by their mother to Dr. Tynan for the purchase of land, or to designate any parcel of land purchased by him for which a portion of the purchase money had been furnished by her. The Hardscrabble place was the only purchase which they identified as having been made by him, or for which any specific sum of money came from their mother, and in reference to this purchase Mrs. Woodside testified: "The next purchase I remember was the Hardscrabble place. He wanted to get forty dollars from mother. She objected to giving him the money, but finally she gave it. He said afterwards he paid for the land. How much besides that forty dollars he contributed I do not know." There is no evidence showing that this purchase was made on behalf of the mother, or even with her consent; and the testimony concerning her giving the money, even if it be admitted that the money so given was her separate property, is quite as consistent with considering it a loan to her husband as to consider it a part of the consideration contributed for the purchase. The amount of the purchase price is not given, and the witness said that she did not know what it was. With reference to another purchase, she testified: "He made this remark, that he borrowed some money to buy a piece of land on this side of the river, and he told me it took all he and mother could save from both places to pay for it." Whatever land was purchased upon the credit of Dr. Tynan was community property, and did not cease to be such by reason of a subsequent payment of the loan with money furnished by his wife. With reference to the purchase from Mrs. Kincaid, she testified: "I don't know how much was paid for it, nor to whom. Mrs. Kincaid was at the house. She came to sell the land. The doctor did not have sufficient to pay for it, and he asked mother for it. Mother came out of her bedroom. She handed her purse to the doctor. She contributed by handing her purse to him. I understood she gave the money to contribute towards the purchase price." It is unnecessary to recite the evidence in regard to other purchases, as it is all of similar tenor, and in no part of the record is there any evidence which will sustain the aforesaid findings of the court. In this finding the court seems to have acted upon the theory that the several purchases of land by Dr. Tynan were in furtherance of a common purpose between him and his wife, whereas there is no evidence which tends to establish such common purpose; and, in the absence of such evidence, each purchase is to be regarded as a distinct and separate transaction. The record fails to show the amount of money which was paid for any single parcel of land purchased, the only evidence in that respect being the consideration recited in the deeds; and, with reference to many of the parcels of land, there is no testimony of the circumstances under which they were purchased.

The court also found that Dr. Tynan employed the separate funds of his wife to the extent of three-fifths of the purchase price thereof, in purchasing certain farming utensils and other personal property and stock in the Grangers' Bank, and rendered judgment awarding to the plaintiffs an undivided three-fifths therein and in "all other property acquired by him after July 27, 1862, and which at the time of the commencement of this action stood in his name." This finding is challenged by the appellant as unsupported by any evidence, and counsel for respondents have not cited us to any part of the record in which the finding is sustained; nor have we been able, upon a thorough examination thereof, to find any evidence in the record of the purchase of any of this personal property, or of the circumstances under which it was made. It was not shown that Dr. Tynan did not have the means with which to make the several purchases; and, in the absence of evidence to the contrary, it must be assumed that they were made with his own funds, and that he intended them for himself alone. The judgment and order are reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

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109 Cal. 566

PACIFIC MUT. LIFE INS. CO. v. FISHER et al. (No. 19,441.)

(Supreme Court of California. Oct. 12, 1895.)

MECHANIC'S LIEN—CLAIM FOR LIEN—NONSUIT—PARTNERSHIP—ASSIGNMENT.

1. The fact that the architect, in his claim for a lien on the building, alleges the date of the contract for his services to have been two years prior to its actual date, will not defeat his lien.

2. A nonsuit should not be granted where there is a conflict in the evidence.

3. An assignment of a partnership claim by a member of the firm in the name of the firm to himself individually is sufficient to enable him to sue thereon, the other partners not objecting thereto.

In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the Pacific Mutual Life Insurance Company against John C. Fisher and others. From a judgment denying defendant J. W. Reid's claim for a mechanic's lien, he appeals. Reversed.

Luce & McDonald, Gibson & Titus, Conklin & Hughes, and Shaw & Holland, for appellant. Fox & Kellogg and Parrish & Mossholder, for respondent.

GAROUTTE, J. The present action is a consolidated action, involving the respective rights of plaintiff as a mortgagee, and the rights of defendants and appellants as owners and lien claimants. This appeal is brought by J. W. Reid, a lien claimant, who was nonsuited by the trial court; the appeals of all the other appellants having been heretofore dismissed upon motion. Reid's rights are based upon a claim for services as architect in the preparation of plans and specifications to be used in the erection of the San Diego Opera House, and as the superintendent of such building during the process of construction. Respondent presents various grounds as sufficient to sustain the action of the trial court in granting the nonsuit, and we assume that the best reasons disclosed by the record have been advanced. We proceed to examine them in detail.

1. The contract upon which Reid seeks to recover is stated in his claim of lien as follows: "That on or about the 22d day of January, 1889, the said Reid Brothers entered into a contract with John C. Fisher, as agent of the said owners, under and by which said Reid Brothers agreed to furnish the said architectural drawings, plans, and specifications, and to superintend the erection and construction of said building; and the said Fisher and said San Diego Opera-House Company, a corporation, agreed to pay for the said architectural drawings, plans, and specifications * * * an amount of money equal to five per centum of the total cost of construction, erection, and completion of said building." It is now asserted that the lien claimant at the trial must stand upon

the contract set out in his claim of lien, and that no such contract was proven. That contract was of the date of January 23, 1889, while the contract proven was entered into on or about April 27, 1891, being more than two years subsequent to the date set forth in the claim of lien. This is a most substantial variance as to time, but we do not think it so material as to be fatal to the claimant's case. In actions brought for the foreclosure of mechanics' liens, the day upon which contracts are entered into is a matter of little importance. It is practically immaterial, for no rights are fixed by it, and nothing is dependent upon it. For the purposes of description and identity, the date of the contract is in a sense material, for the party to be charged must have notice of the particular contract upon which the lien claimant intends to rely at the trial. But here the terms and conditions of the contract are stated, and they are the essential elements contemplated by the statute to be stated in the claim of lien. We think them amply sufficient to identify this contract, and put the defendant upon his proof, notwithstanding the plaintiff's evidence at the trial as to the time when the contract was entered into varies materially from the date set out in his claim of lien. Indeed, it may be said to be doubtful if the statute requires a statement in the claim of lien. There was evidence that Fisher entered into the contract individually with the architect; there was evidence that he entered into the contract with the architect as the agent of the opera-house company; and there was evidence that the opera-house company directly entered into the contract independently of Fisher. Under such conditions, a nonsuit should not have been granted for lack of evidence in this regard. Again, there was evidence that the architect agreed to take one-half or one-third of the contract price in stock of the opera-house company, and there was also evidence that the full amount was to be paid in money. This evidence also furnished no ground for a nonsuit, and, in the face of such a conflict, respondent has no right to assume that part of the contract price was to be paid in stock, and has no right to argue therefrom that, consequently, the contract was void and the nonsuit justified. Where there is a conflict in the evidence, a motion for a nonsuit should never be granted.

2. The evidence discloses that neither Fisher nor the opera-house company was the owner of the real estate upon which the building was subsequently constructed, in January, 1889, when the contract is alleged to have been made; but we do not think this fact is material. We know of no reason why parties desirous of erecting buildings have not the right to contract for their erection, even though at the time they do not own the realty upon which the buildings are to be erected; and we do not see how the question is at all material or pertinent to any litigation which might subsequently arise from the claims of lienholders; but, beyond this, we have shown that the date of the contract was a false date, and the evidence fully indicates that when the contract was actually entered into, in April, 1891, Fisher, or the opera-house company, or both, were the owners of the property, and were the owners at all times when work was being performed in the construction thereof.

3. The claim of lien was filed by Reid Bros., a partnership consisting of three brothers, of whom this appellant was one. Plaintiff brought this action, relying upon an assignment from the partnership. This assignment was in writing, and was made by plaintiff in the name of the partnership to himself, individually. Respondent attacks this assignment as invalid. In Caulfield v. Sanders, 17 Cal. 570, it was held that one partner might transfer a partnership account to a third party, and we see no reason why the same rule does not apply in the present case; but we think it sufficient to say that the other members of the firm are not here objecting to the assignment; and as against all parties standing in the position of these respondents, we think it sufficient. We find nothing further disclosed by the record demanding our consideration.

For the foregoing reasons, the judgment in favor of the plaintiff and defendant Fisher and the San Diego Opera-House Company, as against the appellant Reid, is reversed.

We concur: HARRISON, J.; TEMPLE, J.; McFARLAND, J.

109 Cal. 523

NOBLE et al. v. SUPERIOR COURT OF FRESNO COUNTY. (No. 16,009.)

(Supreme Court of California. Oct. 12, 1895.)

WRIT OF REVIEW—WHEN LIES—REMEDY BY APPEAL—ORDER IN INSOLVENCY PROCEEDING.

1. Under Code Civ. Proc. § 1068, providing that a writ of review may be granted when an inferior tribunal has exceeded its jurisdiction, "and there is no appeal," the writ does not lie when there is a remedy by appeal.

2. By express provision of Insolvent Act 1880, § 67, subd. 5, an appeal lies to the supreme court from an order in insolvency proceedings setting aside to the insolvent a homestead, or other property, as exempt from execution.

3. Under Insolvent Act 1880, § 67, subd. 5, allowing an appeal from an order setting aside to an insolvent a homestead, or other property, as exempt from execution, the supreme court, on appeal, may consider all errors affecting the rights of appellant; and the fact that the order, in excess of the power of the court below, included a stay of execution then pending, and commanded a release of the property by the sheriff, is not ground for the issuance of a writ of review.

Commissioners' decision. Department 2.

In insolvency proceedings in the superior court of Fresno county, James E. Hughes was adjudged insolvent, and applied for a setting apart of certain land as a homestead, and certain chattels as exempt from execution. The application was granted, over the objection of A. Noble and A. Otto, execution creditors, who petition for a writ of review. Denied.

Gale & Peery and W. P. Thompson, for petitioners. L. L. Cory, for respondent.

SEARLS, C. One James E. Hughes filed his petition in insolvency in the superior court of the county of Fresno, state of California, in due form; and an order was thereupon made by the said superior court adjudging the said James E. Hughes an insolvent debtor, and directing notice to be given as provided by law to the creditors of said insolvent to meet for the purpose of electing an assignee, and did then and there order that all the proceedings against said insolvent be stayed. Thereafter the said insolvent presented a petition to the superior court, asking that certain real property be set apart to him as a homestead, and that certain personal property by him owned be set apart as exempt from execution. Notice was given of the time and place of hearing said application, and at the hearing thereof the petitioners herein (who were judgment creditors of said insolvent, and who had caused an execution to issue and be levied upon a portion of the personal property claimed as being exempt from execution) appeared, and presented written objections to setting apart said personal property as exempt, and protested against the making of any order staying the execution which had been levied upon the exempt property by the sheriff of Fresno county prior to the proceedings in insolvency. Upon the hearing of the matter the court made and entered an order or decree exempting and setting apart the homestead of the insolvent, and the personal property in said order described, as exempt from execution, and providing that the same shall not be in any way subject to execution, and forever staying execution against the same, and ordering the sheriff of Fresno county to release and discharge any and all of said property from the operation and effect of said execution. Thereupon the plaintiffs presented their petition to this court, setting forth substantially the proceedings in the superior court, and praying a writ of review to issue out of this court, directed to the superior court, citing it to show cause why the order complained of should not be vacated and set aside. The writ issued. Defendant answered, and demurred to the petition upon various grounds, among which are that the petitioners had a plain, speedy, and adequate remedy at law, in this: that an appeal from the order in the petition set forth, and sought to be reviewed herein, is given said petitioners by reason of subdivision 5 of section 67 of the insolvent act of 1880.

Our writ of review, which answers to the common-law writ of certiorari, "may be granted by any court, except a police or justice's court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal nor in the judgment of the court any plain, speedy and adequate remedy." Code Civ. Proc. § 1068. From this provision, it is made manifest that three concurring requisites are essential to the issuance of the writ of review, viz.: (1) An excess of jurisdiction by the inferior tribunal, etc., exercising judicial functions; (2) that there is no appeal; (3) that there is no other plain, speedy, and adequate remedy. Section 67 of the same act is as follows: "An appeal may be taken to the supreme court in the following cases: (1) * * * (2) * * * (3) * * * (4) * * * (5) Against or in favor of setting apart a homestead or other property claimed as exempt from execution." Turning to the insolvent act of 1880, and we find that, by the terms of section 60, "it shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart for the use and benefit of said insolvent such real and personal property as is by law exempt from execution; and also a homestead in the manner as provided in section one thousand four hundred and sixty-five of the Code of Civil Procedure." From these provisions of the insolvent law it appears (1) that it is made the duty of the superior court, in insolvency proceedings, to exempt and set aside for the use of the insolvent such personal property as is exempt from execution, and also a homestead; and (2) that the order so doing, or refusing so to do, is appealable.

That the writ will not lie, under our statutes, where there is a remedy by appeal, is equally settled by the Code of Civil Procedure and by the adjudications of this court. Faut v. Mason, 47 Cal. 7; Newman v. Superior Court, 62 Cal. 545; McCue v. Superior Court, 71 Cal. 545, 12 Pac. 615; Weill v. Light, 98 Cal. 193, 32 Pac. 943; Estate of McConnell, 74 Cal. 217, 15 Pac. 746. Proceedings in insolvent cases must be brought before the supreme court by appeal, and not by certiorari. People v. Shepard, 28 Cal. 115; Tomasini v. Superior Court, 75 Cal. 225, 17 Pac. 1.

The contention of petitioners is that they are not here objecting to the order of the court setting apart the homestead, or to so much of the order as set apart the personal property exempt from execution, but only to that portion of the order which stayed the proceedings of the sheriff under execution, and required him to release and discharge such property from the operation and effect of said execution. The answer is that there is but one decree or order in the case, which decree sets apart the property, and orders the sheriff to release and discharge the personal property from the operation and effect of the execution; and from this decree or order, as we have shown, an appeal lies. Where an appeal is given from a judgment, the appellate court may correct all the errors therein detrimental to the appellant; and the fact that some portion of the judgment is without, and in excess of, the powers of the court, is but a reason for a reversal of the judgment on such appeal. If the theory of petitioners is correct, then it must follow that an appeal will lie to so much of the judgment as set apart the homestead and the exempt property, and a writ of review as to the residue. Our law is not guilty of any such inconsistency. When an appeal is given from a judgment or order, it is that all the errors therein affecting the rights of the appellant may be corrected. In Estate of Burton, 63 Cal. 36; Estate of Groome, 94 Cal. 69, 29 Pac. 487; and Estate of Kimberly, 97 Cal. 281, 32 Pac. 234,—cited by petitioners in support of their contention, it appears that the court below, upon applications for homesteads, proceeded to try and determine the question of title to the land sought to be set aside. Upon appeal to this court, it was held in each case that the question of adverse ownership could not be considered in such a proceeding, but must be tried and determined in another form. The question there was, in principle, like that presented by the case at bar. The court below, having jurisdiction to set apart a homestead, had, in excess of its power, attempted to determine the question of adverse claims to the land sought to be homesteaded. We find no suggestion in those cases indicating a doubt as to the right to have the question heard and determined on an appeal from the orders as made. Had the petitioners here taken an appeal from the order of the court below, the very question they are seeking to raise here could have been determined on such appeal. This being so, it follows that, under our law, the writ of review cannot be maintained and the writ should be discharged.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the writ is discharged.

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109 Cal. 614

MERZBACH v. HADLEY (PACIFIC MUT. INS. CO., Intervener. L. A. 81).

(Supreme Court of California. Oct. 28, 1895.)

POSTPONEMENT OF MORTGAGE SALE.

The refusal to postpone a sale under foreclosure will not be reversed where it did not appear that notice of motion had been served upon any of the parties interested, and the evidence was conflicting as to the propriety of the postponement, though it was alleged that the commissioner appointed to sell left the court room during the argument, and proceeded with the sale, and, though respondent's attorneys sent a telegram to the judge objecting to a postponement except upon legal grounds, it was not shown that they had notice of said motion, nor of the reasons upon which it was based.

Department 2. Appeal from superior court, San Diego county; Geo. Puterbaugh, Judge.

Action by F. H. Merzbach, assignee of the State Investment & Insurance Company, insolvent, against W. E. Hadley, to foreclose a mortgage. The Pacific Mutual Insurance Company intervened. From an order denying his motion to postpone the sale under decree of foreclosure, plaintiff appeals. Affirmed.

J. F. Riley (Crittenden Thornton, of counsel), for appellant. Fox, Kellogg & Gray, for respondent.

PER CURIAM. This is an appeal from an order refusing to postpone a sale under a decree of foreclosure. Appellant's assignor held a mortgage upon property in San Diego executed by defendant to secure $60,000 and interest. This mortgage was assigned to the intervener to secure a loan made by it to plaintiff's assignor, amounting to $45,000, with interest. A decree of foreclosure was entered December 15, 1894, for $71,097.20 and costs. Of this sum, $50,119.39 was found to be due the intervener in payment of the debt due it, and secured by the assignment of the mortgage. A commissioner was appointed to sell the mortgaged premises in satisfaction of the decree, and the sale was noticed to take place on the 16th day of January, 1895. January 15, 1895 (the day before the proposed sale), Judge Puterbaugh made an order requiring the commissioner to show cause at 9 o'clock January 16, 1895, why the sale should not be postponed for 30 days. It does not appear that the order to show cause was served upon any one, or that either the intervener or commissioner was represented at the hearing, which was on the 16th. It does appear that F. H. Merzbach informed the court that the commissioner, despite the fact that the motion to postpone the sale was being argued, had left the court room, and was proceeding with the sale. This is only a statement of what Merzbach said, but not that the commissioner was at any time present at the hearing. The bill of exceptions also shows that the judge received a telegram from Fox, Kellogg & Gray, attorneys for the intervener, that they objected to a postponement of the sale unless legal grounds were shown. This does not show that they were informed that a motion of that character had been made, nor the reason why a postponement was asked; much less did it afford them any opportunity of being heard. The defendant did appear and filed an affidavit stating facts which tended to show that it would be better for all concerned that no postponement should be had. In their arguments, counsel for appellant assert that the sale was actually made while the motion was being made. No injunction was issued and no stay order argued.

The order cannot be reversed. No notice of the motion having been given, other parties interested were not heard. The evidence as to the propriety of a postponement was conflicting, and we are not convinced that the judge, in refusing to postpone, abused his discretion. A reversal of this order would serve no useful purpose. A sale having been made, if appellant was aggrieved, his remedy was to have the sale set aside. The sale was not a proceeding in the court depending upon the order appealed from, and which would fall by a mere reversal of the order. The order is affirmed.

109 Cal. 616

STEWART et al. v. JUSTICE'S COURT OF LOS ANGELES TP. (L. A. 58.)

(Supreme Court of California. Oct. 29, 1895.)

JUDGMENT IN JUSTICE'S COURT.

Under Code Civ. Proc. § 872, providing that if a demurrer to the complaint is overruled, and defendant fails to answer at once, the justice may render judgment against him, it is proper, on the overruling of a demurrer and a failure to answer forthwith, to immediately enter judgment against defendant, who had notice of the time of hearing, but did not appear; and section 850, requiring the justice to fix a day for the trial of the cause after an appearance, is thus complied with, as the issue presented was one of law, for which a hearing was fixed.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Application by Stewart and others for a writ of review directed to the justice's court of Los Angeles township. From the judgment therein entered, an appeal was taken. Reversed.

Will D. Gould and Groff & Lefroy, for appellant. McKeeby & Appel, for respondents.

HARRISON, J. An action against the respondents was commenced in the justice's court of Los Angeles township by certain parties, and the summons issued therein was served upon the defendants (respondents herein). The defendants filed a demurrer to the complaint, and the justice fixed the following day for the hearing upon the demurrer. Notice of this fact was served upon the defendants, but they failed to appear at the time set for the hearing; and the justice, after waiting one hour, overruled the demurrer, and made an order that the defendants answer "at once," and, upon their failure to answer, entered their default, and rendered judgment against them for the amount claimed, with costs. The defendants thereupon applied to the superior court for a writ of review, directed to the justice's court; and, upon a return thereto showing the above facts, the superior court annulled the judgment of the justice's court. From the judgment thus entered, an appeal has been taken to this court.

Section 858, Code Civ. Proc., prescribes the proceedings to be had in the justice's court upon a demurrer, and declares: "(2) If the demurrer to a complaint is overruled, the defendant may answer forthwith." And section 872 authorizes the justice to render judgment in favor of the plaintiff "(2) if the demurrer to the complaint is overruled, and the defendant fails to answer at once." The provisions of section 850 requiring the justice to fix a day "for the trial of said cause" after an appearance by the defendant, and to notify the defendant thereof, have reference only to such "trial" as is authorized by the nature of the appearance. If by such appearance only an issue of law is presented, there can be a trial of only such issue of law, and a trial of fact cannot he had unless an issue of fact is presented after the trial and disposition of the issue of law. In the present case the only issue that was presented by the defendants for trial was an issue of law, and the defendants received due notice of the day upon which the trial of this issue would be had by the justice. Upon the overruling of the demurrer, the action of the justice was in strict accordance with the provisions of the statute. By section 858, the defendants could have answered forthwith upon the overruling of their demurrer, but they failed to do so; and by section 872, upon their failure to answer "at once," the justice was authorized to render judgment "in like manner as if the defendant had failed to appear and answer or demur." As there was no issue of fact to be tried, there was no occasion for the justice to fix any day for the trial other than that which he had already fixed. In Jones v. Justice's Court, 97 Cal. 523, 32 Pac. 575, the defendant was not notified that the case had been set for trial; and we held that the notice required by the provisions of section 850 to be given to the parties of the time fixed for trial is jurisdictional, and that, in the absence of such notice, the justice has no jurisdiction to proceed in the cause. In the present case, however, the notice required by this section was given to the defendants, and the justice thereby acquired jurisdiction to try the issue before him, and to render judgment accordingly. There is no provision of the Code which requires the justice to allow the defendant any time within which to answer the complaint in case his demurrer shall be overruled, or to give to him any notice that his demurrer has been overruled; but, by the terms of the sections above referred to, the justice is authorized to proceed forthwith with the cause, and, if no issue of fact has been presented for trial, to render judgment in favor of the plaintiff. As the justice's court had jurisdiction to render the judgment, any error that may have been committed by it in its action cannot be reviewed upon certiorari. The judgment appealed from is reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

109 Cal. 611

PEOPLE v. WALLACE. (Cr. 67.)

(Supreme Court of California. Oct. 28, 1895.)

SEDUCTION — PROMISE OF MARRIAGE — CONSENT—PREVIOUS CHASTE CHARACTER—INSTRUCTIONS.

1. The promise of marriage, in a prosecution for seduction, need only be shown by circumstances sufficient to warrant the inference that sexual intercourse would not have been accomplished in the absence of such promise.

2. Where it was apparent from the testimony of prosecutrix in a prosecution for seduction that she yielded to defendant's solicitations, but she testified that she did not expressly consent to the act, the jury properly subordinated the literal terms to the substance of the evidence.

3. The state must affirmatively show the previous chaste character of the prosecutrix, in a prosecution for seduction.

4. An instruction which was sufficiently explicit when read in connection with other instructions in the case is not ground for reversal.

Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

C. R. Wallace was convicted of seduction, and appeals. Affirmed.

McKeeby & Appel, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

VAN FLEET, J. Appeal from a judgment convicting defendant of seduction, and from an order denying his motion for a new trial.

1. It is contended that the evidence does not sustain the verdict, but the claim is untenable. There is not only evidence tending to support each issue involved in the charge, but, if true,—and the jury have found that it was,—it established very clearly the guilt of the defendant. The charge was seduction under promise of marriage, and, of course, the gist of the offense is the accomplishment of the act by means of such promise, as the inducing cause of the consent of the one seduced. It is not essential, however, in such case, in order to convict, that the evidence shall disclose any express or direct reference by the seducer to such promise as a means to accomplish his purpose; nor, on the other hand, that the consent of the female shall be expressly rested by her upon such consideration. It is sufficient if the circumstances be such as to warrant the jury in the deduction that the act of sexual intercourse would not have been accomplished without, or in the absence of, such promise. The record discloses a state of facts fully justifying such inference in this case. In fact, as to all the essential elements involved, we cannot readily conceive of a case of this character being more satisfactorily established than was done in this instance. The claim that a case of seduction was not shown, because the prosecutrix did not consent to the act, and that it was therefore rape, if anything, is without weight. It is true, the prosecutrix states, in terms, that she did not consent to the act; but her testimony, taken as a whole, shows that she did, and the jury were justified in so finding. Obviously, what the prosecutrix meant to convey by her testimony was that she did not give her consent in express terms, because she did not think it was right, but that her objections were so far overcome by defendant's solicitations that she yielded a reluctant acquiescence in his act. The jury very properly subordinated the literal terms used by the witness to the substance and effect of her evidence.

2. The court properly admitted the evidence of the prosecution as to the previous chaste character of the prosecutrix. That was one of the elements of the offense which the people were called upon to establish affirmatively, and as a part of their case in chief, and the evidence offered was competent for the purpose.

3. It is claimed that the court erred in not charging the jury as to the meaning of the term "seduced," used in one of its instructions. We think the instruction complained of was sufficiently explicit when read with the other instructions in the case; but if the defendant desired, or thought necessary more full and specific instruction on the point, he should have requested it. The record is without error, and the judgment and order are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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109 Cal. 406

PIMENTAL v. MARQUES et al. (No. 18,399.)

(Supreme Court of California. Oct. 8, 1895.)

ACTION ON NOTE — RELEASE OF SURETY — NOVATION—INSTRUCTIONS—HARMLESS ERROR.

1. In an action on a note the exclusion of evidence to show that defendant is liable only as surety is harmless error where an instruction stated that the evidence shows that such defendant was a surety.

2. In an action on a note it cannot be urged that the erroneous exclusion of evidence to show suretyship compelled a trial on the theory of novation instead of release, where it appears that such ruling did not prevent a disclosure of all the facts.

3. In an action on a note with surety it appeared that the maker before its maturity transferred his property to a stranger to sell, and out of the proceeds pay the note; that after maturity all the parties agreed to a sale of the property on 15 days' notice of sale; that, a sale on the date fixed being impracticable, plaintiff consented to a postponement, and there was no evidence that the surety did not consent thereto. There was no evidence that the payee agreed to look wholly to the sale for payment of the debt or to release the surety. *Held*, that the surety was not released.

4. Where the maker, payee, and surety on a note agree to a transfer of the maker's property to a stranger to sell on a certain date to raise funds to pay the note, and such agreement is not a novation, an instruction placing the burden on the surety to show plaintiff's consent to a postponement of the sale in order to establish a release is proper.

5. Where the maker, payee, and surety on a note agree to a transfer of the maker's property to a stranger to sell on a certain date to raise funds to pay the note, an instruction requiring

the surety to show consent of the payee to a postponement of the sale in order to show a release is not inconsistent with one that the failure of the stranger to sell and pay the debt could not affect the rights of the surety to plead the agreement as a novation.

6. A transfer of property by the maker of a note to a third person to sell and pay the note out of the proceeds, made with the payee's consent, will not constitute a novation unless the payee accepted the stranger as his debtor in place of the maker, and released the maker from any obligation on the note.

7. Where, in a suit on a note, a surety relies on novation as a defense, and it appears that plaintiff had possession of the note, an instruction that the "surrender or extinguishment of a note" are essential to a novation will not be held erroneous as requiring a verdict for plaintiff where it also appears that the jury understood that such expression meant that the obligation of the note must be extinguished.

Commissioners' decision. Department 2. Appeal from superior court, Kings county; Justin Jacobs, Judge.

Action by Antonio Y. Pimental against Alberto S. Marques and M. P. Rose on a note. From a judgment for plaintiff, defendant Rose appeals. Affirmed.

The fifth instruction given for defendant was to the effect that Biddle's failure to sell the sheep and pay the note could not affect the rights of defendant Rose to claim a novation as a defense to the action.

Horace L. Smith, for appellant. Rowen Irwin and Newman Jones, for respondent.

HAYNES, C. This appeal is from the judgment, upon the judgment roll and a bill of exceptions. The action was upon a promissory note made by the defendants to the plaintiff on September 1, 1892, payable one year after date, for the sum of $1,872, with interest at 10 per cent. It was stipulated in the note that in case any suit should be instituted thereon the makers should pay such additional sum as the court might adjudge to be reasonable as attorney's fees therein. Marques made default. Rose answered, alleging that he executed the note as surety for the defendant, and that the consideration of the note was an antecedent debt, which, at the date of the note. Marques owed to the plaintiff. He further alleged that on or about September 10, 1893, Marques was the owner of about 1,900 sheep and other property, and that on said date he placed them in the hands of one Biddle for sale, and that plaintiff and said Marques agreed between themselves that Biddle should hold said sheep, and sell the same, and out of the proceeds of said sale pay the plaintiff the principal and interest of said note; and that in pursuance of said agreement Biddle advertised said sheep for sale, and with the consent of plaintiff postponed the sale; and that he had not yet sold said sheep, or any part of them. It was also alleged that Biddle would have sold said sheep at the time advertised for the sale if plaintiff had not consented that the sale should not take place until the price of sheep should increase; and that, if sold at the time advertised for the sale, sufficient would have been realized to pay and discharge said note; that said sheep were then, and are now, of the reasonable value of $2,900; and that Biddle still held them under said agreement between the plaintiff and defendant Marques. The action was tried by a jury, and resulted in a verdict for the plaintiff for the full amount claimed, and judgment was entered thereon. Upon the trial appellant was sworn on his own behalf, and was asked the following questions: "Did Marques owe this same debt before? Was Marques indebted to Pimental at the time you signed the note?" The plaintiffs objected to the questions that they were immaterial, and that the allegation in the answer that it was given for an antecedent debt was surplusage. The court sustained the objection, and defendant excepted. The witness was also asked: "You signed it simply as surety?" and a similar objection was made thereto, and sustained, and the defendant excepted, and these rulings are assigned for error. These rulings were clearly erroneous (Civ. Code, § 2832); but the question, however, remains, was defendant injured by these rulings? The court instructed the jury that "the evidence in this case shows that Rose was a surety on the note." So far as the fact of suretyship, therefore, was concerned, the instruction was as beneficial to the defendant as any testimony upon that point could have been. Appellant contends, however, that the ruling compelled him to try the case upon the view taken by the court of the facts set up in the answer, which was that the answer set up a novation of contract, rather than a release of the defendant as surety. If appellant was in fact released from his liability as surety, such release must have been based upon some act of plaintiff, or some agreement between the parties in relation to the sheep; and upon that point there was no restriction in the examination of the witnesses, and the bill of exceptions discloses no objection or ruling which could possibly have prevented a full disclosure of all the facts; and therefore appellant was not injured by the ruling of the court above noted.

The ground upon which Rose claims that he was released as surety is that his principal, the defendant Marques, placed his property out of his control, and conveyed it to Biddle, as pledgee, for the security of plaintiff; and that this operated to discharge him from liability as surety, though it might not establish a novation. A brief statement of the evidence in relation to the contract alleged in the answer is necessary for the consideration of all the questions in the case. The agreement between the defendant Marques and Biddle was made March 13, 1893, before the note here in suit matured. Under this agreement Marques transferred to Biddle sheep to the number of about 1,987 ewes, and about 1,500 young lambs, and certain horses and a wagon. At the time of this contract there was a prior lien upon the property in favor of Shubert, Beal

& Co., which Biddle agreed to pay off and discharge. That the property so transferred was to be sold by Biddle "to the best advantage, either at private sale or public auction, and out of the proceeds pay the amount you have advanced to Messrs. Shubert, Beal & Co.; pay to the party holding the note that M. P. Rose indorsed for me, of $1,800 and interest, also note of $467.15 owing Manuel V. Maydne, dated October 13th, 1892, due November 1st, 1892; also any other notes or accounts due. Then, when sale is made, if any money is left, the said J. D. Biddle is to pay the balance to the said Alberto Marques, or his order, or assigns. Sheep to be sold as soon as circumstances will permit, or as soon as J. D. Biddle deems advisable." Under this agreement Biddle discharged the lien of Shubert, Beal & Co., and took possession of the sheep, but at what precise date does not appear. It does appear, however, that a few days after Marques' note to plaintiff became due, Marques, Rose, Pimental, and Biddle met at Biddle's office. Biddle testified that the agreement between Marques and himself, above referred to, was read to the plaintiff. This the plaintiff denies, but the agreement, or at least that the fact that the property above mentioned was left in the hands of Biddle to be sold for the purpose of paying the note in question was communicated to him, is not disputed. Taking the evidence, however, most strongly in favor of appellant, it may be said that plaintiff agreed to the arrangement with Biddle to sell the sheep, and that Marques and Rose relied upon the sale of the sheep to meet their obligation to the plaintiff. At the first interview between these parties defendant Rose wanted 20 days' time for Biddle to sell the sheep, claiming that it was necessary to properly advertise the sale. The plaintiff thought 15 days long enough, and it was agreed that 15 days' notice should be given. That at that time, owing to the financial crisis which affected the whole country, and the suspension of banks and refusal of other banks to loan money, it was found to be impracticable to sell the sheep without a great sacrifice; and it is claimed that plaintiff consented that Biddle should exercise his discretion in regard to selling, and that he did not want to see the property sacrificed. However this may be, there is no testimony in the case tending to show that appellant did not consent to the delay in selling the property. Nor do I find any evidence tending to show that the plaintiff regarded the arrangement between Marques and Biddle otherwise than as a means of raising money for the payment of his claim, or, at the most, as additional security for its payment. Nor do I find any evidence that the plaintiff consented to "the substitution of a new debtor in place of the old one, with intent to release the latter"; that is, that the plaintiff did not consent or agree to look wholly to the sale of the sheep, or to release the defendant Rose from his liability as surety upon the promissory note. Upon these questions, therefore, I conclude that appellant, having consented to the delay in selling the sheep, was not released as surety, and that there was no novation of the obligation.

Appellant also contends that the court erred in its third instruction given at request of the plaintiff. This instruction is as follows: "In order to establish a defense set up by defendant in his answer herein, defendant Rose must prove by a preponderance of evidence that the plaintiff, Pimental, consented to the postponement of the sale of sheep advertised by Biddle." The exception to this instruction seems to be based upon the theory that the agreement between Marques and Biddle, and the assent of plaintiff to it, operated of itself to discharge appellant as surety. We have already seen, however, that there was no novation, and therefore the instruction is not obnoxious to the criticism of appellant. It is said, however, upon this point, that, "if Rose had consented to the postponement of the sale, a different question would be presented, which the instruction does not deal with." I find nothing in the bill of exceptions which indicates that Rose did not consent to the postponement of the sale, nor do I see any conflict between the instruction above quoted and instruction No. 5 given at request of defendant, as it is certainly very clear that, if there were in fact a novation, Rose could not be affected by any delay in disposing of the sheep, whether with or without the consent of the plaintiff. Nor did the court err in refusing to give the fourth instruction asked for by the defendant, inasmuch as said instruction omitted one material fact necessary to satisfy the legal definition of novation, namely, that the agreement between Marques and Biddle should not only be assented to by the plaintiff, but that the plaintiff consented to the substitution of this obligation for the obligation evidenced by the promissory note, or that he consented to take Biddle as a new debtor in place of the appellant, whose obligation was fixed by the terms of the promissory note; and that with the intent to release him. The court further instructed the jury, of its own motion, as follows: "Bear in mind, gentlemen of the jury, that the consent of the plaintiff to the substitution of one contract for another is an essential thing in the action, and the surrender or extinguishment of the note is another essential thing." This instruction, it is contended, is erroneous, and that, inasmuch as the evidence discloses the possession of the original note by plaintiff, the jury must have known there had been no surrender of the note, and that, therefore, under this instruction, they were bound to find for the plaintiff. We agree with counsel for appellant that the "surrender" of the note was not essential to the novation, though by novation the obligation of the note as such would be "extinguished." The note would only remain to mark the extent of the new obligation, and would have no legal existence beyond that. The court having used the words "surrender or extinguishment" in this connection, the jury could not have been misled by the use of the word "surrender." The judgment appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

HENSHAW, J. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

TEMPLE, J. I concur in the judgment.

[redacted]

109 Cal. 571

MARKET ST. RY. CO. v. HELLMAN et al.

(S. F. 14.)

(Supreme Court of California. Oct. 19, 1895.)

STREET RAILROADS—CONSOLIDATION—VALIDITY OF PROCEEDINGS—NOTICE—VOTING STOCK—PROXIES—CREATING BONDED DEBT—LIABILITY FOR DEBTS OF CONSTITUENT COMPANIES.

1. Civ. Code, § 288, which went into effect January 1, 1873, provides that no corporation in existence before such date is affected by Id. div. 1, pt. 4, relating to corporations and authorizing the consolidation of railroad companies (section 473), unless such existing corporations elect to continue their existence, as allowed by section 287. The second clause of section 288 provides that the "laws under which such corporations exist are applicable to such corporations, and are repealed, subject to the provisions of this section." Sections 401, 403, show an intent to limit the effect of the first clause of section 288 by providing that corporations existing before the Code took effect could extend the term of their existence to 50 years, and by declaring that that part of the Code relating to corporations generally should be applicable to every corporation, "unless such corporation is excepted from its operation, or unless a special provision is made," in which case "the special provision prevails." *Held*, that all prior laws regulating corporations were repealed, except the laws governing their "formation" and "existence," and that, with the exception of provisions relating to such matters, the provisions of Civ. Code, div. 1, pt. 4, relating to corporations, and including section 473, relating to consolidation of railroad companies, apply

equally to corporations formed before and after the Code took effect.

2. Civ. Code, § 288, provides that no corporation formed before the Code took effect "is affected by the provisions of part 4 of division 1 of this Code, unless such corporation elects to continue its existence under it as provided in section 287; but the laws under which such corporations were formed and exist are applicable to all such corporations, and are repealed, subject to the provisions of this section." Division 1, pt. 4, tit. 3, § 473, authorizes the consolidation of railroad corporations, and title 4, § 510, which was adopted after the adoption of the main body of the Code, provides that street railroads are governed by title 3, so far as applicable. *Held*, that all prior laws relating to street railroads, except laws regulating their formation and existence, were repealed by section 288, and that, therefore, section 473, authorizing consolidation of railroad corporations, applies to street railroads.

3. Under Const. 1879, art. 12, § 1, providing that all laws in force concerning corporations "may be altered from time to time or repealed," power was conferred to enact Civ. Code, § 473, authorizing the consolidation of railroad corporations without the consent of all stockholders, if the consent of holders of three-fourths in value of the stock of each corporation is obtained.

4. A street-railway company, by consenting to consolidation proceedings taken under Civ. Code, § 473, authorizing consolidation of railroad companies on consent of the holders of three-fourths in value of all of the stock of each company, and by transferring all its property to the new company so created, cannot assert that the legislature could not authorize consolidation without the consent of all the stockholders.

5. Where corporations are consolidated under Civ. Code, § 473, the resulting corporation is a new and distinct body, and the objection that the consolidation would extend the existence of the constituent corporations beyond the statutory limit is without merit.

6. The word "stock," as used in Civ. Code, § 473, authorizing the consolidation of railroad companies when the consent of the holders of "three-fourths in value of all the stock of each corporation" is obtained, means stock actually subscribed and outstanding.

7. A trustee of corporate stock has the legal title, and may vote the stock at corporate meetings without accountability to any but the cestui que trust.

8. Under Civ. Code, § 286, providing that private corporations may be formed for any purpose for which individuals may lawfully associate themselves, a corporation may be formed for the purpose of "buying, selling, and dealing in all kinds of public and private stocks," and a purchase by a corporation so formed of stock in another corporation is not ultra vires.

9. Where a corporation is legally organized for the specific purpose of dealing in land, its power to hold land is not limited.

10. Under Civ. Code, § 313, providing that shares of stock of a deceased person may be represented by his executor, the executor may vote the stock without a formal transfer thereof to him.

11. Where the consent of a stockholder to consolidation of the corporation with others is given through an agent acting under a defective power of attorney, the principal, by surrendering his old stock, and accepting corresponding stock in the consolidated corporation with full knowledge of the facts, ratifies the act of the agent.

12. Civ. Code, § 473, requires notice of consolidation of railroad companies to be published for "one month" in a newspaper in each county through which the road runs, and for the same length of time in one published in Sacramento and in two published in San Francisco. *Held*, that a notice of the consolidation of street railroads published five consecutive times in a weekly paper published in the county where the roads were situated, and in a Sacramento daily, except Sundays, from October 18th to November 17th, inclusive, and in two San Francisco papers daily for more than a month, is sufficient.

13. Where street-railroad companies are consolidated under Civ. Code, § 473, the outstanding liabilities of the constituent companies cannot be transferred to the new corporation without the consent of the creditors of such companies.

14. Under Civ. Code, § 473, providing that the consolidation of railroad companies thereby authorized shall not relieve such companies from their joint liabilities, the obligations of the constituent companies, though not primary liabilities of the consolidated company, are charges on its property, which such company may properly consider as debts, within section 309, forbidding a corporation to create debts in excess of its subscribed capital stock.

15. Civ. Code, § 303, provides that a corporation may provide in its by-laws a "mode of voting by proxy," and section 312 provides that, at all elections had "for any purpose," the participants, "in person or by proxy," must be members or bona fide stockholders. *Held*, that proxy votes cast at an election to create a bonded debt, in compliance with a by-law allowing votes by proxy, if the same, in writing, signed by the stockholder, are filed with the secretary, were valid.

16. In a proceeding by a street-railway company consolidated under Civ. Code, § 473, to enforce a contract for the purchase of its bonds, the validity of the consolidation cannot be attacked, section 358 providing that the incorporation of any company claiming in good faith to be a corporation, and doing business as such, or its right to exercise corporate powers, "shall not be inquired into collaterally." Per Harrison, J., dissenting.

In bank. Commissioners' decision. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Proceedings on an agreed case, submitted without action, to determine the liability of I. W. Hellman and others on a contract for the purchase of bonds of the Market Street Railway Company. From a judgment for the company, I. W. Hellman and others appeal. Affirmed.

Robert Y. Hayne and J. Howard Smith, for appellants. J. P. Langhorne, amicus curiæ. J. E. Foulds, for respondent.

SEARLS, C. This is an appeal from a judgment in favor of plaintiff upon an agreed case, submitted in accordance with the provisions of section 1138, Code Civ. Proc. The plaintiff, the Market Street Railway Company, claimed to be a consolidated corporation; the result of proceedings taken by 11 constituent corporations under sections 473 and 510 of the Civil Code of the state of California. After consummating its consolidation and obtaining its final certificates, it took proceedings for the issuance of bonds secured by a mortgage or deed of trust upon all its property, which mortgage or deed of trust was made to the Union Trust Company of San Francisco. It then made and entered into a contract with the defendants herein for the sale to them of $1,000,000 worth of said bonds, for which defendants were to pay the sum of $1,000,000, subject, however, to the conditions expressed in the contract in the following terms: "* * *

on the express condition that the amalgamation and consolidation of all of said constituent corporations into the Market Street Railway Company, above mentioned, was properly and legally effected, and the said Market Street Railway Company is a duly amalgamated, consolidated, and incorporated corporation, and the legitimate successor of all of said constituent corporations, and the owner of all the property formerly owned by said constituent corporations, respectively, and entitled to dispose of and incumber the same as against every one, including all and every of the stockholders of said constituent corporations, and of each of them, and that all the proceedings authorizing the issuance of said bonds were properly and legally taken, and that the said bonds are valid bonds of said Market Street Railway Company, and are properly secured by said mortgage or deed of trust upon all the property mentioned and described therein, and that said mortgage or deed of trust is a valid security upon all the property mentioned and described therein for the payment of said bonds, according to the tenor thereof." The plaintiff tendered the bonds to the defendants, who refused to accept and pay for them upon the ground of their supposed invalidity, and thereupon, and for the purpose of avoiding the expense and delay of an ordinary action at law to determine the liability of the defendants to purchase said bonds, the agreed statement herein was prepared, and the controversy submitted to the superior court without action. The cause comes up on the judgment roll, supported by a bill of exceptions, the appeal having been brought within 60 days next after the entry of judgment.

The first point made by appellant in favor of reversal is that the consolidation was not legally effected for the reasons:

1. Some of the constituent corporations were organized under the statutes in force prior to the adoption of the Civil Code, and did not continue their existence under such Code, and hence that, under section 288 of such Civil Code, these corporations were independent of and not subject to its provisions, and could not consolidate with other corporations by virtue of the authority therein given so to do. The Potrero & Bay View Railroad Company was organized in 1866, under an act entitled "An act to provide for the incorporation of railroad companies and the management thereof," etc., approved May 20, 1861, and of the several acts supplementary to and amending the same. The City Railroad Company was incorporated in 1863. The Central Railroad Company was incorporated as a street railroad company in 1862. The three corporations above mentioned were all incorporated prior to the adoption of the Civil Code, and were constituent corporations, with eight others organized under said Civil Code, in the amalgamated and consolidated corporation, plaintiff herein. If we read the record correctly, the City Railroad Company and the Central Railroad Company elected to continue their existence under section 287 of the Civil Code, while the Potrero & Bay View Railroad Company has not done so. Section 288 of the Civil Code, which took effect at 12 o'clock noon, on January 1, 1873, provides as follows: "No corporation formed or existing before twelve o'clock noon of the day upon which this Code takes effect is affected by the provisions of part 4 of division first of this Code, unless such corporation elects to continue its existence under it as provided in section 287; but the laws under which such corporations were formed and exist are applicable to all such corporations, and are repealed, subject to the provisions of this section." The first clause in the foregoing section is certainly broad enough to apply to all then existing corporations which should not elect under the previous section to continue their existence under the Code. When, however, we consider the probable object of the legislature in its passage, in connection with the latter clause of the same section, and with other sections in the same title, we are led to doubt the legislative intent as broadly expressed in the first clause of section 288. We must bear in mind that, under the constitution of 1849, corporations could be formed under general laws, but could not be created under special acts, and that all laws pursuant to the section (section 31, art. 4) were subject to amendment or repeal. Under that provision of the constitution, general laws had been enacted for the formation of corporations, specifying their powers, the mode of their exercise, etc. These laws constituted the charters under which corporations, when organized pursuant to them, acted. The laws conferred and measured their powers, and prescribed the mode of their exercise. The Codes, when adopted, constituted a comprehensive system of laws, and repealed all existing statutes not specially saved from their operation. To save existing corporations from annihilation, we may fairly presume, was the paramount object of the legislature. Hence this section. But the latter clause of the same section throws light upon the more general declaration of the first clause. It is as follows: "But the laws under which such corporations were formed and exist are applicable to all such corporations, and are repealed, subject to the provisions of this section." Now, the laws under which corporations were formed and existed constituted but a small portion of the whole body of laws which related to and controlled corporate action. As only those laws under which corporations were formed and existed were saved, it must follow that the residue of such laws were repealed, whether consistent with the Code or not. Section 20, Civ. Code, is as follows: "No statute, law, or rule is continued in force because it is consistent

with the provisions of this Code on the same subject; but in all cases provided for by this Code, all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed or abrogated." To enumerate all, or any considerable part of, the provisions of law applying to and regulating the conduct of corporations, some of which were penal in character, and which in no wise related to their formation or existence, would be a work of supererogation. It is sufficient to say that they were not saved by the Code, and hence, having ceased to exist, there are no regulations binding upon corporations, unless the provisions of the Civil Code and the several amendments thereto are applicable. We are of opinion the clause in section 288, that "No corporation formed," etc., is affected by the provisions of part 4, when read in the light of the later clause in the same section, and in the light of other provisions of the same title and part, and must be construed as relieving existing corporations only from such provisions as were saved to them from existing laws, viz. those relating to their formation and existence. In the interpretation of statutes, force and effect should be given to every part thereof, where it can be done, and the natural import of words is their literal sense; but where it is apparent, from the language used or from the context, that words are used in a restricted sense, and such sense is essential in order to give force and effect to other provisions of the same statute, then the literal sense is not controlling. "The mere literal construction of a section in a statute ought not to prevail, if it is opposed to the intention of the legislature apparent by the statute. * * * General words or clauses may be restricted, to effectuate the intention, or to harmonize them with other express provisions." Suth. St. Const. § 246, and cases there cited. The necessity of a restricted construction to the first clause of section 288 is made apparent by the subsequent sections in the same title. Section 401 of the Code, which is a part of the same subject, title, and part as section 288, as adopted at the same time, reads as follows: "Every corporation heretofore formed for any purpose enumerated in this title for which corporations may be formed for a period of time less than fifty years may at any time" extend the term of its existence to 50 years, etc. That this section was intended to apply to existing corporations goes without saying.

Again, section 403, the last section in title 1, which relates to corporations generally, is as follows: "The provisions of this title are applicable to every corporation, unless such corporation is excepted from its operation, or unless a special provision is made in relation thereto inconsistent with some provision in this title, in which case the special provision prevails." These are samples, selected from others which might be cited, tending to illustrate the legislative intent to apply the provisions of this part of the Code to existing as well as to future corporations, except as to the law of their formation and existence. Part 4 of division 1 of the Civil Code contains a comprehensive system for the organization, existence, and duration of corporations, divides them into classes, defines their powers and duties, regulates the mode in which those powers are to be exercised, and in which their duties are to be discharged. In all these matters, relating to future conduct, no reason is observed why existing corporations should not be governed by the same laws as those formed subsequently to the adoption of the Code, and for like purposes. To say that they shall not be is to select from the mass of entities known as corporations a class to which legislative action does not apply, thus constituting partial and special legislation, applying only to certain units in the class, to the exclusion of others of the same class. This would amount to an arbitrary discrimination between persons standing in the same relation to the subjects of legislation, which is not permissible. As was said in City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604: "A law is constitutional and general when it applies equally to all persons embraced in a class founded upon some natural, or intrinsic, or constitutional distinction. It is not general or constitutional if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those who stand precisely in the same relation to the subject of the law."

Again, waiving all question as to the application of the Civil Code as originally passed, or any part of it, to existing corporations, section 510, as adopted in 1874, applied the provisions of title 3 to all street railroads not especially excepted therefrom. The section reads as follows: "Street railroads are governed by the provisions of title 3 of this part, so far as they are applicable, unless such railroads are therein specially excepted." "Particular expressions qualify those which are general." Civ. Code, § 3534. According to this rule of construction, the particular expressions of section 510 must be held to qualify and limit the meaning of section 288 to "the laws under which such corporations were formed and exist," and not to the whole body of laws enacted for the government and control of the future acts and conduct of corporations.

Yet again, if it be admitted that the Code does not apply to any corporations organized before its adoption, what follows? Simply this: All of the corporations involved in the present case, except one, have been organized since the adoption of the Code, or have elected to continue their existence under it, and under section 473 of the Civil Code are authorized to "consolidate their capital stock, debts, property, assets, and franchises in such manner as may be agreed upon by their respective boards of directors." As to the one company organized before the adoption of the Civil Code, the statute of 1861 in relation to the formation of railroad companies provides for their consolidation in precisely the same manner as that specified in the Civil Code. Hitt. Gen. Laws, par. 865. Indeed, the Code provision was but a re-enactment of the existing law, with a few slight changes of verbiage, none of which go to any essential requisite in a consolidation. We are of opinion the provisions of the Civil Code in relation to the consolidation of railroad corporations (section 473) apply equally to corporations formed and existing before and after the adoption of the Civil Code, and that section 510 applies the same rule to the consolidation of all street-railroad corporations.

The objection that the proceedings under which the consolidation was had were violative of the constitutional rights of nonconsenting stockholders, does not call for extended comment. Section 1 of article 12 of the constitution of 1879 provides that: "Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed." The constitution of 1849 contained a similar provision. Under them, the legislature may, by general laws, provide for the organization of corporations, may repeal or amend and change such general laws at will. When an individual becomes a stockholder in a corporation, it is with the implied assent, on his part, to the right of the legislature to alter and amend the law within the scope of the constitutional provision, and is as binding upon him as a contract to like effect of his own making would be. Authorities drawn from states in which no such legislative power over corporations is reserved are without application to cases in this state. The power to amend comes from the constitution, and whether the act of 1861, under which some of the corporations were formed, provided for such amendments or not is of no moment, as the power of the legislature to change the laws of corporate existence and powers is not dependent on statutory reservation. Corporations cannot, without the consent of all their stockholders, consolidate with others, except where the power so to do is given by their charters, or by a general statute, existing at the date of incorporation, or in those cases where the right is reserved by constitutional or statutory provision to the legislature to alter or amend the charter. There is some conflict of authority as to the power of the legislature to so amend the statute as to authorize corporations, without the consent of all the stockholders, to consolidate, but the weight of authority is, as we think, clearly in favor of the position that it may do so, and that the legislature, corporation, and majority are not subject to the will of dissenting stockholders. Cook, Stock, Stockh. & Corp. Law, § 896; Durfee v. Railroad Co., 5 Allen, 230; Bishop v. Brainerd, 28 Conn. 289; Railroad Co. v. Dudley, 14 N. Y. 336; Mowrey v. Railroad Co., 4 Biss. 79, Fed. Cas. No. 9,891. In England there is no restriction on the power of parliament to amend a charter. Heathcote v. Railway Co., 2 Macn. & G. 100; McDonnell v. Canal Co., 3 Ir. Ch. 578. In this state, where the power is expressly reserved to the legislature by our constitution, the right should equally exist. The contract of the stockholders was made in view of the existence of our constitutional provision, which entered into and formed a part of the charter as effectually as did the statutes under which the corporations were organized.

Again, so far as the Potrero & Bay View Railroad Company is concerned, no rational objection can be urged for two additional reasons: (1) Its stockholders, by action taken subsequent to the consolidation, ratified and adopted all the proceedings relating thereto. (2) It conveyed all its property to the new corporation.

The other two corporations formed before the adoption of the Code, viz. the City Railroad Company and the Central Railroad Company, having elected to continue their existence under the Civil Code, as provided in section 287, are not in a position to object.

2. It is further contended that the consolidation of the several corporations "was illegal and void, because no plan or manner of consolidation was agreed to in writing by three-fourths in value of the capital stock of each constituent corporation as required by section 473 of the Civil Code." The material portion of section 473, which confers power upon corporations of this character to consolidate, is as follows: "Two or more railroad corporations may consolidate their capital stock, debts, property, assets and franchises in such manner as may be agreed upon by their respective boards of directors. No such amalgamation or consolidation must take place without the written consent of the holders of three-fourths in value of all the stock of each corporation." The section further provides that notice of the consolidation must be given in the manner provided, and that a copy of the new articles of incorporation must be filed in the office of the secretary of state, but no question is made as to a compliance with these provisions. It will be observed that the consolidation may be made "in such manner as may be agreed upon by their respective boards of directors." The terms of the consolidation are left to the several boards of directors, with no limitations upon their power in that respect, except that the written consent of the holders of three fourths of all the stock of each constituent corporation is essential to the validity of the consolidation. Some objection is made to the

sufficiency of the consent by stockholders, which will be considered hereafter. For the purposes of the present contention it may be said that what the stockholders did was this: The holders of over three-fourths in value of all the stock in each corporation, at dates varying from September 5, 1893, to October 13, 1893, consented in writing to the consolidation of the several companies (naming them), "in such manner as may be agreed upon by the respective boards of directors of said companies." Thereafter, and on the 13th day of October, 1893, the boards of directors of the several companies executed the "articles of consolidation, amalgamation, and incorporation," in which the manner, terms, etc., of the consolidation were, among other things, fully set out. In the absence of more specific directions in the statute, the consent of the stockholders is deemed sufficient. It was in the nature of an authorization or power to the directors to act, and might as well be executed before action was taken by the latter, as assented to at the time or subsequently. The authority given was broad enough to cover any action that might be agreed upon by the directors, and was binding upon the stockholders. The consolidated corporation became a distinct entity,—a new corporation,—and as such might be organized for a term of 50 years, irrespective of the term of existence of the constituent corporations. California S. R. Co. v. Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123; Railway Co. v. Hooper, 76 Cal. 404, 18 Pac. 599. In Maine Cent. R. Co. v. Maine, 96 U. S. 499, it was said: "A new corporation may be as readily created by the union of two or more corporations, as by the union of individuals." The authorities upholding the position that, upon a consolidation of corporations, the resulting association is a new corporation, are to be found in large numbers emanating from the courts of many states. It follows that the objection that the action here taken had the effect of extending the existence of the constituent corporations beyond the period of 50 years fixed by our statute cannot be maintained.

As before stated, it is objected by appellant that the requisite number of stockholders of many of the constituents did not consent to the consolidation, and the objections under this head are:

(a) In some of the corporations a portion only of the stock was issued, and in estimating the three-fourths of the stockholders whose consent was necessary only the "outstanding stock" was taken into the account. The case of the Market Street & Fairmount Railway Company will serve to illustrate the facts applicable to all. The capital stock of this company consisted of 10,000 shares, of the par value of $100 per share, of which number of shares only 2,050 were ever at any time issued or outstanding. The holders of all of said 2,050 shares so issued consented in writing to the consolidation. This is deemed sufficient. When shares of a corporation, or a majority of shares, are spoken of in statutes, it usually refers to the subscribed or issued or outstanding shares. Section 312 of the Civil Code provides that "at all elections or votes had for any purpose there must be a majority of the subscribed capital stock * * * represented, either in person or by proxy." In adopting by-laws, the assent of stockholders representing a majority of all the subscribed capital stock is necessary. Section 301. The liability of a stockholder for the debts of the corporation is for such portion as his share bears to the whole of the subscribed capital stock or shares. Section 322. Whenever any portion of the capital stock is held by the corporation by purchase, a majority of the remaining shares is a majority of the stock for all purposes of election or voting. Section 344. Stockholders are the owners of shares in a corporation having a capital stock. Section 298. Assessments are levied and collected upon the subscribed capital stock. Section 331. As stock or shares which have never passed to the ownership of stockholders, or, having so passed, have again been purchased by the corporation, cannot be voted or represented by either the corporation or by stockholders, they are not taken into consideration in determining majorities, where action in corporate meetings or assent of stockholders is involved; but when a given proportion of the stock is spoken of it must be construed to mean of the shares which have passed from the corporation and which may be voted.

(b) Some of the stock was held and voted by trustees, who not only appeared upon the books of the corporation as such, but were really and in fact trustees for other persons. The contention of appellant is that a trustee of stock has no authority to destroy the corporation by merging it in another corporation. The answer to the proposition must be that the trustee is the legal owner of the stock, and, as against the corporation, and all the world, except his cestui que trust, no inquiry may be had touching his actions in the premises. Civ. Code, §§ 307, 312.

(c) In many cases the stock of the constituent companies was held by other corporations, and it is contended that one corporation cannot hold stock in another corporation. As to this objection, the record shows that stock in several of the constituent corporations was held by the Pacific Improvement Company, a corporation organized under the laws of the state of California in 1878, and, as specified in its articles of incorporation, among other purposes, for the purpose "of buying, selling, and dealing in all kinds of public and private stocks, bonds, and securities." Whether the purchase by a corporation of shares in another corporation is ultra vires or not is said to depend upon the purpose for which it is made, and whether, under the circumstances, it is a reasonable or necessary means of carrying out corporate objects. Hill v. Nisbet, 100 Ind. 341. We need not, however, for the purposes of the present case, enter upon a discussion or analysis of the adjudicated cases on this subject. It is sufficient to say of them that they, in the main, turn upon the point as to whether or not the purchases ultra vires vested in the corporation. Our Civil Code (section 286) provides that: "Private corporations may be formed for any purpose for which individuals may lawfully associate themselves." It is beyond controversy that individuals may lawfully associate themselves for the purpose of purchasing, selling, and dealing in all kinds of public and private stocks, bonds, and securities. The Pacific Improvement Company having been organized for exactly that purpose, it is infra vires to purchase, hold, and sell stock in other corporations. Ordinarily, a corporation may only purchase and hold so much real estate as may be necessary to the transaction of its business; but, if organized, as in this state it may be, for the specific purpose of purchasing, holding, and selling land, its power in that direction is not limited.

(d) In the case of the Omnibus Cable Company, 1,470 of its shares were owned by and stood in the name of Daniel Stein, who died, say, six months before the consent was signed by his executors; and as the stock was never transferred on the books to the names of such executors, it is contended they were not authorized to censent. "The shares of stock of an estate of a minor or insane person may be represented by his guardian, and of a deceased person by his executor or administrator." Civ. Code, § 313. No transfer of the stock to the executors was necessary to entitle them to vote it. Spell. Priv. Corp., at section 380, says: "In case of the death of a stockholder, his administrator becomes, by operation of law, vested with the legal title to the stock, and is entitled to vote it at all elections without a transfer upon the stock book; * * * and the fact that the decedent held the stock subject to a trust would not alter it. Upon the death of a trustee of personal property, the trust would devolve upon his representative, and he becomes legal owner as to all persons except the cestui que trust, and the corporation has nothing to do with the equities between the immediate parties to the trust, or between the legal owner and third parties, as regards the rights of voting." See cases cited by same author in footnote to section 380. In further evidence of the authority of Michael D. Stein, one of the executors, to execute the agreement, the record contains a power of attorney from all the heirs of Daniel Stein, executed July 31, 1893, authorizing him to transact any business which they might or could do under or pursuant to any rights which they had or might thereafter acquire as legatees or heirs at law of Daniel Stein, deceased. And, under such power, the said attorney in fact executed a ratification and confirmation of the agreement for consolidation for and in the names of his principals.

(e) George Leroy was the owner of 900 shares of the stock of the Omnibus Cable Company, and his consent was executed in writing under a power of attorney from said George Leroy, which, it is claimed, was insufficient to authorize such consent. George Leroy subsequently, and with full knowledge of all the facts, surrendered his certificate of stock in the Omnibus Company, and received in exchange therefor the corresponding certificate in the consolidated company, and still holds the same. It is not clear but that the power of attorney from George Leroy was sufficient, but, waiving that question, the acts of said George Leroy, in surrendering his stock and receiving the corresponding stock in the new company with full knowledge of all the facts, amounted to a ratification of the acts of the agent. In arriving at this conclusion, we need not state the proposition as broadly as is warranted by the authorities. Wherever an agent, acting under a specific authorization, has exceeded his authority in the performance of a lawful act, which the principal could have authorized, the principal may thereafter ratify such unauthorized act, and, when so ratified, it acts retrospectively, and the principal is equally bound as he would have been had the original authority been ample, or had he originally performed the act in person. Whart. Ag. tit. "Ratification," § 61 et seq. The case of Kate Johnson, who held 200 shares in the same company, need not be noticed, for the reason that more than three-fourths of the stock issued was represented by the other consenting holders.

(f) A portion of the stock of the North Beach & Mission Railway Company stood in the names of certain persons who consented in writing to the consolidation, but such persons held it in trust for the Omnibus Cable Company, which, it is claimed, invalidates it. What has been said hereinbefore, as to the right of persons in whose name stock stands on the books of the company to vote and control it, applies here. It further appears that, on the 13th day of October, 1893, this stock, so held in trust, was canceled, but the certificates were not canceled until January, 1894. It does not appear that the cancellation took place before the consent to consolidation was executed; but, on the contrary, the resolutions and articles of association recite that the consent in writing of the stockholders had been executed prior to the acts of incorporation. In this and several other cases the consent was executed on the same day with the resolutions of the several companies in favor of consolidation and execution of the articles of the new company, the plaintiff herein. Under these circumstances, the plain inference is that the consent was executed prior to the cancellation.

(g) Objection is also made to the notice of consolidation, and to the manner of its publication. The substance of the notice was that, pursuant to the statute, the several constituent corporations, naming them, upon the written consent of the stockholders holding more than three-fourths in value of all the stock of each of said corporations, respectively, and by the agreement of the respective boards of directors of said corporations, made and entered in accordance with such consent, and pursuant to the statute, etc., have consolidated and amalgamated their capital stock, debts, properties, assets, and franchises under the corporate name and style of the Market Street Railway Company. The notice is dated October 14, 1893, and was published daily in the Sacramento Daily Record-Union, Sundays excepted, and in every issue thereof, from October 18th to November 17th, both days inclusive. The said Record-Union is published at Sacramento, and is not published on Sundays. This was a publication of one month, as provided for in section 473 of the Civil Code. The publication in two newspapers in San Francisco, viz. the Chronicle and Evening Post, was daily, and for more than one month. The notice was also published five consecutive times in as many consecutive weeks in the Times-Gazette, a weekly newspaper, published weekly, in the county of San Mateo, from and after October 21, 1893. This was in full compliance with the requirements of the statute.

We have thus noticed, consecutively, the several objections made by appellant to the several steps taken by the several corporations in the process of consolidating and amalgamating their properties, and if, in so doing, the reasoning has not been full, and the conclusions seem curt, it should be attributed to a growing consciousness, as the work progressed, that an opinion should have an ending as well as a beginning. The conclusion reached is: The several constituent corporations were duly and legally consolidated into and formed the existing corporation known and designated as the "Market Street Railway Company," which is and has been a valid and existing corporation, de jure, since such consolidation, with a capital stock of $18,750,000, divided into 187,500 shares, of the par value of $100 each.

Upon what may be termed the second branch of the case,—that is to say, matters relating to the regularity of the proceedings for the issue of the bonds,—we note but two objections calling for special comment: (1) As to the sufficiency of the notice to stockholders, and of the resolution passed at the meeting in pursuance of the notice. (2) As to the right of the stockholders to be represented and have their votes cast by proxies.

Upon the first proposition, it is objected that the notice and resolution were indefinite and uncertain, in that the notice specified, in substance, that the purpose of the meeting was to consider and act upon the proposition to create a bonded indebtedness of the corporation to the amount, in the aggregate, of $17,500,000, a portion thereof to be used in retiring the existing bonded indebtedness, and to increase the bonded indebtedness, in the aggregate, to $17,500,000, and to mortgage the property, etc. The resolution adopted at the stockholders' meeting provided, in substance, that a bonded indebtedness to the amount of $17,500,000 be created, and that the bonded indebtedness be increased to the amount, in the aggregate, of $17,500,000, etc. The capital stock of the company, as before stated, is $18,750,000, and there was an outstanding indebtedness of the several constituent corporations amounting, in the aggregate, to $7,035,000. Section 359 of the Civil Code, as amended in 1893, provides that "the bonded indebtedness of a corporation may be created or increased by a vote of the stockholders representing at least two-thirds of the subscribed capital stock, at a meeting called by the board of directors, and after notice of the time and place of the meeting, * * * which notice shall state the amount of the bonded indebtedness which it is proposed to create, or the amount to which it is proposed to increase such indebtedness," etc. The foregoing section, it will be perceived, provides the method by which the bonded indebtedness of all corporations is to be created or increased. The power to create such bonded indebtedness by railroad corporations is given by section 456 of the Civil Code, which, in part, is as follows: "Railroad corporations may borrow on the credit of the corporation, and under such regulations and restrictions as the directors thereof by unanimous concurrence may impose, such sums of money as may be necessary for constructing and completing their railroad, and may issue and dispose of bonds or promissory notes therefor * * * in payment of any debts or contracts for constructing and completing their road, with its equipments and all else relative thereto, and for the purchase of railroads and other property within the purposes of the corporation. The amount of bonds or promissory notes issued for such purposes must not exceed, in all, the amount of their capital stock." The residue of the section authorizes them to secure the payment of such bonds or promissory notes by mortgage or deed of trust upon their property and franchises. The power, then, is given to create a bonded indebtedness, under the circumstances indicated in the statute, to the amount of the capital stock. As the proposed issue of $17,500,000 was within this limit, the corporation was authorized to issue its bonds therefor, unless there was an existing issue precluding it from so doing.

Were there any outstanding bonds of the plaintiff corporation? Strictly speaking, it cannot be said there were any outstanding bonds of the corporation. The constituent corporations which had united in its organization had outstanding bonds, and "no such amalgamation or consolidation must in any way relieve such corporation or the stockholders thereof from any and all just liabilities." But duties which a corporation owes to parties who have dealt with it previous to a consolidation, and obligations it has incurred to such parties under contracts, cannot be transferred to the new corporation without their consent. The effect of the exercise of such a power would be to impair the obligation of contracts, and therefore it cannot be conferred by the legislature. Spell. Priv. Corp. § 107; Bruffett v. Railroad Co., 25 Ill. 310; In re Manchester & L. Loan Ass'n, L. R. 9 Eq. 643; Railroad Co. v. Strait, 35 N. J. Law, 322. A creditor may not prevent a consolidation of corporations, but he may insist that the property of the debtor corporation remain subject to his demands, and that its stockholders shall be answerable to him to the extent of their statutory liability. "Novation is made by contract, and is subject to all the rules concerning contracts in general." Civ. Code, § 1532. In some of the states there are statutes broad enough to create a primary liability upon consolidated corporations for the liabilities of the several constituent companies. Where this is the case, no doubt but that, while creditors are not compelled to have recourse to the new company, they may elect to do so, and recover. There is no evidence of such an election on the part of creditors here. The property of the several corporations, however, is still liable for the debts contracted by them, and, as a corporation may not create debts in excess of its subscribed capital stock (Id. § 309), these several demands, while not primary liabilities of the corporation plaintiff, are yet charges upon its property which will reduce it by so much, and hence come within the spirit of the rule limiting the indebtedness, under section 309, supra. It was in this view, no doubt, that the plaintiff framed its notice, the action of its stockholders, and of its officers in reference to the issue of bonds. It had, so far as it was able in the articles of consolidation, made itself liable for all the liabilities of the several constituent corporations, and the agreement only needed the consent of creditors to constitute a novation of debtors. Between itself and the constituent corporations it was absolutely bound to make such payment. Hence, its right to treat the outstanding bonded indebtedness as its own obligation, and to provide in its action for the payment thereof, or, if the creditors refused to receive payment upon their bonds, to treat them as a part of its own bonded indebtedness, and to issue bonds for such less amount as, with those outstanding, would aggregate a given amount or sum. In this view of the object, there is nothing indefinite in the notice and resolution to create a bonded indebtedness of $17,500,000 (a portion of which is to be used in retiring existing bonded indebtedness), and thereby to increase its bonded indebtedness up to the amount in the aggregate of $17,500,000.

3. As to the right of stockholders to be represented by proxies in the stockholders' meeting by which the bonded indebtedness was authorized. The language of Civ. Code, § 359, is: "The increase shall be made by a vote of the stockholders representing at least two-thirds of the subscribed capital stock." It is conceded that the requisite two-thirds of the capital stock was attempted to be voted; but as many of the shares were voted by proxies, which, if eliminated, would not leave a two-thirds majority in favor of the proposition, it is contended that the whole proceeding was void. The theory of the appellant is that, while the constitution of this state (section 12, art. 12) provides that: "In all elections for directors or managers of corporations, every stockholder shall have the right to vote in person or by proxy," etc., and while section 307 of the Civil Code in effect enunciates the same thing, still all this has no application to a vote, under section 359, for the creation of a bonded indebtedness; that, as to the latter, the authority is given to a vote of the stockholders, and not to the proxies of the stockholders; that express provision is made for voting by proxy where the legislature thus intended, etc. This theory would have been deemed eminently sound a century since, but within that period the law in regard to corporations has undergone important changes. The modern law writers upon corporations, without exception, so far as we have observed, recognize the right of a private corporation, in the absence of any statute on the subject, to provide by by-law for stockholders to vote by proxy. Taylor, at section 579 of his work on Corporations, says: "It is held that stockholders have no implied right to vote by proxy, but it is competent for a corporation by a by-law to authorize votes to be cast in that manner,"—citing People v. Crossley, 69 Ill. 195; State v. Tudor, 5 Day, 329. Cook on Stock, Stockholders, and Corporation Law, says, at section 610: "At common law a stockholder has no right to cast his vote by proxy. This rule was evolved from the analogous rule governing municipal corporations, which requires all votes to be given in person. The right to vote by proxy is often given by the charter itself. Even if not so given, the right may be created by by-law." Morawetz on Private Corporations, at section 486, says: "The members of a corporation must vote personally, and cannot vote by proxy, unless the right to vote by proxy is expressly conferred by the company's charter or by-laws." That the right of voting by proxy may be conferred through a by-law adopted by the majority appears to be reasonably settled. Beach on Corporations, at section 303, holds the same doctrine. See 2 Kent, Comm. 294, and Philips v. Wickham, 1 Paige, 598. Spelling on Private Corporations, at section 387, says: "Proxy voting was not recognized by the English common law, but has become so universal a custom in this country that the right would, at the present day, probably be held to exist, even in the absence of statutory provisions, where so provided in the by-laws." And in a footnote it is said: "The California statute recognizes the right and empowers all cor-

porations to regulate the manner by by-laws, only requiring that proxies shall be in writing. Civ. Code, § 312." Section 312, Civ. Code, is, in part, as follows: "At all elections or votes had for any purpose, there must be a majority of the subscribed capital stock or of the members represented, either in person or by proxy in writing. Every person acting therein, in person or by proxy or representative, must be a member thereof or a bona fide stockholder," etc. This section clearly recognizes the right of a stockholder to appear and act, not only at all elections, but also at all votes had for any purpose, either in person or by proxy. It is true, the section just quoted contains a recognition, rather than a grant, of the right of a stockholder to appoint a proxy to represent him. Turning to section 303 of the Civil Code, we find it provides that: "A corporation may, by its by-laws, where no other provision is specially made, provide for: * * * (3) The mode of voting by proxy." It only remains to be said that section 7 of the by-laws of the plaintiff contained the following provision: "At all meetings of stockholders absent members may vote by proxy, duly authorized in writing, signed by the stockholders granting them, and such proxies shall be filed with the secretary." The record further shows that all proxies were in writing, and were filed with the secretary, and that the stockholders granting them were absent from the meeting. The Pacific Improvement Company authorized Douty, its secretary, by resolution duly passed, to vote its stock, and subsequently ratified and confirmed the acts of the proxies appointed by the pledgees of some of its stock, which stood on the books of the company in the names of such pledgees. What has been said heretofore upon the subject of ratification will suffice.

As to the 2,813 shares standing upon the books of the plaintiff in the name of J. D. Grant and T. L. Barker, executors of estate of Ed Hull, deceased, and voted by proxy from them to J. L. Willcutt, and as to 554 shares standing upon the books of the company in the name of the Crocker Estate Company, a corporation, no notice need be taken, for the reason that, if it be conceded these votes were irregular, there was still more than two-thirds of all the capital stock voted in favor of the resolutions without these shares. The whole number of shares, as before stated, in the corporation plaintiff was 187,500, two-thirds of which is 125,000. The total number of shares represented and voted in favor of the resolution was 137,240, being an excess over the required number of shares of 12,240. From this vote deduct 2,813+574+150 shares of Hendry's Son & Co., to which objection is also made, and we still have an excess of 8,727 shares in favor of the resolutions over and above the necessary two-thirds prescribed by section 359 of the Civil Code, as amended in 1893.

The other objections raised by appellants will not be mentioned in detail. They have been examined, and in them no cause for reversal is discovered. Upon the whole record, we are of opinion the judgment appealed from should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

I concur in the judgment. BEATTY, C. J.

HARRISON, J. I am unable to agree with the opinion of the majority of the court upon the first proposition discussed therein, for the reason that, in my opinion, it is in disregard of the following provision of section 358 of the Civil Code, viz.: "The due incorporation of any company claiming in good faith to be a corporation under this part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit in which such de facto corporation may be a party; but such inquiry may be had at the suit of the state on information of the attorney general;" and that the court is thereby precluded from determining the question in this action. That the effect of proceedings for a consolidation of two or more railroad corporations, taken by virtue of section 473, Civ. Code, is to create a new corporation, and that the constating articles by which the consolidation is effected constitute the articles of incorporation of such new corporation, is well established by authority, and is recognized by the section itself, which declares: "When the consolidation and amalgamation is completed a copy of the new articles of incorporation must be filed in the office of the secretary of state." To determine whether the proceedings therefor have been regularly taken in accordance with the provisions of the section, and are sufficient in form to create a de jure corporation, would be to inquire into its "due incorporation," which, as above seen, "shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party." As it is only at the suit of the state, upon the information of the attorney general, that such inquiry may be had, any conclusion thereon in the present case, however persuasive it may be, is merely obiter, and can have no authoritative force in any subsequent action at the instance of the state; and, consequently, the views of the court upon the subject ought not to be given, except in a case in which it shall be properly presented, and after the state, through its attorney general, has had an opportunity to be heard thereon. The want of authority or jurisdiction in the court to make any inquiry of this nature has been fully argued by counsel for the respondent in its brief, and the sufficiency of this argument has not been contradicted by the appellants; and, independent of the express declaration of the statute, I have not been able to find any adjudicated case in which it has been decided that the legality or regularity of its incorporation can be inquired into for the purpose of determining the rights of the corporation under a contract entered into between it and an individual after it had received its charter of incorporation. I concur in that portion of the opinion which holds that the proceedings for the issue of the bonds were in accordance with the requirements of the statute.

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109 Cal. 627

CENTRAL PAC. R. CO. v. DEETZ (MARTIN et al., Interveners. No. 18,398).

(Supreme Court of California. Nov. 5, 1895.)

SALE OF LAND — ASSIGNMENT OF CONTRACT TO MORTGAGEE—RIGHT TO DEED.

Where a contract for the purchase of land provides that, on performance of the contract by the vendee, the vendor will, on request and "surrender of the contract," execute a deed, an assignee of a mortgage given on the land by the vendee allowing the mortgagee at maturity to pay all liens on the land is entitled to a deed from the vendor on tender of any balance due on the price, without offering to surrender the contract.

Department 2. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by the Central Pacific Railroad Company against Mary E. Deetz for cancellation of a contract for the sale of land. H. P. Martin and another intervened as assignees of the contract, and asked for the specific performance thereof. From a judgment for plaintiff, interveners appeal. Reversed.

T. M. Osmont, for appellants. J. F. Farraher, for respondent.

TEMPLE, J. This action was brought to bar and cut off the right of the defendant to certain land which she had contracted to purchase from plaintiff. Appellants filed a complaint of intervention, to which the plaintiff demurred. The demurrer was sustained, and, judgment having been rendered for plaintiff, the interveners appeal.

It is averred in the complaint that, after defendant had entered into the contract for the purchase of the land, said defendant and several other persons named in the complaint made, executed, and delivered to one M. A. Harding their promissory note for $22,000, payable with interest two years from its date, which was April 15, 1891; and at the same time, to secure the payment of said sum with interest, said makers, including the defendant, executed and delivered to Harding a mortgage upon the premises described in the complaint and upon other lands, which was duly recorded; also, that the interveners have become the owners of the said note and mortgage. The note is now due and wholly unpaid. It is provided in the mortgage that the mortgagee or his assigns may pay and discharge at maturity all liens or incumbrances upon the mortgaged premises. It was also averred that it was necessary for the protection of the interveners, as mortgagors, that the amount due the plaintiff be paid; and, in connection with this allegation, it was averred that the remaining property covered by their mortgage was insufficient to pay the amount due and owing on said mortgage. It was also charged in said complaint that "prior to the 15th day of October, 1892, these interveners offered to plaintiff to pay the said railroad company the balance of its said demand, to wit, the said sum of $1,500, but plaintiff refused to accept payment thereof from these interveners without the production by them of said written contract (Exhibit A); that these interveners were not then in possession of said contract, and were not able to produce the same, which facts were by them communicated to the plaintiff, and at the same time the plaintiff was further informed that the interveners held a mortgage upon said premises executed by the said Mary A. Deetz and others, and that they were therefore interested in making final payment upon said land so as to save the security, and ultimately secure out of the same the full payment and satisfaction of the note and mortgage executed to said Harding by said Mary A. Deetz and others; and the interveners ever since have been and now are ready and willing to pay the balance due to plaintiff under its said contract with Mary A. Deetz, together with the interest due thereon; and they do hereby offer and tender to plaintiff full payment and satisfaction thereof; and they hereby offer to keep and perform all the stipulations and undertakings by the defendant required to be kept and performed by the terms of said contract (Exhibit A)." The prayer was that interveners be allowed to pay the plaintiff all sums due on the contract, and that thereupon plaintiff be required to convey the land to Mary A. Deetz, to be held subject to the lien of their mortgage. The contract between plaintiff and Mary A. Deetz, which was Exhibit A, referred to, provided that upon performance by Mary A. Deetz, her heirs or assigns, plaintiff, party of the first part, "will cause to be made and executed to the said party of the second part, upon request and surrender of this contract, a deed," etc.

The main contention on the part of plaintiff is that inasmuch as the interveners do not offer to surrender the contract, and are not able to do so, they cannot perform the contract, and are not entitled to pay the amount due plaintiff, and compel plaintiff to convey the land; in other words, plaintiff could only be compelled to convey upon full performance of the contract on the part of Mary A. Deetz, and, by the terms of the contract, the surrender of the contract was a condition precedent to the obligation on the part of plaintiff to execute the deed. To this proposition I cannot agree. Had Mary A. Deetz paid the full amount of the purchase money, she could have compelled plaintiff to convey, although she had lost the paper contract, and her assignee could also do so. The vendee under the contract was in equity the owner of the land, subject to the conditions of the contract. She could convey or mortgage her estate in it, and the grantee or purchaser under the mortgage will succeed to the estate of the vendee. It does not appear that the contract of sale had been assigned by the vendee prior to the mortgage. If, however, there is any claim of that kind, the claims of such supposed assignees can be litigated in this suit, or the plaintiff secured against it. Whether the tender was properly made or not is of no consequence on this demurrer. The contract does not make time of the essence of the contract. The decree does not allow interveners to perform the contract. It is claimed by plaintiff that interveners cannot do so unless they are able to surrender the written contract. The judgment is reversed, and the cause remanded, and the court directed to overrule the demurrer to the complaint of intervention.

We concur: HENSHAW, J.; McFARLAND, J.

109 Cal. 610

PEOPLE v. BELLAMY. (Cr. No. 27.)

(Supreme Court of California. Oct. 24, 1895.)

CRIMINAL LAW — CIRCUMSTANTIAL EVIDENCE — PROBATIVE FORCE.

A charge that, "to justify the inference of legal guilt from circumstantial evidence, the existence of inculpatory facts must be established absolutely and to a demonstration incompatible with the innocence of the accused," demanded a greater degree of certainty than the law required.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Louis Bellamy was convicted of burglary, and appeals. Affirmed.

Byron Waters and Henry W. Nisbet, for appellant. Wm. F. Fitzgerald, Atty. Gen., for the State.

PER CURIAM. The defendant appeals from a conviction of the crime of burglary, and, as grounds for a reversal of the judgment, insists that the court committed error in refusing to give to the jury the following instruction as to the law of the case: "In order to justify the inference of legal guilt from circumstantial evidence, the existence of inculpatory facts must be absolutely and to a demonstration incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt." The law does not require the evidence to be of such a character as to establish in the minds of the jurors that degree of certainty demanded by the foregoing instruction. A conviction in the minds of the jurors to a moral certainty and beyond a reasonable doubt, arising from the evidence of the defendant's guilt, is sufficient, and an absolute or mathematical demonstration of guilt is not required. We find no error in the record, and the judgment and order appealed from are affirmed.

109 Cal. 607

PEOPLE v. DEMASTERS. (Cr. No. 68.)

(Supreme Court of California. Oct. 24, 1895.)

CRIMINAL LAW — NEW TRIAL — CUMULATIVE EVIDENCE — RES GESTÆ.

1. The refusal to grant a new trial on the ground of newly-discovered evidence was proper where such evidence would have been cumulative, and was not such as to render a different verdict reasonably probable upon a retrial.

2. On a trial for mayhem, it was proper to permit the prosecution to show a threat or attempt by defendant to assault the prosecuting witness a few minutes before the final assault, it appearing that it was all a part of the same transaction.

Department 1. Appeal from superior court, Tulare county; W. A. Gray, Judge.

W. F. Demasters was convicted of mayhem, and appeals. Affirmed.

Roth & Fadzean, for appellant. W. F. Fitzgerald, Atty. Gen., for the State.

VAN FLEET, J. Defendant was convicted of an assault with intent to commit mayhem, and appeals from the judgment and order denying his motion for a new trial.

1. We can see no abuse of discretion on the part of the court below in denying defendant's motion for a new trial, made upon the ground of newly-discovered evidence. As has been repeatedly held by this court, a motion for a new trial is addressed to the sound legal discretion of the trial court, and the action of the latter will not be disturbed, except in an instance manifesting a clear and unmistakable abuse of such discretion. This rule is peculiarly applicable to an application based upon the ground of newly-discovered evidence, which not only involves an enlarged discretion in the trial court, but has never been looked upon with favor, but rather with distrust. Hobler v. Cole, 49 Cal. 250; Arnold v. Skaggs, 35 Cal. 684. To entitle the plaintiff to a new trial on this ground, it must appear, among other things, that the new evidence be not cumulative merely; that it be such as to render a different verdict reasonably probable upon a retrial; and that the evidence could not with reasonable diligence have been discovered and produced at the trial. 1 Haynes, New Trials & App. § 88. Assuming that defendant's affidavits, which are very general in their terms in that regard, satisfy the last of these requirements, we are very clear that they fall short of complying with the first two. In the first place, we regard the evidence as purely cumulative. Its only tendency would be to establish a state of ill will on the part of Crawford, the prosecut-

ing witness, against the defendant, and an indefinite threat by Crawford to use violence upon defendant, if the latter should again come upon Crawford's place. The record discloses that evidence of exactly the same general character was introduced in behalf of defendant at the trial through the witness M. F. Demasters, who testified to threats and expressions of ill will, made by Crawford, of quite as specific and violent a character as those proposed to be established by the evidence newly discovered. But, in the next place, while the mere fact that the new evidence be cumulative is not conclusive against defendant's right to a new trial on that ground, we are satisfied that the evidence is not such as to make a different result on a new trial obviously probable. To the contrary, the impression made by a consideration of the proposed evidence, in the light of that taken at the trial, is rather unfavorable than otherwise as to the probability of its producing any different result. Under such circumstances, we are not at liberty to disturb the order.

2. The court was clearly right in its ruling in allowing the prosecution to show a threat or attempt by defendant to assault the prosecuting witness with a gun a few minutes before the final assault was committed. The evidence on the part of the people tended to show that it was all a part of one and the same transaction. In fact, if the evidence of the people be true, there was one continuous and aggravated assault committed by defendant upon the witness Crawford, from the time defendant threatened him with the gun until the biting and wounding were accomplished. The evidence was therefore admissible as part of the res gestæ.

3. The objection arising upon the cross-examination of the witness Ward Demasters, and the further one as to the admissibility of evidence of his general bad character for truth, etc., a few years prior to the fact, are trivial, and involve no error. The first was proper as tending to exhibit the feeling of the witness, and the objection to the latter went to its weight, and not its admissibility.

We find no error in the record, and the judgment and order denying a new trial should be affirmed. It is so ordered.

We concur: GAROUTTE, J.; HARRISON, J.

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5 Cal. Unrep. 180

HAAS et al. v. MUTUAL RELIEF ASS'N OF PETALUMA. (L. A. 27.)[1]

(Supreme Court of California. Oct. 24, 1895.)

CHANGE OF VENUE—SUFFICIENCY OF APPLICATION.

A recital, in an affidavit by a mutual benefit association to change the place of trial of an action against it from L. to S. county, "that all payments of benefits that have become due and payable to the nominees of any deceased member are made and always have been made by a warrant payable in the city of P.," in S. county, does not controvert an allegation in the complaint that defendant promised to pay at A. in L. county, and justifies the refusal of the motion.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Haas and another against the Mutual Relief Association of Petaluma on a benefit certificate. From an order denying its motion to change the place of trial, defendant appeals. Affirmed.

Lippitt & Lippitt, for appellant. J. F. Conroy, for respondents.

PER CURIAM. Appeal from an order denying a motion to change the place of trial. The action was commenced in the county of Los Angeles, and a motion was made by the defendant to transfer the cause for trial to the county of Sonoma. Upon the hearing of the motion there was read to the court an affidavit in behalf of the defendant showing that by its articles of incorporation the county of Sonoma is its principal place of business, and also the complaint in the action, which contains the allegation that the defendant promised to pay the money sued for herein at Los Angeles. The defendant did not controvert the truth of this allegation, but in the affidavit filed on its behalf merely stated "that all payments of benefits that have become due and payable to the nominees of any deceased member of said corporation are made, and always have been made, by a warrant drawn in favor of the nominees upon the treasurer, and payable in the city of Petaluma." This statement, however, instead of traversing the averment in the complaint, is entirely consistent with the fact that the defendant promised to pay the sum sued for herein at Los Angeles, and justified the court in denying the motion upon the ground that the contract was to be performed in that county. Trezevant v. W. R. Strong Co., 102 Cal. 47, 36 Pac. 395; Lake Shore Cattle Co. v. Modoc Land & Livestock Co. (Cal.) 41 Pac. 472. The order is affirmed.

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5 Cal. Unrep. 168

In re FISHER'S ESTATE. (No. 18,368.)

(Supreme Court of California. Oct. 10, 1895.)

ACCOUNTING BY ADMINISTRATOR—WHO MAY QUESTION ALLOWANCES.

An administrator, in settling his accounts, presented a voucher signed by deceased's widow for payments alleged to have been made her in pursuance of an order granting her a certain amount as a family allowance. *Held*, that a creditor of the estate could not object to the allowance of the voucher as a credit on the ground that the amount covered by it had not been actually paid the widow.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

In the matter of the estate of Hiram Fisher, deceased. Appeal by S. C. Fisher, administrator, from an order settling his account. Modified.

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[1] Rehearing denied.

Elliott & Elliott, for appellant. Louttit, Woods & Levinsky, for respondent.

HAYNES, C. A creditor of the estate, whose claim had been allowed and approved by the court, filed several exceptions to the first annual account of the administrator. Several of these exceptions were confessed by the administrator, and after a hearing the court made the following record (omitting formal preliminary matter): "Now, after having considered said account and report, the objections to the same, and the evidence, the court finds that the amount of money received by said administrator during the time covered by said account and report to be the sum of $2,623.50, and the amount properly paid out and expended by him as such administrator, and for which he should receive credit against said estate, to be $2,207.59, leaving a balance in his hands in favor of said estate of $415.91, and with all property of said estate that has come into his hands and remaining undisposed of. It is therefore ordered that said account, after making the corrections and reductions proper to be made, shows a balance in his hands, of cash, $415.91, and the same is hereby settled, allowed, and approved." From this order the administrator appeals.

The amount received by the administrator, as shown by his account, was not changed by the order. Items excepted to, amounting to $75.75, were admitted by the administrator upon the hearing to be erroneous or unauthorized. His account as filed showed a balance due him from the estate of $148.10. Adding to this the amount found by the court to be in his hands, namely $415.91, showed a total reduction of credits amounting to $564.01. Deducting from this sum the items admitted by the appellant to be erroneous or unauthorized, namely $75.75, leaves the sum of $488.26 taken from his credits by the court. The order made by the court does not show what items amounting to this sum were disallowed, but the bill of exceptions and the briefs of counsel make it reasonably clear that that sum was deducted from the item of $950 claimed by the administrator as a payment on account of "family allowances."

On June 16, 1893, the court made an order that the administrator pay the widow of decedent the sum of $50 per month as a family allowance, "commencing on the 24th day of November, 1891." The voucher for said item of $950, signed by the widow, was for nineteen months, commencing November 24, 1891, and ending June 24, 1893. The administrator was sworn and examined touching this item, and admitted that it had not all been paid to the widow; that some moneys had been advanced by him to her prior to the allowance; that other sums were paid to her after the allowance was made; and that at her request the remainder was retained by him to be paid out to or for her as the same should be required. His examination was contradictory and uncertain as to payments made, both as to time and amount, and nothing like a definite and accurate statement of the facts as to the amount paid or remaining unpaid can be arrived at from his examination. The question, however, is presented (and it is the only one noticed by counsel or which appears to be involved in the case), whether a creditor, or any one save the widow, can attack or question the voucher signed by her. That the order for the payment of an allowance of $50 per month was made was not disputed. That this order has not been modified or vacated is not claimed; and the amount claimed to have been paid thereunder and represented by the voucher of the widow does not exceed the amount so allowed. As between the widow and the creditors of the estate, she is undoubtedly bound by her voucher, and could not be heard afterwards to say that she had not received the amount therein admitted to have been paid. She must have had legal notice of the settlement of the amount; and, not having objected, she is bound by the adjudication upon that account so far as affects the estate. Whether she would be bound by her receipt, as between her and her son, who is the administrator, need not be considered. This allowance is a preferred claim against the estate, though where the estate is insolvent it cannot be allowed for a longer period than one year after granting letters testamentary or of administration; but where the estate is solvent, it may be allowed during the progress of the settlement of the estate. Code Civ. Proc. § 1466. The creditor excepting to said account as to this item alleged that it was "claimed by said account" that the estate was insolvent, and, if insolvent, that the allowance should not be paid for a greater period than one year; so that the question as to whether the estate was insolvent or not appears to have been brought to the attention of the court, and, as no order was made upon that point, we cannot assume that the estate was in fact insolvent. However, the account filed by the administrator does not show that the estate is insolvent, but merely shows that the amount paid out exceeded the amount received by the administrator. The examination of the administrator touching this item was had over his objection, and the ruling of the court thereon was duly excepted to; so that the question made by appellant is made upon the admission of evidence as well as upon the final order of the court.

I think the full amount of said voucher, viz. $950, should have been allowed the administrator as a credit upon his account, and that the order appealed from should be modified accordingly, but without costs to either party.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed, with directions to modify the same in accordance with the foregoing opinion, and as so modified that it be affirmed.

5 Cal. Unrep. 779

SANTA PAULA WATER WORKS v. PERALTA. (L. A. 18.)

(Supreme Court of California. Oct. 21, 1895.)

APPEAL—FILING BRIEF—EXCUSE FOR FAILURE.

Where appellant's failure to file a brief was due to a misunderstanding between two attorneys as to which was to act for her in the supreme court, and appellant, through her ignorance of English, was excusable for that misunderstanding, the appeal not being in the opinion of counsel without merit, respondent's motion to dismiss will be denied.

In bank. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by the Santa Paula Water Works against Julia Peralta, in which judgment was rendered for plaintiff, and defendant appealed. For the failure of appellant to file a brief, respondent entered a motion to dismiss the appeal. Denied.

Daly & Toland, R. F. Del Valle, and Shepherd & Eastin, for appellant. W. H. Wilde and Orestes Orr, for respondent.

PER CURIAM. Motion by respondent to dismiss the appeal for failure of appellant to file a brief. We think it sufficiently appears from the affidavits filed by appellant in resistance of the motion that the failure to file the brief arose from a misunderstanding between appellant and his counsel as to whom appellant desired to represent him in this court. Daly & Toland were the attorneys for appellant in the lower court. After the appeal was perfected, appellant, who is a Spaniard, and speaks and understands English very imperfectly, informed Mr. Toland, as the latter understood him, that he intended to get Mr. J. L. Murphy, of Los Angeles, to attend to the case in the supreme court. Subsequently appellant called on Mr. Murphy and told him that he wished to secure his assistance in the case on the appeal. He was informed by Mr. Murphy that he would assist in the case if agreeable to Daly & Toland, and suggested that appellant see the latter on the subject. Appellant, it seems, did not understand the suggestion as to the necessity of his seeing Daly & Toland, and went away in the belief that he had done all that was required and necessary in the premises to secure the services of Mr. Murphy. The latter did not understand appellant that he was expected to take control of the case to the exclusion of Daly & Toland, but simply to assist them in the preparation of the brief and the presentation of the case in this court. Some correspondence subsequently occurred between Murphy and Toland upon the subject, which does not appear to have assisted to the better understanding of the appellant's desires in the premises, and, as a result, each attorney waited for the other to act, and no brief was filed. The affidavits make it clear that the appellant at all times and in good faith intended to prosecute his appeal, and supposed that everything necessary thereto was being done by his attorneys; and it also appears that, in the judgment of counsel, there is merit in the appeal. The whole misapprehension and misunderstanding of the attorneys would seem to have arisen from the imperfect ability of the appellant to make himself understood by reason of his lack of familiarity with the English language. Under the circumstances, we think a case of excusable neglect is disclosed which should entitle appellant to present his cause on the merits; and in this view the motion to dismiss should be denied. It is so ordered.

5 Cal. Unrep. 182

REMY v. OLDS et al. (No. 18,316.)[1]

(Supreme Court of California. Nov. 4, 1895.)

CHANGE OF VENUE—DISQUALIFICATION OF JUDGE—CALLING ANOTHER JUDGE.

Code Civ. Proc. § 398, requiring a judge who is disqualified from acting in a cause to transfer it, if pending before him, to some other court, is not satisfied by calling to the court of the disqualified judge a judge who is not disqualified.

Commissioners' decision. Department 1. Appeal from superior court, Merced county; Joseph H. Budd, Judge.

Action by Theophile Remy against E. J. Olds and others. From an order denying change of venue, defendants appeal. Reversed.

J. W. Knox, for appellants. James F. Peck and T. C. Law, for respondent.

BRITT, C. Messrs. J. K. & T. C. Law, brothers, were attorneys for plaintiff in this action. The former was elected judge of the superior court of Merced county, where the action was and is yet pending, and entered upon the discharge of the duties of that office; his brother remained an attorney of record for the plaintiff. This being the situation of the case, defendants notified plaintiff that they would on December 7, 1893, move said court to change the place of trial of said action to another superior court on the double ground of the relationship of Hon. J. K. Law, judge of the Merced court, to one of the plaintiff's attorneys, and that he had himself been an attorney for the plaintiff in the action. The fact of such notice being brought to the attention of Judge Law on December 4th, he announced to the parties in open court that he would not hear the motion, but would have another judge to hear it. Defendants objecting to such course, he stated that the objection should be presented to such other judge. On said December 7th, Hon. Joseph H. Budd, judge of the superior court of San Joaquin county, at the request of Judge Law, held a session of the said Merced superior court for the dispatch of various matters, and called for hearing the said motion for change of venue. Defendants objected, for the reasons, among others, that it was the duty of said judge of the Merced court to hear the motion; that he was then present in the courthouse; and that Judge Budd had been selected and requested by him to be present for the purpose of hearing such motion. The matters of fact stated in the objections made were shown by evidence admitted in support thereof. The objections were overruled, Judge Budd stating that he would then, or as soon as counsel were ready, preside as judge on the trial of the case. An order was then entered reciting that the motion was heard at a session of the court held by Judge Budd, at the request of Judge Law; that the former was not disqualified to act as judge at the trial of the action,—and denying the motion.

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[1] Rehearing granted.

The statutes pertaining to the matter may be thus abstracted: No judge shall act as such in any action when he is related to an attorney or counsel of either party by consanguinity or affinity within the third degree, or when he has been attorney or counsel for either party in the action; but his disqualification does not extend to the power of transferring the action to another court. Code Civ. Proc. § 170, as amended in 1893. The court may, on motion, change the place of trial when from any cause the judge is disqualified from acting. Id. § 397. If an action is pending in a court, and the judge is disqualified from acting as such, it must be transferred for trial to a court the parties may agree upon; or, if they do not agree, then to the nearest court where the like objection does not exist. Id. § 398.

The case differs in no material particular from Upton v. Upton, 94 Cal. 26, 29 Pac. 411, where similar proceedings by the same judges, resulting in a denial of an application for change of venue, were sustained by this court; and the order appealed from here should be affirmed if that case is to be followed. But the court subsequently said of Upton v. Upton: "We felt constrained to follow the decision in Paige v. Carroll, 61 Cal. 216. We did so, however, because the point of practice had been so settled, and not without serious doubts as to the correctness of the decision, which ignores what seems to be a substantial provision of the statute, designed to prevent the selection by either party to the controversy of the court and judge before whom the trial is to be had. It is not necessary here to determine whether the practice tolerated in Upton v. Upton and Paige v. Carroll can be longer recognized." Krumdick v. Crump, 98 Cal. 119, 32 Pac. 800. In the present instance that necessity arises; and it seems to us that the sooner cases which ignore such a provision of the statute are overruled, the better for the courts, at least, in which any ground for suspicion even of indelicacy in matters of this sort would be lamentable. For the purposes under view, the law treats counsel as identified with his client. It has made axiomatic the principle that no man ought to be a judge in his own cause. Mining Co. v. Keyser, 58 Cal. 322. High authorities seem to consider such a power not conferrable by act of parliament or the constitutions of our states. Co. Litt. § 212; Cooley, Const. Lim. pp. 207, 506-509. But the difference between judging one's own cause and the right to select another to judge therein is more of shadow than substance. To men of turn for intrigue probably the latter privilege would appear more valuable than the former. We consider that the statute which requires a judge who is disqualified from acting in a cause by reason of interest, or by having been of counsel, or otherwise, to transfer the same if pending before him to some other court (Code Civ. Proc. § 398), is not satisfied by his calling a judge who is not disqualified, and who must perforce deny the transfer, and so become the appointee of the first for the trial of the cause; and, without meaning to intimate by anything here said—as we do not at all suspect—that either of the learned judges named was actuated by other than the sincerest desire to keep within the law and serve the substantial convenience of the litigants, we are of the opinion that the order appealed from should be reversed. It will, of course, be understood that the ruling here does not forbid the parties to agree upon another judge who, pursuant to such agreement, might be requested to try the action in the court where the same is pending, as provided by the constitution (article 6, § 8); and, in those courts having several judges, the necessity for transfer of a cause on this ground cannot exist, unless all the judges are disqualified.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

109 Cal. 618

TYLER v. TEHAMA COUNTY. (No. 18,338.)

(Supreme Court of California. Nov. 4, 1895.)

COUNTIES—LIABILITY FOR TORTS—DEFECTIVE CONSTRUCTION OF BRIDGE—PLEADING.

1. Const. 1879, art. 1, § 14, which provides that "private property shall not be taken or damaged for public use without just compensation," renders a county liable for damages to plaintiff's property consequent on the construction of a bridge in such a manner that its abutments turn the current of the stream in such a way as to cut into his land.

2. A county cannot avoid its liability for damages from the defective construction of a bridge by its supervisors on the ground that, instead of being erected on the line of the road, it was erected on property belonging to plaintiff, abutting the road, as long as it maintains the bridge, and fails to repudiate the action of its supervisors in so constructing it.

3. A complaint which alleges that the entire work of constructing a county bridge was done under the direction of, and according to the plans and specifications furnished by, the board of supervisors, and that it was accepted by them when completed, sufficiently states a cause of action, when objected to by general demurrer; it being immaterial that the work done in placing the abutments so that the current of the stream was turned, and made to cut into plaintiff's land, causing the injury complained of, was performed by a bridge company.

Commissioners' decision. Department 1. Appeal from superior court, Tehama county; John F. Ellison, Judge.

Action by J. C. Tyler against Tehama county to recover damages consequent upon the construction of, and to enjoin defendant from maintaining, a certain bridge. There was judgment for defendant, from which plaintiff appeals. Reversed.

J. C. Ball, J. T. Matlock, and Armstrong & Bruner, for appellant. L. V. Hitchcock, for respondent.

HAYNES, C. This appeal is by the plaintiff from a judgment rendered on demurrer to his amended complaint. The action was brought to recover damages, and to enjoin the defendant from maintaining a certain bridge, with its buttresses, piers, and walls, and that the same be declared a nuisance, and abated as such. The bridge in question was erected by the board of supervisors, in 1892, over Elder creek, on the Tehama and Red Bluff road, to replace a bridge erected many years before, and which had become unsafe. It is alleged that the new bridge was built below and alongside of the old one, but outside of the highway, on the property of plaintiff; that plaintiff's residence is on the southerly side of said creek, a short distance below the bridge, and near said creek; that it was built before said new bridge was erected; that the abutments or walls supporting the new bridge confined the waters during freshets, and turned the current against the south bank of the stream, near his house, and caused it to cut away the bank; and that, if continued, it will destroy his house and much valuable land. The demurrer was general and special; but the ground upon which the demurrer was sustained, as appears from the written opinion of the learned judge of the court below, as well as from the briefs of counsel, was that the complaint does not state a cause of action.

The ground upon which the court based its decision, briefly stated, is that, as the bridge was built, not upon the highway, but upon private property, the acts of the board of supervisors in causing its construction were unauthorized and unlawful; that for such acts the county is not responsible; and that, if any one is responsible, it is the supervisors personally (citing Crowell v. Sonoma Co., 25 Cal. 313); while counsel for respondent adds to the above that the construction of bridges is not one of the powers of counties, but is one of the enumerated powers of the board of supervisors; that counties are not liable for the acts or negligence of their officers, unless such liability is imposed by express statutory provisions; that the complaint does not allege that said bridge was erected either wrongfully, unlawfully, or against the will or consent of the plaintiff; and that, even if the complaint had alleged the erection of the bridge, piers, etc., upon the public highway, it would not have stated a cause of action, as it fails to allege a lack of ordinary care and skill in its erection.

Assuming for the present that the acts of the board of supervisors were authorized and lawful, the first question to be determined, then, is whether the county is liable for the consequential injuries caused by the construction of the bridge in such manner as to change the direction of the current so as to cut away the southerly bank of the stream, causing injury to plaintiff's land, and threatening the destruction of his residence. It is undoubtedly true that at common law an action does not lie against a county, and that, in the absence of some constitutional or statutory provision, counties are to be treated as political divisions of the state, created for convenience, and not liable for damages caused by the neglect of their officers or agents. Crowell v. Sonoma Co., 25 Cal. 313, cited in the opinion of the learned judge in the court below, and by counsel for respondent in his brief, was an action against the county for injuries to the land of plaintiff, caused by the construction of the abutment of a bridge, by which the water was turned towards the plaintiff's land, cutting away portions thereof, and destroying improvements thereon. That case, however, arose under the constitution of 1849, which provided, "Nor shall private property be taken for public use without just compensation" (Const. 1849, art. 1, § 8); while the new constitution provides that "private property shall not be taken or damaged for public use without just compensation having been first made or paid into court for the owner" (Const. 1879, art. 1, § 14). These constitutional provisions, as well as the common-law liability of counties, were very fully considered in Reardon v. City and County of San Francisco, 66 Cal. 492, 6 Pac. 317. In that case the defendant was engaged in improving Army street, and, in making the improvements, placed thereon a large amount of rock, the weight of which caused the soil to sink and spread out at the side; thus raising and moving the ground upon plaintiff's lot, and injuring the foundation of the building thereon. The court, speaking of the change in the constitutional provision above noticed, said: "To what kind of damage does this word 'damaged' refer? We think it refers to something more than the direct and immediate damage to private property, such as its invasion or spoliation. There is no reason why this word should be construed in any other than its ordinary and proper sense. It embraces more than the direct taking. If it did not refer to more than the damage above mentioned, the word 'damaged,' in the clause relied upon, would be superfluous. It seems to us that the direct invasion spoken of would come within the clause as it stood in the constitution of 1849. If the word 'damaged' only embraced physical invasions of property, the rights secured by this word would add nothing to the guaranty as it formerly stood." The court there quoted extensively from City of Atlanta v. Green, 67 Ga. 386, in which state the corresponding provision of its constitution is the same as the provision in our constitution of 1879. The court said: "The article does not define whether the damage shall be immediate and direct or consequential. Any damage to property for public use must receive its compensation. It may be, and will no doubt often occur, that the consequential damage may impose a more serious loss upon the owner than the temporary spoliation or invasion of the property." This court followed and adopted the views expressed by the supreme court of Georgia, and cited a large number of cases from other states expressing a like view, as will be seen at page 504 of the opinion in 66 Cal. (page 317, 6 Pac.); and it was there said by the court, in further commenting upon those cases, that: "It was held to be within the constitutional provision, as to property damaged, whether the work was done with care and skill, or not. We are of the opinion that the right assured to the owner by this provision of the constitution is not restricted to the case where he is entitled to recover as for a tort at common law. If he is consequentially damaged by the work done, whether it is done carefully and with skill, or not, he is entitled to compensation for such damage, under this provision. This provision was intended to assure compensation to the owner as well where the damage is directly inflicted, or inflicted by want of care and skill, as where the damages are consequential, and for which damages he had no right of recovery at common law." In that case a judgment for the plaintiff was affirmed. In Conniff v. San Francisco, 67 Cal. 45, 7 Pac. 41, the action was brought to recover damages for injuries to plaintiff's lot caused by grading Montgomery avenue in the mode provided for grading streets in the general statute in regard thereto. There, in grading the street, an embankment was formed 15 feet above plaintiff's property and contiguous lots, by which the water that ran in a water course across the street was permanently stopped in its flow, and backed upon plaintiff's lot, causing damage to it and the building thereon. This court cited Pumpelly v. Canal Co., 13 Wall. 166, and said: "The action in that case was against a private corporation; here, against one that is public and municipal. But we are not aware that there is anything in the nature or essence of the corporation known as the 'City and County of San Francisco,' though public and municipal in its character, or in the statutes relating to it, which justifies it, even in the prosecution of a public work authorized by statute, and for the public benefit, in taking the property of another. The former constitution of California, under which the work was done, as well as the constitution now in force, renders null all legislation to authorize such a proceeding." In Bigelow v. City of Los Angeles, 85 Cal. 614, 24 Pac. 778, the court cited Reardon v. City and County of San Francisco, supra, to the point that, if compensation had not been obtained under the provisions of the Code with respect to eminent domain, it can be recovered in an action.

I think the injuries here complained of are clearly within the constitutional provision above cited, as construed in the cases above noticed; and, if so, I see no reason why the plaintiff's damages may not be recovered from the county, since the statute expressly authorizes counties to sue and be sued. All the California cases cited by counsel for respondent, except Crowell v. Sonoma Co., were for personal injuries; and counsel contends that the same principle applies in cases of injury to property, and that therefore, upon the authority of the cases cited, the county is not liable. It was so said in Crowell v. Sonoma Co., and under the old constitution that was doubtless true; but the change in the constitution, in the respect we have discussed, creates a clear distinction between damages to property and damages for personal injuries. Cases cited by counsel for respondent from other states need not be considered, the question as to the liability of the county being settled by our own decisions. I think the allegations of the complaint as to the injuries resulting from the change in the current of the stream state a cause of action, unless, as held by the court below, the fact, alleged in the complaint, that the bridge was constructed upon private property, and outside of the dedicated highway, exempts the county from liability. By erecting the bridge outside of the right of way, and upon private property, the supervisors did not acquire title to the bridge in themselves, as individuals, or as a board, nor did it become the private property of the plaintiff. The bridge was erected and paid for by the county, for the use of the public, and is used by the public. It would hardly be contended that, because the bridge was built upon the plaintiff's land, he is at liberty to destroy it, or to prevent the public from using it. Nor, upon the other hand, will it be contended that the county may continue perpetually to maintain it for the use of the public without liability for damages to private property resulting from its maintenance. The board of supervisors had ample authority, under the statute, to construct a bridge across Elder creek; but in doing so they inflicted an injury upon the plaintiff, which may or may not have been unavoidable. If the property of the plaintiff was in fact taken for public use without having been condemned and paid for under the provisions of the Code relating to eminent domain, he may recover compensation therefor in an appropriate action, notwithstanding the mode of its taking was unauthorized. Reardon v. City and County of San Francisco, supra; Bigelow v. City of Los Angeles, supra. And if, by such taking or use, other property of the plaintiff is "damaged," it follows that a recovery for such injury may also be had. If the board of supervisors had no authority under any circumstances to erect a bridge, respondent's contention would have a very different basis; but the board is authorized to erect bridges, and necessarily to determine the place of such erection, and if, from necessity, or by mistake, they erect a bridge outside of the limits of the highway, the county cannot, while maintaining the bridge for public use, repudiate the action of the board, and refuse to compensate a person whose property has been taken or damaged. It is said in Lewis, Em. Dom. § 623, that "it has been held in a number of cases that, where land is appropriated to a public use, either with the consent of the owner or otherwise, a common-law action will lie to recover the just compensation to which the owner is entitled." See cases cited in note 1. But the injury caused by the change in the direction of the current is not attributed to the fact that the bridge was erected upon plaintiff's land, but to the walls or abutments confining the water in times of freshets, whereby the direction of the current is changed; and that for injuries thus caused a recovery may be had, see Lewis, Em. Dom. § 66, and cases there cited. The plaintiff does not allege the value of the land taken by the change in the location of the bridge and of the road leading to it, nor seek to recover compensation for the land so taken.

Counsel for respondent calls attention to two specifications of alleged uncertainties (marked "G" and "H"), namely: "It is uncertain as to whether the obstructions alleged to have been built in said Elder creek were built by the defendant, or by the Pacific Bridge Company;" and "it is uncertain as to who built the said buttresses, piers, and walls of stone and other material, in said Elder creek." It is immaterial whether the work of building said obstructions was done by the bridge company, or by some one else. It is alleged, as to the entire work, that it was done under the direction of, and according to plans and specifications furnished by, the board of supervisors, and that the work, when completed, was accepted by them; and this is sufficient. The complaint, in some respects, may be subject to criticism, though it is not obnoxious to a general demurrer; but, as the case is an important one, the plaintiff should be permitted to amend his complaint, if he so desires. The judgment appealed from should be reversed, with leave to the plaintiff to amend his complaint as he may be advised.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with leave to the plaintiff to amend his complaint as he may be advised.

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109 Cal. 504

BUCK v. CITY OF EUREKA. (No. 15,733.)

(Supreme Court of California. Oct. 10, 1895.)

OFFICE AND OFFICER—ESTOPPEL TO QUESTION CREATION—INCREASE OF COMPENSATION—CONTRACTS AGAINST PUBLIC POLICY.

1. One who has accepted an appointment by a city council to an office which the council had power to create, is estopped from showing that the council did not follow the prescribed mode of creating the office.

2. As it is the duty of a city attorney under Pol. Code, § 4391, to "attend to all suits, matters and things in which the city may be legally interested," a contract between a city attorney and the city to defend a certain action against the city is void, as being an attempt to increase an officer's compensation during his term of office. Const. art. 11, § 9.

3. A city attorney who declares on a contract with defendant city for extra services, void as being an attempt to increase his compensation during his term of office, cannot recover under such declaration for that part of his services which were rendered after his term of office expired.

In bank. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by S. M. Buck against the city of Eureka for professional services. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

J. N. Gillett and E. W. Wilson, for appellant. Buck & Cutler, for respondent.

HENSHAW, J. Appeals from the judgment entered upon verdict of jury, and from the order denying a new trial. Plaintiff sued the city of Eureka, and charged in his complaint upon three counts. In the first, he pleaded that one Wing Hing, upon January 21, 1886, brought action against the defendant, city of Eureka, in the circuit court of the Ninth judicial circuit, to recover damages in the sum of $432,800. The city of Eureka, on the 8th day of February, 1886, employed and retained plaintiff to act for it as its attorney in the matter of said action, and agreed to pay him a reasonable compensation for his services, under resolution ordering: "That S. M. Buck, Esq., be, and he is hereby, retained and authorized to act for the city of Eureka as its attorney in defense of said action; and he is also authorized to retain and associate with himself in the defense of said action some able attorney and counselor residing in San Francisco, California, if in his judgment it becomes necessary. And said S. M. Buck, Esq., is instructed to conduct said defense as economically as it can be done consistent with a vigorous and successful defense thereof." Plaintiff performed all duties imposed upon him by his contract. The case in the circuit court was finally dismissed for lack of prosecution. The value of plaintiff's services is alleged to be $13,000, of which the city paid $1,000, and refused to pay more. The second count charges in like manner and for like services as the first, asking compensation, however, for so much of the services as was rendered after August 1, 1886. The value of this is alleged to be $10,000. The second count is apparently framed in anticipation of the defense presented by the city: namely, that at the time of the making of the contract plaintiff was, and continued to be until August 1, 1886, the city attorney of the city of Eureka. The third count charges for services in a different employment, and does not call for consideration or review. Judgment was asked for $7,000, with interest. A verdict in the sum of $4,250, with interest, was rendered; and this verdict, so far as the value of the services is concerned, is supported by the evidence. In defense of the action, the city of Eureka pleaded and sought to prove that, at the time of his employment, plaintiff was its city attorney, and that the contract was therefore void, as increasing his compensation during his term of office. Const. art. 11, § 9. By respondent it is contended (1) that the office of city attorney of the city of Eureka was never created; (2) that he was never the incumbent of such office; and (3) that if the office existed, and he was its incumbent, still he is entitled to compensation under the contract, since it was no part of his duty as such officer to defend the suit in question.

Certain provisions of part 4, tit. 3, of the Political Code were and are a part of the charter of the city of Eureka (St. 1873-74, p. 91). Those pertinent to this consideration are as follows:

"Sec. 4408. The common council has power: (1) To create the office of city clerk, city attorney, assessor, tax collector and such other offices as may be necessary, and prescribe their duties and fix their compensation. * * *"

"Sec. 4369. The common council must during the first year by ordinance fix the term of office of all elective officers and the time when they must be elected, and provide for the appointment of other necessary officers, including city clerk and treasurer, and fix their terms and amount of their bonds."

"Sec. 4386. The mayor has power: (1) To nominate and with the consent of the common council to appoint all nonelective officers of the city provided for by the common council, including city attorney, secretary of the council and city treasurer. * * *"

"Sec. 4374. All city officers, before entering upon their duties, must take the oath of office. The marshal, attorney, clerk, assessor, collector and treasurer must also give a bond with sureties to be approved by the mayor payable to the corporation by its corporate name in such penalty as may be prescribed by ordinance conditioned for the faithful performance of the duties of their office, and a like bond may be required of any officer whose office is created by an ordinance."

"Sec. 4391. The city attorney must attend to all suits, matters and things in which the city may be legally interested; to give his advice or opinion in writing whenever required by the mayor or common council, and do and perform all such things touching his office as by the common council may be required of him."

The defendant produced its records for the purpose of showing that plaintiff was nominated and confirmed as city attorney for the term of two years from July 12, 1884, to July 12, 1886, and that after such nomination he qualified and acted as such city attorney. The court refused to admit the proofs, and defendant then offered in evidence its records to show the existence of the office of the city attorney of the city of Eureka, and the plaintiff's incumbency therein during the time mentioned, which record evidence was stricken out upon motion of plaintiff. The evidence so offered and rejected consisted of various ordinances "fixing official fees and salaries in the city of Eureka," and dating from the year 1876. In each of these the council fixed the salary of the "city attorney." Finally, in 1882, by ordinance, the council declared that the city attorney shall receive a "salary of $25.00 a month." This ordinance was in force during all the time in question. In 1877 the council passed its ordinance "fixing the bonds of city officers," which provided that "the city officers hereinafter named, before entering upon the duties of their respective offices, shall give a bond," etc. "The penalty of such bonds shall be as follows: * * * The city attorney's bond, $1,000.00." This ordinance remained in full force and effect. The minutes of the meeting of the common council for July, 1884, show: "The mayor placed before the council the name of S. M. Buck for the position of city attorney for the ensuing term; whereupon, on motion, the nomination was confirmed." The bonds of the city officers for the terms commencing in 1884 could not be found, but the minutes of the council for August of that year show that "the mayor verbally announced to the council his approval of the bonds of * * * S. M. Buck as city attorney." There was likewise offered in evidence a document from the mayor's office, under the seal of the city, reciting the especial confidence reposed in the integrity and qualifications of S. M. Buck for the office of city attorney, and appointing him with consent of the council as city attorney for the term as established by law, etc., to which was appended the oath of S. M. Buck to support the constitution of the United States and of this state, and faithfully discharge "the duties of the office of city attorney of the city of Eureka." It was likewise shown that plaintiff drew and received from the city the "salary" fixed by ordinance, of $25 per month, during all of this time, up to July 12, 1886.

There can be no question upon this evidence, assuming for the moment the existence of the office, but that plaintiff was not only de facto city attorney, but that he was the regularly appointed, qualified, and acting city attorney,—a de jure officer,—charged with all the duties and entitled to all the emoluments of the office. There can be no better proof of the acceptance and holding of an office than the qualification of the officer, and his drawing of the salary. Here, the plaintiff was appointed as city attorney, filed his bond as city attorney, took the oath of office as city attorney, and drew the fixed salary of city attorney, all duly and regularly, as required by law and the ordinance of the city.

Nor can plaintiff be heard to say (still assuming the existence of the office) that his contract with the city, or his understanding with the council, imposed upon him other or different or lesser duties than those which by law he was obliged to perform. He cannot, for example, be heard to say, as here he undertakes to do, in the face of the ordinance fixing his compensation, that his understanding with the council was that they were to give him $25 a month as a "retainer,"—a "stipend,"—and were to pay him "extra for all important duties, particularly business in the superior court or business in the higher courts." It was not within the power of the plaintiff or of the council to modify, by convention, the duties which by law were made to pertain to the office of city attorney. Pol. Code, § 4391. And the plaintiff, after having qualified, filed his bond, and taken his oath to perform the duties of the office, and drawn the salary pertaining thereto, will not be permitted to assert that the duties he swore to perform were not those the performance of which the law made obligatory upon him.

The contention that he was not city attorney cannot, then, be based upon any defect in the machinery of appointment, nor upon plaintiff's refusal, with proper formalities, to accept the appointment. It is claimed to rest upon the fact that the council, notwithstanding its repeated recognition of the existence of the office, never in fact created it, and that, therefore, it never existed. And the argument is that the council had power to create the office (Pol. Code, § 4408); that they were required, if they created it, to do so by ordinance (Id. § 4369); that the mode is the measure of their power; and that no ordinance was produced wherein and whereby the common council of the city of Eureka did ordain that the office of city attorney of the city of Eureka is hereby created.

It is a general rule, founded upon the dictates of public policy, that the acts of a de facto officer are valid, and that those who deal with such an officer are protected. The public is not required to know the terms and tenure upon which one openly holding and claiming the right to hold a public office maintains his position; nor is any person who has dealt with such an officer to suffer loss if the tenure should prove illegal. So, likewise, it is the general rule, upon grounds of plain justice and public policy, that a de facto officer is forever estopped in civil or criminal actions from denying that he holds the office, and from escaping any of the responsibilities which attach to his incumbency. But the further rule is that the law as to de facto officers applies only where there is a de jure office, the idea of a de facto officer being necessarily founded upon the conception of a de jure office. A de jure office is one having a legal existence, or, rather, one having an existence recognized by law. We are not here further concerned with the law concerning de facto offices, since, as has been said, this office, if it existed, was filled by a de jure incumbent. While it is certainly impossible to conceive of an officer either de facto or de jure filling or attempting to fill a nonexisting office, there is a marked and well-recognized distinction between such nonexisting offices and those which, while having an irregular or merely potential, or in some instances even an illegal, existence, yet do exist, and are recognized by the law. Of offices having an illegal existence which are, nevertheless, recognized, the government of a state in rebellion and of a municipality acting as such without legal authority are conspicuous examples. The government of a state in rebellion and all offices thereunder are absolutely illegal; yet, upon strong and plain grounds of public policy, the government and offices are recognized by law, and the incumbents are treated as de facto officers. "In such a case the acts of a de facto executive, a de facto judiciary, and of a de facto legislature, must be recognized as valid. But this is required by political necessity." Hildreth v. McIntyre, 1 J. J. Marsh. 207. So a municipal corporation acting under color of the law may have no legal existence, and consequently no legal municipal offices; yet such a corporation has still an existence recognized by law, and, upon plain grounds of public policy, the question of its legal existence should be raised only by the state itself upon quo warranto. Cooley, Const. Lim. 254; Town of Geneva v. Cole, 61 Ill. 397; St. Louis v. Shields, 62 Mo. 247; State v. Carr, 5 N. H. 367.

In some states, indeed, it is the established rule that officers filling offices created by unconstitutional laws are, nevertheless, de facto officers, until, under direct proceedings, the act has been declared unconstitutional. Thus, in Burt v. Railroad Co., 31 Minn. 472, 18 N. W. 285, 289, it was held that the municipal court of Mankato was a de facto court, and that there can be a de facto office under an unconstitutional act creating it until the act is declared void. In the case of Trumbo v. People, 75 Ill. 561, a school district had been illegally established. The supreme court of Illinois, reviewing the case in a later opinion (Leach v. People, 122 Ill. 420, 12 N. E. 726), say: "So far as that alleged district was concerned, there was no such legal district, and there was no de jure office of school director of that alleged district." Yet, upon a proceeding to collect a tax, the tax was sustained, it being held that the school directors were officers de facto, and that in collateral proceedings the legality of the formation of the district could not be inquired into. And in Com. v. McCombs, 56 Pa. St. 436, it is said: "An act of the assembly, even if it be unconstitutional, is sufficient to give color of authority to the person acting under it." These decisions are in obvious conflict with the authority of the great leading cases of State v. Carroll, 38 Conn. 449, and Norton v. Shelby Co., 118 U. S. 425, 6 Sup. Ct. 1121, in the latter of which Field, J., explains that, while there are many cases deciding that a person holding an office under an unconstitutional law is a de facto officer, in every one it will be found that there was a legal office, and that the unconstitutional law went only to the mode or manner of filling it. And they are likewise in conflict with the rule in this state, declared in People v. Toal, 85 Cal. 333, 24 Pac. 603. They are not here cited in commendation or approval, but as instructive examples of the lengths to which those courts have felt compelled to go in carrying out what they conceived to be the plain mandate of public policy. When, however, we come to consider the doctrine as applied to offices having an irregular or potential existence (as distinguished from a nonexisting office, or one void in its creation), the cases are numerous and uniform in treating the incumbents of such offices as de facto officers.

In Gibb v. Washington, 1 McAll. 430, Fed. Cas. No. 5,380, dealing with the question of the creation of the office of appraiser, the court say: "If such an office has been even colorably created, then any irregularity which does not render the creation of the office void cannot be availed of." In Re Ah Lee, 6 Sawy. 410, 5 Fed. 899, the constitution of Oregon provided that, when the population of the state reached 200,000, the legislature should district the state into designated circuits, and provided for the election of judges to the circuit courts therein. The legislature passed the act before the state attained the requisite population, and before election the governor, without authority, appointed the judge whose act was under review. The court held that, admitting the act to be unconstitutional and the appointment of the governor to be invalid, still the judge was a judge de facto, since the office in effect was created by the constitution. In Carleton v. People, 10 Mich. 250, the county officers were elected before the law creating the offices went into effect. They were held to be de facto officers. Though there were no legal offices in existence at the time, still the offices were created and had a potential existence. And the court, in distinguishing between such offices and nonexistent offices, aptly says: "Where the law negatives the idea that there can be a legal incumbent, any one assuming to act assumes what any one is bound to know is not a legal office." In Yorty v. Paine, 62 Wis. 154, 22 N. W. 137, the legislative act creating the town of Pine River provided that the electors should meet upon the first Tuesday of the following April (April 4th), and elect town officers, but the act itself did not become a law until four days afterwards,—April 8th. The potential existence of the town was recognized as sufficient for holding the election, and the officers were declared to be de facto, though elected without authority of law to offices then having no more than a potential existence. In Fowler v. Bebee, 9 Mass. 231, the legislature had created a new county and the offices thereof. The governor appointed officers before the law went into effect. It was held that their acts were binding as de facto officers, though the appointments themselves were afterwards declared void by the same court when the question was presented upon direct attack. Com. v. Fowler, 10 Mass. 291. Here, too, therefore, the potential existence of the office was recognized. In Leach v. People, 122 Ill. 420, 12 N. E. 726, an unconstitutional law regulating township organizations provided for the number of members, mode of election, etc., of the board of supervisors, and under this law a board was selected whose acts were under consideration. It was held that, notwithstanding the invalidity of the law, there was still "such a legal official body known to the law as the 'Board of Supervisors of Wayne County'"; and the acting board, though in number and in mode of selection illegal, was upheld as a de facto body. The case of Smith v. Lynch, 29 Ohio St. 261, is nearly a parallel case with the one at bar. The legislature of Ohio authorized villages and towns to establish boards of health and appoint members. The village of West Cleveland, by a void ordinance, attempted to do this. The members appointed qualified and entered upon the discharge of their duties, and were accepted and regarded by the public as such members. The opinion of the court, delivered by Welch, C. J., is as follows: "The questions argued by counsel are: (1) Had the superior court jurisdiction? (2) Are the requirements of the statute as to the manner of passing the ordinance mandatory, or are they merely directory? (3) If these requirements are mandatory, are the persons so acting to be regarded as a board of health de facto? We are satisfied that the last named of these questions must be answered in the affirmative. It is unnecessary, therefore, to consider the first and second questions. In other words, we think that, under the circumstances, the board is to be regarded as a board de facto. Whether it was a board de jure, and whether the superior court had jurisdiction of the case, became, therefore, immaterial questions. It is claimed by counsel for the plaintiff that this is not a case where an office has been filled, and its duties performed, by parties not legally appointed or qualified, but a case where there was no office to be filled. We do not so understand the law. The statute (66 Ohio Laws, p. 200) creates the office. It authorizes the council to 'establish' the board, and to fill it by appointment. True, until the council act in the premises, it is a mere potentiality in their hands; yet it is none the less an office, known to the law. Where the council assumes to establish the board under the law, and to appoint its members, there is no good reason why an irregularity or illegality in the act of establishing the office, any more than an irregularity or illegality in the appointment of the officers, should be held as rendering the acts of the officers void, and themselves mere trespassers. The reasons —the considerations of public policy—which exist in one case exist equally in the other. It is enough that the office is one provided for by law, and that the parties have the color of appointment, assumed to be and act as such officers, and that they are accepted and acknowledged by the public as such, to the exclusion of all others. Such was the case here. There was both the color and the fact of office."

The office under consideration was given a potential existence by the acts of the legislature in the sections of the Code above quoted. The plaintiff, having accepted the appointment to it, and received the emoluments of it, is estopped from endeavoring to show to his own advantage that the council did not follow a prescribed mode in perfecting that potential existence. It was therefore error for the trial court to strike out the admitted evidence. It does not seem to be disputed that, if plaintiff's services in the case of Wing Hing v. City of Eureka were such as under his office he was in duty bound to perform, his contract with the council would be void as an attempt to increase his compensation; and, indeed, no question can arise upon this point. It is definitively settled by the language of the constitution, in the first place (Const. art. 11, § 9); and in the second place, even in the absence of such a provision, such a contract would be declared void upon grounds of public policy. "It is a well-settled rule that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary be a very inadequate remuneration for the services. * * * Whenever he considers the compensation inadequate, he is at liberty to resign. The rule is of importance to the public. To allow changes and additions in the duties properly belonging or which may be attached to an office to lay the foundation for extra compensation would introduce intolerable mischief. The rule, too, should be strictly enforced." Dill. Mun. Corp. (4th Ed.) § 233; Mechem, Pub. Off. §§ 324-376.

The contention here is, however, that these services were not among those whose performance is enjoined on the city attorney, and herein plaintiff relies upon the case of Herrington v. Santa Clara Co., 44 Cal. 496. As the law then stood, the district attorney was entitled to receive as compensation 10 per cent. of all money recovered by him for the county in any action. The county supervisors, ignoring the district attorney, authorized other attorneys to bring suit without the county for the recovery of a large sum of money. Recovery was had in the action, and the district attorney sued to recover his percentage. The law made it the duty of the district attorney to prosecute all actions for the recovery of debts, etc., and to defend all suits brought against his county. Pol. Code, § 4256. The district attorney was not denying that it was his duty to prosecute this suit, but, to the contrary, insisted that it was his duty. The defendant county never claimed that it was not the district attorney's duty to prosecute the suit, but insisted that the duty was not exclusively imposed upon and the right not exclusively vested in him, but that the supervisors could, if they saw fit, engage other counsel to perform the service, as in many cases special counsel are employed. The language of the court in its opinion, therefore, while not obiter, was not addressed to any contention raised by the parties. The decision of the court was by a bare majority; Chief Justice Wallace being disqualified, and Justice Rhodes expressing no opinion. It was based upon two grounds; the second, which is argued at length, holding that, as the district attorney had not collected the money, he was not entitled to his commission; and the first, which is not argued, being a declaration to the effect that it was "not a duty enjoined upon the district attorney by law to prosecute or defend civil actions in which the county is interested which are pending in any other county than his own." This declaration is, however, supported by no reasoning, by no analysis of the statute, and by no citation of authority; and it would be difficult so to support it. Says Dillon: "The statutes of the legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may and what may not be considered strictly official; and, if these distinctions are much favored by courts of justice, it may lead to great abuse." Dill. Mun. Corp. (4th Ed.) § 233.

When the law of the state says that the district attorney shall prosecute and defend all suits, and the city attorney shall attend to "all suits, matters and things in which the city may be legally interested" it is a most forced and unwarranted construction to hold that in the one case it means only such suits as are commenced and finally determined in the county courts, and in the other only such as are in like manner commenced and determined in the municipal courts. If the legislature meant that, it could and would have said so. But when it says "all suits, matters and things," the language will bear no other construction than that which is patent on its face. No rules of interpretation are necessary to be considered, for no need or room for interpretation exists. Thus, the court, in Ryce v. City of Osage (Iowa) 55 N. W. 532, said the law made it the duty of the city attorney "to act as attorney for the city in any suit or action brought by or against the city, and generally to attend to the interests of the city as its attorney." There, as here, plaintiff claimed extra compensation for services rendered under contract with the council for defending an action against the city in the district and supreme court, and there, as here, urged that it was no part of his official duty to defend the suit. Says the court: "It seems to us that a mere reading of that section of the ordinance prescribing the duties of the city attorney is sufficient to show that under it he was required to act for the city in any case brought by or against it. * * * That the services rendered by plaintiff, and for which he seeks now to recover, were included within his duties as city attorney, is too plain to admit of argument." In Lancaster Co. v. Fulton, 128 Pa. St. 48, 18 Atl. 384, construing a similar statute, say the court: "The services for which the contract in question undertakes to provide are clearly within the sphere of the duties of the solicitor of Lancaster county." Russell v. Hallett, 23 Kan. 276, is not in conflict with the authorities upon this question. In that case the county attorney sued his county for compensation for services demanded of him without the duties of his office, as the court decided. He had been compelled to assist in a trial in a county other than his own. The law expressly limited his duty to attending before magistrates and judges in his county. Gen. St. Kan. 1868, p. 284, § 137.

But it is unnecessary to multiply quotations upon this plain proposition. We think it must be apparent that the construction given to the statute in Herrington v. Santa Clara Co., supra, cannot be supported, and should no longer be maintained; and we believe that the evil results to the public service which must arise under that construction justify and demand a declaration from this court that it be no longer considered as authority. It is of the last importance that any and every public officer entering upon the discharge of his duties should know once and for all that, be the duties onerous or be they easy, the compensation for them must be that fixed by law, and that only. If they become too burdensome, the law does not forbid the officer's resignation; but it does emphatically say that he shall not under any circumstances, by use of the power of his office, by contract, express or implied, fair or unfair, or by aid even of legislative enactment, obtain increased compensation for their performance. "The successful effort to obtain office is not unfrequently followed by efforts to increase its emoluments; while the incessant changes which the progressive spirit of the times is introducing effects, almost every year, changes in the character and addition to the amount of duty in almost every official station; and to allow the changes and additions to lay the foundation of claims for extra services would soon introduce intolerable mischief." Evans v. City of Trenton, 24 N. J. Law, 764.

The services here performed by the plaintiff being such as it was his duty to perform as the city attorney of the city of Eureka, the contract was an attempt to increase his compensation, and is in violation of the constitution, against public policy, and therefore void. "A promise to pay them [officers] extra compensation is absolutely void, under the statute of Ohio. Such promise could not be enforced at common law, being against sound policy and quasi extortion. English judges have declared that such are novel in courts of justice, and that actions founded on such promises are scandalous and shameful (2 Burrows, 934); and in the court of errors of New York they meet with no more favor (Hatch v. Mann, 15 Wend. 46)." Gillmore v. Lewis, 12 Ohio St. 281; Vandercook v. Williams, 106 Ind. 345, 1 N. E. 619, and 8 N. E. 113; City of Decatur v. Vermillion, 77 Ill. 315; Hunter v. Nolf, 71 Pa. St. 282.

Nor can plaintiff recover under the contract, as by his second count he seeks to do, for such part of the services as was rendered after his term of office had expired. This is not the case of a city attorney carrying on litigation, after his term of office had expired, with the knowledge and consent of the authorities, in which case an implied contract and promise to pay might arise after his tenure had terminated. Here plaintiff declares on and seeks to recover under a contract against public policy and wholly void. Such a contract will not support any action for recovery. As is said by the court in Lancaster Co. v. Fulton, 128 Pa. St. 48, 18 Atl. 384: "There is no pretense that any new agreement was entered into, or the terms of the original in any manner changed, after the expiration of the term of office. Neither the subject of a new contract nor the modification of the original ever appears to have been considered by the parties. The services of plaintiff below were, no doubt, efficient and valuable; but, as far as they were rendered during his term of office, his salary is all the compensation he can claim. As to services rendered after the expiration of his term of office, under and in pursuance of the original illegal and void contract, he cannot, under the pleadings and evidence in this case, recover." A void contract cannot form the basis of a judicial proceeding. Lumber Co. v. Hayes, 76 Cal. 387, 18 Pac. 391.

There are considerations in plaintiff's case which appeal with force to a court. In the first place, the services rendered, as found by judge and jury, were of great value to defendant. In the second place, they were rendered under an early interpretation given to the statute, which justified plaintiff in suing upon his contract. In now declaring what we believe to be the only tenable construction of the law relative to the duties of the office, it has followed as a necessary consequence that the contract, void as against public policy, will not support a cause of action. Plaintiff, however, if the facts will warrant it, should recover, not upon the original or void contract, but upon an implied one for services rendered after the expiration of his term of office. The judgment and order are reversed, with directions to the trial court to permit plaintiff, if he shall be so advised, to amend his complaint, or file an amended complaint, seeking compensation upon quantum meruit for services rendered after the expiration of his term of office.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.; TEMPLE, J.

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109 Cal. 468

JOHNSON et al. v. CITY OF SAN DIEGO.
(No. 19,483.)

(Supreme Court of California. Oct. 9, 1895.)

MUNICIPAL CORPORATIONS—SEGREGATED TERRITORY—LIABILITY ON CITY BONDS.

1. Under St. 1889, p. 356, authorizing the segregation of territory from cities, but providing that such territory should not be relieved in any manner whatsoever from any liability contracted by the city prior to such exclusion, the territory segregated from the city of San Diego was liable for the payment of its proportionate part of the bonds of said city after separation as well as before, though no part of the money realized from said bonds was expended on said territory.

2. But, said city having acquired no contract rights under said act, the legislature had power to subsequently enact (Laws 1893, p. 536) that such segregated territory should be relieved from further payment of any part of said bonds.

In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by P. L. Johnson and others against the city of San Diego to determine what proportion, if any, of the bonded indebtedness of San Diego was properly chargeable on certain territory excluded from that city. From the judgment rendered, defendant appeals. Affirmed.

William H. Fuller and Clarence L. Barber, for appellant. S. M. Shortridge and Gibson & Titus, for respondents.

HENSHAW, J. Appeals from the judgment and from the order denying a new trial. Under an act of the legislature approved March 19, 1889 (St. 1889, p. 356), a portion of the territory formerly embraced within the corporate limits of the city of San Diego was excluded therefrom. The act referred to was in its nature permissive. It provided for the calling of an election upon petition, at which election the qualified electors within the territory proposed to be segregated should vote separately from the other voters of the municipal corporation, and the votes cast in such territory should be canvassed separately from the votes cast by the other electors of the municipality. If a majority of the votes cast in the territory proposed to be excluded and a majority of the votes cast in the municipality proper should both be for the segregation, then, after certain formalities had been complied with, the territory should cease to be a part of the municipal corporation, "provided [so runs the law] that nothing contained in this act shall be held to relieve in any manner whatsoever any part of such territory from any liability for any debt contracted by such municipal corporation prior to such exclusion: and provided further that such municipal corporation is hereby authorized to levy and collect from any territory so excluded from time to time, such sums of money as shall be found due from it on account of its just proportion of liability for any payment on the principal or interest of such debts; such assessment and collection shall be made in the same manner and at the same time that such assessment and collection is levied and made upon the property of such municipal corporation for any payment on account of such debts: and provided further that any such territory so excluded from any municipal corporation may at any time tender to the legislative body of such municipal corporation the amount for which such teritory is liable on account of such debts, and after such tender is made such authority as is herein given municipal corporations to levy and assess taxes on such excluded territory shall cease." Under this law, the territory known as the "Coronado Beach," which contains the land of these plaintiffs, was excluded from the corporate control of the city of San Diego. At the time of this exclusion, the city of San Diego had a bonded indebtedness of $484,000; and, after this exclusion, the city continued to assess and levy taxes upon the detached territory to meet the requirements of this bonded indebtedness, which taxes these plaintiffs duly paid. In 1893 the legislature passed an act entitled "An act providing for the adjustment, settlement and payment of any indebtedness existing against any city or municipal corporation at the time of exclusion of territory therefrom and the division of property thereof" (St. 1893, p. 536). Plaintiffs availed themselves of the provision of this act to have the court determine what proportion, if any, of the bonded indebtedness of San Diego, was properly chargeable against the excluded territory. The demurrer of the defendant city to their petition was overruled; and the court, after hearing evidence, found the existence of the bonded indebtedness; that all of the moneys received by the city and evidenced by this indebtedness had been expended for a sewer system, for the purchase of school sites and the erection of schoolhouses, for refunding a pre-existing debt of the city, and for clearing its titles to certain real estate, and for buying certain rights of way; and that no portion of the money had been expended upon or within the excluded territory. The value of the property belonging to the city at the time of the segregation was found to be $600,000, all of which remained within its boundaries and under its control after the segregation. It was further found that the city of San Diego had never made any improvements in the excluded territory, and had never owned any property in it. The ratio of the value of the excluded territory to that of the city immediately preceding the exclusion was as 1 to 14. Under these findings, and in strict accord with the dictates of the statute, the court adjudged that there was nothing due or to become due from the excluded territory to the city.

The chief contention of the defendant, raised upon demurrer, pressed in its motion for a nonsuit, and urged against the judgment, may be thus stated: The property owners of the city and the property owners of the excluded territory, when, in accordance with the permissive act of the legislature (St. 1889, p. 356), they elected to segregate Coronado Beach, did so under a contract expressed in the act itself, by which the property owners of the excluded territory were allowed to remove their land from the jurisdiction of the city, with the understanding that they should continue to pay their pro rata share of the municipal debts existing at the time of the exclusion; that the rights of the city vested under this contract cannot be destroyed or impaired by subsequent legislation; and that, therefore, to the parties to this controversy the statute of 1893 has no applicability.

This contention is first met by the respondents with the declaration that the act of 1889 did not impose or mean to impose a pro rata liability upon the excluded territory, but only a liability for a just proportion of the debt, which proportion was a subject of future ascertainment or determination; and much nice argument is advanced in its support. But the language of the proviso, that "nothing contained in the act shall be held to relieve in any manner whatsoever any part of such territory from any liability for any debt contracted by such municipal corporation prior to such exclusion," would seem to be a comprehensive pronunciation that the segregated territory should, after exclusion, be held by the same liabilities as bound it before; and, as before its exclusion it was liable for its pro rata share of these debts, it must be that after exclusion it remained subject to the same liabilities. We think, therefore, that, by the only just and reasonable interpretation of which the act in question is susceptible, the legislature, in permitting the division, exercised its undoubted power to adjust the burden of the existing corporate debt, and decreed that the excluded territory should continue to bear its former proportion of that burden.

The question that is left for consideration is that of the power of the legislature to change and readjust the burden of such an indebtedness after having, in the act of separation, declared in what manner it should be borne. Municipal corporations, in their public and political aspect, are not only creatures of the state, but are parts of the machinery by which the state conducts its governmental affairs. Except, therefore, as restrained by the constitution, the legislature may increase or diminish the powers of such a corporation,—may enlarge or restrict its territorial jurisdiction, or may destroy its corporate existence entirely. Says Cooley: "Restraints on the legislative power of control must be found in the constitution of the state, or they must rest alone in the legislative discretion. If the legislative action in these cases operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right, through the ballot box, all these wrongs." Cooley, Const. Lim. (6th Ed.) p. 229. "A city," says Mr. Justice Field, in New Orleans v. Clark, 95 U. S. 644, "is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature." This right of legislative control, arising from the very nature of the creation of such corporations, is established under the well-settled doctrine that such corporations have no vested rights in powers conferred upon them for civil, political, or administrative purposes; or, as Dillon states it: "Legislative acts respecting the political and governmental powers of municipal corporations not being in the nature of contracts, the provisions thereof may be changed at pleasure where the constitutional rights of creditors and others are not invaded." Dill. Mun. Corp. (4th Ed.) § 63.

The act of the legislature in relieving Coronado Beach from the corporate control of San Diego and in adjusting the burden of the city's debt, was undoubtedly the exercise of a proper power directed to the political and governmental affairs of the municipality. That the legislature, by the terms of the act segregating the territory, had the right to dispose of the common property, and provide the mode and manner of the payment of the common debt, imposing its burden in such proportions as it saw fit, is a proposition undisputed and indisputable. It is equally well-settled law that, when the act of segregation is silent as to the common property, and common debts, the old corporation retains all the property within its new boundaries, and is charged with the payment of all of the debts. Upon these two propositions the cases are both numerous and harmonious. People v. Alameda Co., 26 Cal. 641; Hughes v. Ewing, 93 Cal. 414, 28 Pac. 1067; Los Angeles Co. v. Orange Co., 97 Cal. 329, 32 Pac. 316; Town of Depere v. Town of Bellevue, 31 Wis. 120; Laramie Co. v. Albany Co., 92 U. S. 307; Lycoming v. Union, 15 Pa. St. 166; Mount Pleasant v. Beckwith, 100 U. S. 514; Layton v. City of New Orleans, 12 La. Ann. 515; Beloit v. Morgan, 7 Wall. 619. There is authority, however, holding that, when the legislature has spoken in the original act, rights vest under it which may not be impaired; and it is upon these cases that appellants rely. Thus, in Bowdoinham v. Richmond, 6 Greenl. 93, the supreme court of Maine decided in 1829 that as the act of the legislature dividing the town of Bowdoinham, and incorporating a part of it into a new town, by the name of Richmond, enacted that the latter should be held to pay its proportion towards the support of all paupers then on expense in Bowdoinham, a later act exonerating the new town from this liability was void. The court held that by the former act a vested right of action arose in favor of the old town against the new, and that the later act, in destroying this right, impaired the obligation of the contract on the part of Richmond created by the first act. Just how the court reached the conclusion that a contract was created by the first act is not plain, but it seems to have been based somewhat upon the conviction that the assent of the old town was necessary to the segregation. The opinion, however, looks for authority to the case of Hampshire Co. v. Franklin Co. (decided in 1819) 16 Mass. 75. In that case the legislature had created the county of Franklin out of territory formerly a part of the county of Hampshire. The act was silent as to the disposition of the public property and the public debt. By an act passed two years later, the legislature provided in effect that if, at the time of the segregation, there were funds belonging to the county of Hampshire in excess of its debts, the new county should be entitled to such proportion of those funds as the assessed value of the property of the new county bore to the assessed value of the property of the old. The supreme court decided, in accordance with the undoubted rule, that as the first act was silent upon the subject, all of the common property within its limits belonged to the old county, which was likewise charged with all existing debts. It further held that rights vested under this act, and that the later act providing for an apportionment violated these rights in attempting to give the property of Hampshire to Franklin county; in other words, that the later act created a debt from Hampshire to Franklin county which before had not existed. It is to be noticed that in this case the original act was silent as to common property and debts, but as, in such case, the law steps in and makes disposition of them, the silence was deemed equivalent to an affirmative declaration of the legislature making dispositions which could not afterwards be modified.

But, distinguished as are the courts which have announced this doctrine, their views have not been followed, and the decisions themselves have been elsewhere criticised and rejected, until it may be safely said that it is the general rule that, where the original act does not make disposition of the common property and debts, the legislature may at any subsequent time, by later act, apportion them in such manner as seems to be just and equitable. Under the decisions adopting this rule, the theory of vested rights and contractual relations is rejected as being a false quantity in the dealings of the sovereign state with its governmental agents and mandatories; and while it is not denied that the state may make a contract with a municipal corporation, or may permit municipal corporations to enter into binding contracts with each other, which contracts it cannot impair, these contracts must be in their nature private, although the public may derive a common benefit from them, and the contracting cities are as to them measured by the same rules and entitled to the same protection as would a private corporation. The subject of such a contract, however, can never be a matter of municipal polity or of civil or political power, for the legislature itself cannot surrender its supremacy as to these things, and thus abandon its prerogatives, and strip itself of its inherent and inalienable right of control.

Of the cases so holding, either directly or impliedly, a few may profitably be mentioned: In County of Richland v. County of Lawrence, 12 Ill. 1, the facts were that the former county had been carved out of the territory of the latter by an act making no disposition of the county property. The state had given to the county of Lawrence a large sum of money, which it held at the time of segregation. By a later act the legislature declared that the new county should be entitled to receive from the old a certain proportion of this fund, which sum the old county refused to pay under the claim of vested right and ownership. The supreme court upheld the act, declaring that there was no contract between the state and the old county, which was merely the state's agent. The case of Hampshire Co. v. Franklin Co., supra, is unfavorably reviewed. In Perry Co. v. Conway Co., 52 Ark. 430, 12 S.W. 877, the original act, detaching territory, made no apportionment of the debt. A later act, which did so, was attacked as unconstitutional. The supreme court there said: "The earlier doctrine (still followed by some courts) was that the act detaching the territory must apportion the debt, and that it could not be subsequently taken from the old and imposed upon the new county. Hampshire Co. v. Franklin Co., 16 Mass. 75; Bowdoinham v. Richmond, 6 Greenl. 93. The better doctrine is that, the power of the legislature to impose the debt of the one county upon another depending upon the existence of a moral obligation from the new county, or the county receiving new territory, to pay part of the old debt, the legislature may so ordain whenever it finds the moral obligation to exist." In Dunmore's Appeal, 52 Pa. St. 374, four boroughs were erected in a township which was heavily in debt. By act afterwards passed, the burden of the debt was to be apportioned by commissioner between the boroughs and the township. The supreme court of Pennsylvania upheld the act. In Layton v. City of New Orleans, 12 La. Ann. 515, the act of the legislature consolidating several municipalities into one government, known as the "City of New Orleans," provided that the debts of each should be liquidated by taxation upon its own inhabitants. Afterwards, by another act, it was provided that the debts should be paid by taxation uniformly upon all the property of the new city. The court held that the earlier act was not a contract, and no rights vested under it; and that, as in these matters the legislature is supreme, it could change its policy and readjust these debts. In Mayor, etc., of Baltimore v. State, 15 Md. 376, the court say: "The doctrine that there is a fundamental principle of right and justice inherent in the nature and spirit of the social compact that rises above and restrains the power of legislation cannot be applied to the legislature when exercising its sovereignty over public charters granted for the purpose of government." Says Dill. Mun. Corp. (4th Ed.) § 189: "But upon the division of the old corporation, and the creation of a new corporation out of a part of its inhabitants and territory, or upon the annexation of part of another corporation, the legislature may provide for an equitable apportionment or division of the property, and impose upon the new corporation, or upon the people and territory thus disannexed, the obligation to pay an equitable proportion of the corporate debts. The charters and constituent acts of public and municipal corporations are not, as we have before seen, contracts; and they may be changed at the pleasure of the legislature, subject only to the restraints of special constitutional provisions, if any there be. And it is an ordinary exercise of the legislative dominion over such corporations to provide for their enlargement or division, and, incidental to this, to apportion their property, and direct the manner in which their debts or liabilities shall be met, and by whom. The opinion has been expressed that the partition of the property must be made at the time of the division of or change in the corporation, since, otherwise, the old corporation becomes, under the rule just above stated, the sole owner of the property, and hence cannot be deprived of it by a subsequent act of the legislature. But, in the absence of special constitutional limitations upon the legislature, this view cannot, perhaps be maintained, as it is inconsistent with the necessary supremacy of the legislature over all its corporate and unincorporate bodies, divisions and parts, and with several well-considered adjudications." To the same general effect are the cases of Laramie Co. v. Albany Co., 92 U. S. 307; Mount Pleasant v. Beckwith, 100 U. S. 514; Scituate v. Weymouth, 108 Mass. 128; Willimantic School Soc. v. School Soc. in Windham, 14 Conn. 457; Town of Guilford v. Supervisors of Chenango Co., 13 N. Y. 143.

In this state the power of the legislature to make such subsequent adjustments was early declared in People v. Alameda Co., 26 Cal. 641. Alameda county was created out of the territory of Contra Costa county in 1853. At the time of the separation, Contra Costa county owed for a bridge which had been constructed upon the territory set apart for Alameda county. The original act made no provision for the payment of this indebtedness, which thus remained a charge against the old county. By two separate later acts, the legislature provided for the apportionment of the debt, putting a part of the burden upon Alameda county. These acts were upheld as a proper exercise of legislative power. And, indeed, it is not easy to see how the opposite view can be maintained. Since the legislative power, within constitutional limitations, is supreme in the matter, since, in the first apportionment, the people affected are entitled to no voice (except through their representatives), and since the act of the legislature is not in the nature of a contract, it cannot logically be held that the power has been exhausted by its first exercise. The right still remains to make such future adjustments as the equities may suggest. Nor, in the operation of the act in question upon the city of San Diego, can we perceive any hardship. It had at the time of the segregation $600,000, acquired while Coronado Beach was a part of its territory, and partially acquired, doubtless, by taxation upon this land. All of this property it retains. All of the moneys evidenced by the bonded indebtedness were expended within its present territorial limits, and no dollar of it went to improve the excluded territory. Having all of the common property and all of the fruits of the common debt, it is certainly not onerous or oppressive that it should be asked to pay for what has been expended for its exclusive benefit. In a certain sense, it is true that Coronado Beach was also benefited by these expenditures. In the same sense, San Mateo county is benefited by the public improvements of the city and county of San Francisco; but it has never been asserted that for such benefits a sister county should be called upon to pay. The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; HARRISON, J.; TEMPLE, J.; VAN FLEET, J.; GAROUTTE, J.

109 Cal. 633

PIONEER LAND CO. v. MADDUX et ux.

(No. 18,361.)[1]

(Supreme Court of California. Nov. 6, 1895.)

SERVICE OF PROCESS—SUFFICIENCY—LAND CERTIFICATES—PAYMENT OF PURCHASE PRICE—JUDGMENT—VALIDITY—COLLATERAL ATTACK.

1. Act April 9, 1861 (St. 1861, p. 140), authorizing the forfeiture of certificates of purchase of lands sold by the state for nonpayment of the price, provides (in section 2) that, if the name of the holder of the certificate is unknown, service of summons may be "made by posting one copy for three weeks at the courthouse door, * * * and two copies in public places in the township." *Held*, that a return that the summons was served on a person unknown by posting one "copy on the courthouse," and a copy in two public places in the township, not reciting the length of time they were so posted, was insufficient.

2. Where the sum due on the certificate of purchase of land from the state was paid before entry of judgment, under Act April 9, 1861, forfeiting such certificate for nonpayment of the price, the state holds the land in trust for the vendee, and it cannot convey to another.

3. The affirmance on appeal of an order denying a motion to set aside a judgment, on the ground that the judgment could not be reviewed by motion after a long lapse of time, does not give any validity to said judgment, where it appears on its face to be void for want of jurisdiction over the person of defendant, and the invalidity of said judgment may be shown collaterally.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action to quiet title by the Pioneer Land Company against R. A. Maddux and wife. Defendants had judgment, and plaintiff appeals. Reversed.

Daggett & Adams, for appellant. Lamberson & Middlecoff, for respondents.

VANCLIEF, C. Action to quiet plaintiff's alleged title to 40 acres of swamp land situate in the county of Tulare. In 1856, Peter Goodhue applied to purchase the land in question from the state on a credit of five years, pursuant to section 5 of "An act to provide for the sale of swamp and overflowed lands belonging to this state," approved April 28, 1855 (St. 1855, p. 189); and thereupon such proceedings were regularly taken as entitled him to a certificate of purchase under section 8 of said act, and such certificate was issued to him on May 30, 1856. Goodhue inclosed the land, and resided thereon until October 28, 1861, when he conveyed the same by deed, and delivered possession thereof to Marshall D. Young, who thence resided thereon, and maintained the inclosure until February 1, 1864, when he conveyed the same by deed, and delivered possession thereof to Samuel C. Young, who thence resided thereon, and maintained the inclosure until May 10, 1870, when he by deed conveyed the same to Daniel Murphy, who then entered into possession of the land, kept it inclosed, and used it for grazing purposes until October, 1882, when he died testate. Thereafter such proceedings were regularly taken in the matter of the estate of Daniel Murphy that the land in question was distributed by the superior court, according to the will, to Daniel M. Murphy and Diana Murphy Hill. On February 9, 1885, Daniel M. Murphy conveyed by deed all his interest in the land to Diana Murphy Hill, who on June 2, 1887, conveyed the whole thereof to William Thomas, who on June 3, 1887, conveyed the same to plaintiff. Daniel Murphy during his lifetime, and his executors and devisees thereafter, until March 30, 1888, held possession of the land by a sufficient inclosure, and used it for pasturing live stock, and paid the taxes thereon for every year during all that time. The land was assessed to plaintiff in the spring of 1888, and plaintiff paid the taxes for that year. All the deeds above mentioned were duly recorded. The defendants entered upon the land in June, 1888, claiming it to be unsold swamp land, and made application to purchase the same from the state, and procured from the state a certificate of purchase on February 1, 1892. On October 28, 1892, this action was commenced, and defendants filed their answer, claiming title by virtue of the last-mentioned certificate of purchase. On March 10, 1893, and before the trial of this action, the state issued and delivered to defendant R. A. Maddux a patent for the land, as alleged in a supplemental answer of the defendants, filed May 9, 1893. A book in the office of the county treasurer introduced as evidence by the defendants, an extract from which is contained in the record, shows that the principal and interest of the purchase price (one dollar per acre, with interest at 10 per cent. per annum) was fully paid by Peter Goodhue and his successors in interest, as follows: "Visalia, Tulare County, California, No. 33. Peter Goodhue's survey of swamp land in town 21 south, range 27 east, section 25, Mount Diablo, containing forty acres. Surveyed March 25, 1856, S. W. ¼ of S. E. ¼, section 23. Filed May 30, 1856. 1857, In. $4. July 18th received on the above $4. 1859, May 31st, by one year's interest, $4. 1862, September 15th, by two years' interest $8. 1864, October 24th, by principal and two years' interest in full, $48." Respondents contend, however, that the last item of this account ($48) was not paid until October 24, 1865; but in view of the ground, wholly independent of this, upon which I think the judgment should be reversed, it is immaterial whether the last payment was made on October 24, 1864, or on October 24, 1865, since it is admitted that the treasurer's account is correct, except as to the date of the last item, and that the last item of $48 was paid as early as October 24, 1865.

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[1] Rehearing denied.

On the 18th day of May, 1865, the people of the state, by the district attorney of the county of Tulare, commenced an action against Peter Goodhue and John Doe to annul the certificate of purchase issued to Goodhue in 1856, pursuant to an act of the legislature approved April 9, 1861 (St. 1861, p. 140), authorizing the forfeiture and annulling of such certificates of purchase for nonpayment of interest or principal of the purchase price of lands sold by the state on a credit. It was averred in the complaint that "said defendant John Doe, whose true name is unknown to plaintiff, claims to be the holder of said certificate of purchase, and to have an interest in said land adverse to plaintiff; * * * that on the 16th day of November, 1864, there was remaining due plaintiff from defendant, and which had been due for more than thirty days, two years' interest on said lands, to wit, the sum of eight dollars, * * * and said sum of interest still remains due and unpaid; * * * that defendant is delinquent as aforesaid, and has thereby forfeited all his right, title, claim, and interest in said lands." At the time this action to annul the certificate was commenced, and during the whole period of its pendency, Samuel C. Young was in possession of the land, claiming to own the same by virtue of his recorded deed from M. D. Young. The only evidence of service of summons on the defendants is the return of the sheriff indorsed thereon, as follows: "Sheriff's Office, Tulare County. I hereby certify that I received the within summons on the 29th day of May, A. D. 1865, and personally served the same on Peter Goodhue, defendant therein named, by delivering to him a copy of said summons, attached to a certified copy of the complaint in said action, and also served the within summons on unknown owners sued under the fictitious name of John Doe, by posting a copy of the within summons in two public places in the township in which the real estate described in the complaint is situated, and one copy on the courthouse in Visalia, Tulare county. Dated July 29, 1865."

Section 2 of said act of April 9, 1861 (St. 1861, p. 140), provides: "If the name of the holder of the certificate of purchase be not known he may be sued under a fictitious name, and service of summons may be had by posting one copy of the summons, containing a description of the land, for three weeks, at the courthouse door of the county, and two copies in public places in the township where the land is situate." The judgment annulling the certificate, and declaring all rights of the defendant to the land forfeited, was taken by default, on October 30, 1865. It recites that the default of the defendants "for not appearing or answering has been duly entered," but does not recite that summons had been served in any manner on either of the defendants. The court below found that the plaintiff was not the owner of any estate in the land described in his complaint, but that defendants were the owners thereof, and thereupon adjudged that plaintiff take nothing by this action. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

Counsel for appellant contends that the judgment purporting to annul the certificate is void, and that it so appears upon the face of the judgment roll; and so it appears to me. There was no service of summons on Samuel C. Young, who was the holder of the certificate and in possession of the land at the time the sheriff posted the copies of the summons, and who was sued by the fictitious name of John Doe. The deed of the land to Samuel C. Young, which incidentally gave him a right to the certificate of purchase as a muniment or evidence of title (Jackson v. Hyde, 91 Cal. 463, 27 Pac. 759; Henderson v. Grammar, 66 Cal. 332, 5 Pac. 488) was duly recorded on June 18, 1864, and there is no suggestion or pretense that he was not personally known to the attorney for the state at the time he commenced the action, it being alleged only that his "true name" was unknown to plaintiff. Yet it is true that the statute (section 2 of said act of April 9, 1861) provides: "If the name of the holder of the certificate of purchase be not known, he may be sued under a fictitious name and service of summons may be had by posting," etc. Assuming that, under the circumstances above stated, service of summons by merely posting copies thereof, as directed by the statute, was due process of law, surely a substantial compliance with that statute was necessary to effect such service. But, while the judgment roll shows what was done to effect service of summons, it fails to show a substantial compliance with the statute. The statute requires one copy of the summons to be posted "for three weeks at the courthouse door of the county, and two copies in public places in the township where the land is situate"; but the return of the sheriff, indorsed on the summons, fails to show that any copy of the summons was posted "at the door" of the courthouse, or even on the courthouse, "for three weeks" or for a single day, and also fails to show that two copies were posted in the township "for three weeks," or for any specific period of time. A posting of a copy "on the courthouse" elsewhere than "at the door," even for the period of three weeks, would have been a substantial and material departure from the requirement of the statute. The obvious reason for requiring it to be posted "at the door" was that it would more probably be seen and read at that point than at the rear, or on any other part of the courthouse. These defects in the return of the sheriff cannot be supplied or cured by presumption, although they might have been supplied by a recital of due service in the judgment. "Where the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done; but, when the record states what was done, it will not be presumed that something different was done. If the record merely shows that the summons was served on the son of the defendant, it will not be presumed that it was served on the defendant. If the affidavit of the printer shows that the summons was published one month, it will not be presumed that it was published three." Hahn v. Kelly, 34 Cal. 391; Quivey v. Porter, 37 Cal. 462; Hastings v. Cunningham, 39 Cal. 143. These cases have not been overruled in respect to the above quotation from Hahn v. Kelly. Estate of Newman, 75 Cal. 213, 16 Pac. 887; Belcher v. Chambers, 53 Cal. 635. The following cases are also specifically in point: People v. Greene, 74 Cal. 400, 16 Pac. 197; Hyde v. Redding, 74 Cal. 493, 16 Pac. 380; People v. Mullan, 65 Cal. 396, 4 Pac. 348. The judgment purporting to annul the certificate of purchase to Goodhue being void, and the assignees of Goodhue having fully paid both principal and interest of the purchase price as early as October 24, 1865, if not a year earlier, it follows that the state had no beneficial interest in the land in 1888 when it issued a certificate of purchase to the defendant Maddux, nor in 1893, when it issued to him a patent; and consequently such patent to Maddux conveyed no title to him.

After the purchase price was fully paid by Goodhue and his assignees, the holder of the certificate of purchase issued to him in 1856 was the owner of the land, the state being merely a naked trustee of the legal title, which it was and still is bound to convey to the equitable owner on demand, and therefore had no power to sell the land to another. A vested right to a patent from the state for public land is equivalent to a patent so far as the state is concerned. Stark v. Starr, 6 Wall. 402; Wirth v. Branson, 98 U. S. 118; Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U. S. 432, 12 Sup. Ct. 877; Huff v. Doyle, 93 U. S. 558; Pratt v. Crane, 58 Cal. 533; McCabe v. Goodwin, 106 Cal. 486, 39 Pac. 941. That plaintiff's title was sufficient to support this action against the defendants, to quiet it, is clear. Pennie v. Hildreth, 81 Cal. 130, 22 Pac. 398; Orr v. Stewart, 67 Cal. 275, 7 Pac. 693.

The only other matter to be considered arises from the following additional facts: In December, 1888, the plaintiff, as the successor in interest to Peter Goodhue and John Doe, who were the defendants in the action to annul the certificate of purchase, moved the court to set aside judgment in that case purporting to annul the certificate, on the grounds: (1) That the court never obtained jurisdiction of the person of the defendant John Doe; and (2) that the purchase price of the land had been fully paid before the commencement of that action. The superior court denied the motion. The plaintiff herein appealed from the order denying it, and this court affirmed the order, on the ground of the great lapse of time between the date of the judgment and the making of the motion to set it aside, viz. 23 years. This court, by Mr. Justice Works, said: "We know of no provision of law which can be held to authorize the vacation of a judgment on a mere motion after so long a time." People v. Goodhue, 80 Cal. 199, 22 Pac. 66.

The respondents contend that this order denying plaintiff's motion to set the judgment aside, and the affirmance of it by this court, are conclusive of the validity of the judgment against the merely collateral attack made upon it in this case. But no question as to the validity or regularity of the judgment was decided by this court. It was only decided that the judgment could not be reviewed on a mere motion after so long a time. If the judgment was void before the motion, neither the order denying the motion nor the affirmance of that order by this court imparted to the judgment any force or validity. It has been held that the affirmance by an appellate court of a void judgment imparts to it no validity, and especially if such affirmance is put upon grounds not touching its validity. I think Mr. Van Fleet, in his book "Collateral Attack" (section 16), correctly states the law applicable to this case, as follows: "In order to make a judgment void collaterally, either (1) a legal organization of the tribunal, or (2) jurisdiction over the subject-matter, or (3) jurisdiction over the person, must be wanting; or (4) one or more of these matters must have been lost after it once existed. When either of these defects can be shown, the judgment and all rights and titles founded thereon are void, even in the hands of a bona fide purchaser. In such cases the dignity of the court is of no concern. Thus, where a void judgment had been affirmed on appeal by the supreme court of Texas, the court said: 'The judgment of affirmance rendered by this court could not impart to it validity, but would itself be void by reason of the nullity of the judgment appealed from.' Chambers v. Hodges, 23 Tex. 105, 110. The supreme court of Mississippi said that the affirmance of a void judgment on appeal, upon grounds not touching but overlooking its invalidity, did not make it valid. Wilson v. Montgomery, 14 Smedes & M. 205, 207. When a judgment is lacking in any of the foregoing particulars, it matters not whether it was rendered by the highest or the lowest court in the land; it is equally worthless. No one is bound to obey it. The oath of all officers, executive, legislative, or judicial, compels them to disregard it. A few cases hold that want of jurisdiction over the person does not make the judgment of a superior court void (Gay v. Smith, 38 N. H. 171, 174; dictum in Kimball v. Fisk, 39 N. H. 110, 116); but they are out of line, and wrong on principle."

I think the finding of the court that defendants owned the land in question is not justified by the evidence, and that the order and judgment appealed from should be reversed, and the cause remanded, for a new trial.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment appealed from are reversed, and a new trial granted.

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109 Cal. 630

NICHOLLS v. REID et al. (No. 18,450.)

(Supreme Court of California. Nov. 6, 1895.)

CERTIFICATE OF STOCK—TRANSFER OF TITLE.

Where a firm contracted to sell and deliver at a future day certain bank stock standing in the name of the individual members, but before tender both members of the firm died, a person who subsequently became successor of the firm, and had the certificates, unindorsed, in his possession, could not make a valid tender of the same without deraigning title from the original holders thereof.

Commissioners' decision. Department 1.

Action by William Nicholls, Jr., against Robert K. Reid and others, to recover the price of certain shares of stock. Defendants had judgment, and plaintiff appeals. Affirmed.

BRITT, C. Action to recover the contract price of certain shares of stock in the Bank of Stockton, a corporation, which defendants agreed to purchase of W. & P. Nicholls, a copartnership. The contract was in writing, and bore date December 15, 1885. It stated that W. & P. Nicholls had that day sold to Reid, Tully, and Trahern, the defendants, "certificates Nos. 63 and 64, for fifty shares each," of said stock, for the sum of $3,300, to be paid October 1, 1886, with interest; that the vendors were to retain possession and control of the stock until payment of the agreed price, and then deliver the same to the purchasers, who on their part agreed to buy it on the terms stated. Plaintiff sues as assignee of the rights of W. & P. Nicholls under said contract, alleging tender of the certificates by him to defendants in May, 1890, their refusal to accept the same or to pay the purchase price, his continued readiness to deliver, etc. The court found, among other matters, that plaintiff and his alleged assignors were never ready or able to perform the conditions on their part of the said contract; that no tender was made to defendants; and rendered judgment in defendants' favor. It is claimed that the evidence does not justify the findings.

The record shows that the two certificates of stock were issued June 1, 1871. They were in the same form, one of them setting forth "that William Nicholls, of Placer county, is the proprietor of fifty shares of the capital stock of the Bank of Stockton, which is transferable only on the books of the bank personally, or by attorney, upon the surrender of this certificate"; and the other showing that Philip Nicholls is the proprietor of 50 shares, transferable in like manner. Both said certificates were in possession of the firm of W. & P. Nicholls on December 15, 1885, and were in plaintiff's possession at the time of the alleged tender to defendants. William Nicholls, named in one of said certificates, died in the year 1877. At that time he and the said Philip composed the firm of W. & P. Nicholls. At the date of the contract of sale the firm consisted of said Philip Nicholls and John and William Nicholls, the last two being sons of William who died in 1877. The plaintiff, who is the son of said Philip, succeeded his father in the firm in the year 1886. The firm name has never been changed.

Except the mere fact of possession of said certificates, there is no evidence that the title of the deceased William Nicholls in the stock standing in his name ever passed to any of the said successive firms, or to the plaintiff. The certificate was produced at the trial, but bore no indorsement whatever, and was unaccompanied by other evidence of transfer. Possession only of the certificate was insufficient to establish transmission of title therein from William Nicholls, deceased, his representatives or heirs. See Borland v. Bank, 99 Cal. 94, 33 Pac. 737. On the facts appearing, had the certificate been presented by plaintiff or by W. & P. Nicholls for transfer on the books of the bank, it would have been the duty of the latter to refuse to make such transfer. Tafft v. Railroad Co., 84 Cal. 131, 24 Pac. 436; Quay v. Railroad Co., 82 Cal. 1, 22 Pac. 925. Regarding a contract not essentially different from that exhibited here, and under a statute quite similar, as concerns its influence on the question in hand, to section 324, Civ. Code, the court of exchequer held that "the true meaning of the contract is that the party is to convey and deliver certificates showing, either on the face of them, or from the indorsements, that the title is in the person conveying," and that possession of the certificate was not of itself evidence of the right of the party producing it to convey the shares. Hare v. Waring, 3 Mees. & W. 362. While we may concede that the title could have been deraigned otherwise than by indorsement of the certificate, we fail to find evidence of its deraignment to plaintiff or his firm in any manner. The tender made by plaintiff was therefore ineffectual (Civ. Code, § 1495), and the findings of the court were right. It is, of course, immaterial to investigate the title to the other certificate,—issued to Philip Nicholls,—though it also is in doubt, for defendants could not be required to accept one without the other. Polhemus v. Heiman, 45 Cal. 573. The judgment and order should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

110 Cal. 8

In re FIFE. (Cr. 99.)

(Supreme Court of California. Nov. 7, 1895.)

HABEAS CORPUS—JURY TRIAL—REVIEW.

1. The refusal of the court to grant a jury trial on a prosecution for a misdemeanor cannot be reviewed on habeas corpus.

2. The legislature not having provided for summary proceedings without a jury in prosecutions for vagrancy, a jury trial, when demanded, cannot be refused.

In bank.

Jeanne Fife was convicted of vagrancy, and sues out a writ of habeas corpus. Dismissed.

McFARLAND, J. This is a petition for a writ of habeas corpus. The petitioner shows that she was convicted in the police court of the city of Los Angeles of the offense of vagrancy; that she appealed to the superior court of the county of Los Angeles, where the judgment of the police court was affirmed; and that she did not waive a jury in the said police court, and expressly made a demand in the superior court for a jury, and said demand was refused. Her contention is that, having been tried and convicted under these circumstances, without the intervention of a jury, her imprisonment is illegal, and that she should be restored to her liberty upon habeas corpus. In the recent case of Ex parte Wong You Ting, 106 Cal. 296, 39 Pac. 627, we took occasion to inquire somewhat fully into the right of a jury trial in criminal cases; and our conclusion there was that the legislature might provide for summary proceedings without a jury in cases of such petty offenses as were thus provided for in certain early English statutes and in cases which are intrinsically of a similar nature and degree as those mentioned in said statutes. Vagrancy is, we think, one of those offenses, and the legislature might provide by a general law for the summary trial without a jury of persons charged with said offense; but we agree with the superior court of Los Angeles county sitting in bank, whose learned opinion on the subject was presented to us at the argument here, that there is no valid statutory provision for such a trial without a jury. Conceding, however, that the denial of a jury in such a case would be error, for which the judgment should, on appeal, be reversed by the superior court, still the point is urged here that such denial does not raise a question of jurisdiction which can be considered on habeas corpus. The learned judges of the superior court, in their opinion above noticed, seemed to assume, and perhaps quite naturally, that this court, in Taylor v. Reynolds, 92 Cal. 573, 28 Pac. 688, and Ex parte Wong You Ting, 106 Cal. 296, 39 Pac. 627, had decided that the question here involved could be determined on habeas corpus. But in those cases the question was not raised, and was not in any manner considered. In Taylor v. Reynolds the court, in its opinion, says: "The answer admits all the facts alleged, and waives all objections that might be made to the writ, to the end that the questions sought to be raised may be decided upon their merits;" and in the Wong You Ting Case we said: "The only question before us necessary to be decided is whether or not appellant was entitled to a jury trial. * * * The point that the refusal of a jury can be reviewed only on appeal is not made." In the case at bar, however, the point is expressly made and insisted on, and cannot be evaded. Upon a thorough examination of the question, we are forced to the conclusion that either in civil or criminal cases the denial of a trial by jury is merely error to be corrected on appeal, and does not go to the jurisdiction of the court, so that it may be inquired into on habeas corpus, except in those cases where a jury cannot be waived and therefore is a necessary constituent part of the court. A jury may be waived in any civil case, and it is not contended by any one that the refusal of a demand for a jury in a civil case affects the jurisdiction, or is anything more than error; and as a jury may, under the constitution, be waived "in all criminal cases not amounting to a felony," a jury is not a necessary constituent part of a court for the trial of a misdemeanor, and the refusal of the court to allow a jury on such a trial is mere error. This principle will be found to be established by the general authorities, but as it has been definitely declared by decisions of this court we need look no further. Ex parte Miller, 82 Cal. 454, 22 Pac. 1113, is determinative of the point. That was habeas corpus, and the petitioner demanded his discharge upon the ground that he had been denied a jury trial in the justice's court in which he was convicted; but this court sitting in bank remanded the petitioner, and said: "The offense charged was not a felony, and a jury might have been waived. The return of the officer to the alternative writ shows a valid commitment by a court having jurisdiction of the subject-matter and of the party. If a jury trial was denied, it was mere error which could not be reached by a writ of habeas corpus,"—citing authorities. In Powelson v. Lockwood, 82 Cal. 613, 23 Pac. 143, there was an application for a writ of prohibition to restrain a justice of the peace from trying the petitioner on a charge of vagrancy without a jury, which raised the precise point decided in Ex parte Miller. The court said: "I think the court properly sustained the opposition to the writ on the first ground above stated, and for the reasons that the justice's court had jurisdiction of the subject-matter—the misdemeanor charged—and of the parties; that in denying a jury trial, even if appellant was entitled to it, and in trying or in proposing to try the case without a jury, the justice's court did not exceed or propose to exceed its jurisdiction; and that, even if this action or proposed action of the justice's court was erroneous, it was so only as to the mode of procedure in an action of which that court had jurisdiction." Upon the foregoing authorities we hold that the denial by the lower court of petitioner's demand for a jury was only error, and does not go to the question of jurisdiction, and therefore cannot be reviewed in the proceeding of habeas corpus. The petitioner is remanded, and the writ dismissed.

We concur: BEATTY, C. J.; HENSHAW, J.; GAROUTTE, J.; HARRISON, J.; VAN FLEET, J.; TEMPLE, J.

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110 Cal. 1

WITTENBROCK v. CASS et al. (ALEXANDER et al., Interveners. No. 18,331).

(Supreme Court of California. Nov. 7, 1895.)

TRUSTS IN REALTY—PAROL EVIDENCE—ESCROW—VALIDITY.

1. An agreement whereby defendant's mother was to convey certain land, purchased with her money, to defendant, said conveyance to take effect on her death, in consideration that he would pay taxes thereon, and support her during her life, is within Civ. Code, § 852, requiring trusts in realty to be in writing.

2. It may be shown by parol that plaintiff, at the time he advanced money on land to defendant's mother, knew that a deed thereof had been executed to defendant, and delivered in escrow to take effect on the grantor's death, and that the consideration therefor was the payment by defendant of taxes on said property and the support of the grantor during her life.

3. A deed to a child of the grantor, delivered in escrow, with instructions to hold the same without recording it until the death of the grantor, who thereby parted with all control over it, is valid, and operates to immediately vest title in the grantee subject to the grantor's life tenancy. Bury v. Young, 33 Pac. 338, 98 Cal. 446, followed.

Commissioners' decision. Department 2.

Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

Action by George F. Wittenbrock against William H. Cass, administrator, and others, to foreclose a mortgage. D. E. Alexander and others intervened. From a judgment of foreclosure and an order denying a motion for a new trial, defendants appeal. Reversed.

Johnson, Johnson & Johnson, for appellants. Holl & Dunn, for respondent.

BELCHER, C. On March 7, 1892, Maria Louisa Cass borrowed of the plaintiff $2,000 for which she executed to him her promissory note, and a mortgage to secure payment of the same on certain real property in the city of Sacramento. Mrs. Cass died in May, 1892, and thereafter the defendant William H. Cass was duly appointed administrator of her estate. In March, 1893, plaintiff commenced this action to foreclose his said mortgage, making William H. Cass, as administrator and individually, a party defendant. The case was tried, and judgment of foreclosure rendered as prayed for, from which, and from an order denying his motion for a new trial, the defendant appeals.

The defendant answered the complaint, and then, by way of cross complaint, set up, in substance, the following facts: That Maria Louisa Cass was the mother of defendant, and in October, 1882, was 72 years of age, infirm in body, without a home, and greatly in need of care and attention. That she had about $3,700 in money, and no other property. That then and there it was agreed between her and defendant that she should purchase in her own name, and with her own means, a certain lot in the city of Sacramento, and erect a dwelling house thereon sufficient to accommodate her and defendant and his family, and that, after the house should be constructed, she and he, with his family, should move into the same, and thenceforth live together. That he should pay the taxes and insurance upon the property, and keep the house in good repair, and should furnish her with all necessary care and with board and lodging, and attend her in sickness and in health during her natural life; and that in return therefor she should execute to him a deed of the premises, which should be held in escrow until her death, and should also make a will devising to him all her property and estate, and that she would not in any manner sell, transfer, mortgage, or incumber the said property. That in pursuance of the aforesaid agreement Mrs. Cass purchased the said lot, and erected a dwelling house thereon at an expense to her of between $1,900 and $2,000, and she and defendant, with his family, moved into the said house and took up their residence there about February 1, 1883, and defendant and his family have ever since resided in said house. That defendant has in all respects fulfilled said agreement on his part, and has expended in the payment of taxes, insurance, and repairs upon said premises the sum of $750 and upwards. That Mrs. Cass, in pursuance of the said agreement, made her will, devising and bequeathing to defendant all of her property and estate, and also executed to defendant a deed of the said real property, which deed, together with said will, was left in escrow with one Richmond Davis of Sacramento. That in 1885 Mrs. Cass represented to defendant that she had expended all her money remaining after the purchase of the said lot and the construction of the said house, and that she needed more money for present use. She requested him to advance her money from time to time, and he, on her representation that she had executed a deed of the property to him, and placed the same with said Richmond Davis, advanced to her about $275. That in March, 1892, Mrs. Cass, being then feeble in mind and body, executed to the plaintiff the mortgage set out in the complaint, in violation of her agreement with defendant, and without his knowledge or consent; and prior to the execution thereof the plaintiff had full and complete notice of the facts set forth in this cross complaint. At the trial, defendant offered to prove all the facts set up in his cross complaint, and, it appearing that the alleged agreement between defendant and his mother was not in writing, all of the offered evidence was objected to as irrelevant, immaterial, and incompetent, and excluded by the court, the plaintiff reserving exceptions.

1. Appellant contends that the court erred in excluding his offered evidence as to the verbal agreement, etc., between himself and his mother, because, if the facts alleged were true, a constructive trust was created in his favor, which was superior to any rights in the property acquired by respondent; citing Brison v. Brison, 75 Cal. 525, 17 Pac. 689, and other cases. We do not think this contention can be sustained. It is true that a constructive trust arises by operation of law, and is expressly excepted from the rule that a trust in realty can only be created by an instrument in writing (Civ. Code, § 852); and whenever one person acquires from another the title to real property by fraud, actual or constructive, practiced upon that other, a constructive trust is created, which a court of equity will fasten upon the title in his hands. Hayne v. Hermann, 97 Cal. 259, 32 Pac. 171. This, however, is not such a case as that supposed. Mrs. Cass did not acquire the title to the property in question from her son, nor with his money. She bought the property and paid for it with her own money, and simply agreed with him that he and his family should live with her on the premises, and should have the title thereto after her death, provided he would pay the taxes and insurance on the property, and keep the house in good repair, and would furnish her with all necessary care and with board and lodging during her life. All of these conditions were performed, but that fact does not, in our opinion, bring the case within the rule declared in any of the cases cited.

2. Appellant further contends that the court erred in excluding the evidence offered to show that Mrs. Cass executed to him a deed of the said property, and placed it in the hands of one Davis as a depositary, to be delivered after her death, and also to show that respondent had notice of the execution and deposit of the deed at the time he received his mortgage. This contention must be sustained. If the deed was executed and left with Davis, and respondent had notice thereof, as claimed, then it was immaterial whether the prior agreement between the parties was verbal or written, and parol evidence to prove all the facts was admissible. The case of Bury v. Young, 98 Cal. 446, 33 Pac. 338, is in many respects very similar to this. In that case the authorities were quite fully reviewed, and it was held that the delivery of a deed by the grantor to a third party for the children of the grantor, with instruction to such third party to hold the deed for them, without recording it, until after the grantor's death, and thereupon to deliver it to them, the grantor parting with all dominion over the deed, and reserving no right to recall it or to alter its provisions, or to have or enjoy any other or further interest in the premises than to hold the use thereof until his death, constitutes a valid delivery of the deed, which vests the title immediately in the grantee, qualified only by a life tenancy in the grantor, and the depositary becomes the trustee of the grantee. It was further held that the essential requisite to the validity of a deed transferred under such circumstances is that, when placed in the hands of a third party, it has passed beyond the control of the grantor for all time, and that that question is determined by the grantor's intention in the matter, and is a question of fact to be solved by the light of all the circumstances surrounding the transaction. It is not necessary to notice the claims of the interveners. Upon the authority of Bury v. Young, supra, the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: BRITT, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

McFARLAND, J. I concur, on the authority of Bury v. Young, which must now be taken as final on the subject.

112 Cal. 369

EPPINGER et al. v. SCOTT. (No. 18,429.)[1]

(Supreme Court of California. Nov. 7, 1895.)

FRAUDULENT SALE — EVIDENCE — VENDOR'S DECLARATIONS—HARMLESS ERROR.

1. A telegraph message threatening suit if the addressee did not pay an overdue note is not

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[1] Rehearing granted.

admissible to show the addressee's fraud in transferring property on the day after the date of said message, in the absence of proof that the message was ever received, or at least delivered to a telegraph company for transmission.

2. A declaration by the vendor, after an alleged fraudulent sale, that the goods were being removed because he feared that some one would stop the removal, is not admissible to impeach the sale, as against the vendee, the latter having no knowledge thereof.

3. The admission of testimony not bearing on the issue, and not otherwise prejudicial, is harmless error.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. Harr, Judge.

Action by J. Eppinger and others against Jay Scott to recover possession of certain personal property. Defendant had judgment, and plaintiffs appeal. Reversed.

Terry & Williams and H. G. W. Dinkelspiel, for appellants. George E. Church, for respondent.

BRITT, C. Plaintiffs brought this action against defendant, who is the sheriff of Fresno county, to recover possession of a quantity of trays and sweat boxes used in the curing of raisins. It is alleged in the complaint that plaintiffs own the property, and that defendant took the same from their possession. Defendant by his answer denied plaintiffs' ownership and possession; alleged that he seized the goods under a writ of execution upon a judgment recovered by one Fon Kee against one Vieu, that Vieu was the owner and in possession thereof at the time of such seizure, that plaintiffs took the goods from him (defendant) at the commencement of this action; and prayed a return of the same. The plaintiffs claim under a bill of sale made to them of the property by said Vieu on April 6, 1893. The levy by defendant was in November, 1893. The defense is that the sale was void because of constructive fraud, in that it was not accompanied by an immediate delivery, and followed by actual and continued change of possession, of the chattels, and also because of actual fraud, in that the sale was designed to hinder and delay the creditors of said Vieu,—especially said Fon Kee. A jury trial was had, resulting in a verdict and judgment for defendant.

Assuming that evidence to show the sale to be fraudulent in fact was admissible under the issues, then it was relevant to prove that Vieu, the vendor, entertained the fraudulent intent to hinder and delay his creditors. Landecker v. Houghtaling, 7 Cal. 391. Accordingly, Mr. Spencer, a bank teller, testified that he prepared and sent for Fon Kee a telegram as follows: "April 5, 1893. N. Vieu, Dixon, Cal.: Your note is past due. You no pay immediately, I commence suit. Fon Kee." On this statement the paper purporting to contain the written message was read in evidence over plaintiffs' objection, defendant undertaking to prove that Vieu received it; but no such proof was made. We think the testimony did not show the paper to be competent. Its object no doubt was to show that Vieu was impelled by this threat when he transferred the goods to plaintiffs. It was therefore necessary to raise a presumption that the message reached him, and the testimony did not proceed that far. Where the message was sent, or by what means, does not appear. It should have been shown at least that it was delivered to some telegraph company or agency for transmission. 1 Greenl. Ev. (15th Ed.) § 40, note; Steamship Co. v. Otis, 100 N. Y. 446, 3 N. E. 485.

Immediately after the execution of the bill of sale the plaintiffs began the removal of the trays and boxes from Vieu's ranch, where they then were, to a neighboring ranch. Vieu did not participate in this work. As between him and the plaintiffs,—his vendees,—it appears that the sale was complete upon the delivery of the instrument evidencing the transfer. One Ah Loo testified in effect that Vieu told him the goods were removed because he (Vieu) was afraid somebody would stop the removal,—prevent any transfer. This declaration, so far as can be gathered from the statements of the witness, occurred after the removal of the trays, etc., had been completed, and was certainly subsequent to the delivery of the bill of sale. It is not claimed that plaintiffs heard or had knowledge of it. Its admission in evidence was therefore erroneous. Jones v. Morse, 36 Cal. 205; Walden v. Purvis, 73 Cal. 518, 15 Pac. 91.

As to the testimony of the witness Marie Schleyer that she, at Vieu's request, made out a statement for Fon Kee "to show how much money had been taken in," we fail to see how plaintiffs could have been injured by its admission, though we also fail to perceive its pertinency. When or where, or by or for whom, the money was taken, or how the statement bore on the issues, is not disclosed.

The errors noted may have been of not much consequence; but the evidence, as presented in the record, tending to show fraud, whether actual or constructive, was at best inconclusive, and the jury may have accorded controlling weight to the evidence erroneously admitted. The judgment and order should be reversed.

We concur: HAYNES, C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

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110 Cal. 12

FRENCH v. McCARTHY. (No. 15,551.)

(Supreme Court of California. Nov. 9, 1895.)

APPEAL—SERVICE OF NOTICE.

Where it does not appear from the judgment roll that respondent's codefendant answered the complaint below, and the judgment appealed from contains no reference to such codefendant, respondent's motion to dismiss the appeal for failure of the appellant to serve his codefendant with notice thereof will be denied.

Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by one McCarthy against one French and one Joost. There was judgment for defendants, from which plaintiff appeals. The case appears on a motion by defendant French to dismiss the appeal. Denied.

O'Byrne & Peixotto, for appellant. Chickering, Thomas & Gregory, for respondent.

PER CURIAM. The respondent has moved to dismiss the appeal for failure of the appellant to serve his codefendant, Joost, with the notice of appeal. The action was brought against the appellant and Joost upon a contract of guaranty, executed by them to the plaintiff, and was tried solely upon the issues presented by the answer of the appellant. It does not appear from the judgment roll that Joost has answered the complaint, and the judgment appealed from is against the appellant alone, and contains no reference to Joost. A reversal of this judgment would therefore have no effect upon the rights of Joost, as there has been no trial or determination of the plaintiff's claim against him, or of his defense thereto. The motion is denied.

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109 Cal. 662

EMMONS v. BARTON. (No. 18,384.)

(Supreme Court of California. Nov. 7, 1895.)

FRAUDULENT CONVEYANCE—ACTION TO SET ASIDE—AFTER DEATH OF GRANTOR—PARTY PLAINTIFF—PRIVILEGED COMMUNICATIONS—DECLARATIONS.

1. Where an assignor of a claim might have sued to set aside as fraudulent a conveyance by the debtor, the assignee may do so.

2. Code Civ. Proc. §§ 1589, 1590, providing that where decedent made a fraudulent conveyance, and there is a deficiency of assets, the executors must commence action to recover it for the benefit of the creditors, do not exclude a creditor from bringing such action where the executor is the grantee.

3. Where a fraudulent conveyance by a decedent is set aside, any surplus therefrom after satisfying the claims of decedent's creditors goes to the grantee.

4. In an action against a wife to set aside a fraudulent conveyance from her deceased husband she cannot be compelled to testify as to what decedent told her at the time of the conveyance as to his purpose in making it; Code Civ. Proc. § 1881, providing that a husband cannot be examined against his wife without her consent, and that neither husband nor wife, during marriage or afterwards, can be, without the consent of the other, examined as to any communication made by one to the other during marriage.

5. Declarations of a grantor of land, being admissible against the grantee only when made "while holding the title" (Code Civ. Proc. § 1849), are not admissible when made after the grant, though the grantor be still in possession of the property.

Department 2.

Action by Collis H. Emmons against Ella G. Barton. Judgment for plaintiff. Defendant appeals. Reversed.

McFARLAND, J. The plaintiff is the assignee of several money demands against the estate of Robert Barton, deceased, which had been presented to the executrix of said estate and allowed as valid claims. The defendant, Ella G. Barton, is the surviving widow of said Barton, deceased, and also executrix of his will. During the lifetime of said deceased, on July 1, 1890, he by deed conveyed to defendant, then his wife, certain real property, being certain lots in the city of Fresno. It is averred in the complaint that said conveyance was without consideration, and for the purpose of hindering and defrauding the creditors of said Robert Barton; and that the assets of said estate, other than the real property described in said deed, are insufficient to pay the said claims assigned to plaintiff as aforesaid. The prayer of the complaint is that said deed be declared fraudulent and void as against plaintiff, and that the property therein described be added to the assets of the estate, to be applied in due course to the discharge of plaintiff's said claims. The court found for plaintiff on nearly all issues, and entered judgment in accordance with his prayer. Defendant appeals from the judgment, and from an order denying her motion for a new trial.

A demurrer to the complaint was overruled, and appellant attacks the complaint upon two grounds which present debatable questions. It is contended that respondent cannot maintain this action, because he has only an assignment of a bare right to sue in equity for a fraud committed on his assignors, and that such assignment is void as against public policy. There is no doubt of the general rule that a mere right to complain of fraud is not assignable; fraud not being a vendible commodity. 1 Pars. Cont. 226; Story, Eq. Jur. § 1040g; Cross v. Bank, 66 Cal. 462, 6 Pac. 94; Whitney v. Kelley, 94 Cal. 146, 29 Pac. 624. In Whitney v. Kelley, Mr. Justice Garoutte reviews a great many authorities upon the subject, and other cases to the point are to be found in Crocker v. Bellangee, 70 Am. Dec. 489. But the rule in question, as established by the authorities, applies only to a case where the assignment does not carry anything which has, itself, a legal existence and value, independent of the right to sue for a fraud. It does not apply to a case where the right to sue for a fraud is merely incidental to a subsisting substantial property which has been assigned, and which is, itself, intrinsically susceptible of legal enforcement. An examination of the authorities—many of which are quoted and referred to in Whitney v. Kelley, supra—discloses that the rule in question does not govern in cases where the assignors "have some substantial possession, and some capability of personal judgment, and not a mere naked right to overset a legal instrument or to maintain a suit." In Whitney v. Kelley all that the assignee got was the mere right to maintain a suit to set aside a judgment against his assignor on the ground of fraud. In Sanborn v. Doe, 92 Cal. 152, 28 Pac. 105, cited by appellant, the case was really decided upon the particular language of the insolvent law; but, in addition, the attempted assignment there was of debts which had been fully discharged by a decree in insolvency, and had no legal value whatever, unless the decree could be set aside for fraud. In the case at bar the things assigned were money claims against an estate which had been allowed by the executrix, and were really, in effect, judgments. They had legal existence and value in themselves, were capable of enforcement by ordinary methods, and were proper objects of sale and assignment. What their financial value may be without resort to an action to set aside the alleged fraudulent conveyance is a question which does not affect the validity of the assignment; although it does appear that there are other assets of the estate, out of which the assigned claims could be partly satisfied. We think, therefore, that the right to maintain this action is merely incidental to the claims assigned, and that the appellant is entitled to maintain it if his assignors would have been so entitled.

It is also contended by appellant that this action, if maintainable at all, could have been properly brought only by the executrix under sections 1589 and 1590 of the Code of Civil Procedure, which provide that when the decedent did, in his lifetime, convey property with intent to defraud his creditors, and there is a deficiency of assets, the executor or administrator must commence an action for the recovery of such property for the benefit of the creditors, and is bound to do so upon the application of creditors, who must provide for certain costs and expenses of the action. This contention is well worthy of consideration, but we do not think that it can be successfully maintained. In Hills v. Sherwood, 48 Cal. 393, it was expressly held that similar provisions of the old probate act merely gave to executors and administrators the power (formerly doubted) to bring such an action, but do not "purport to exclude the creditors from bringing it if they are authorized so to do by the general law"; and that "the creditors have their remedies independently of the administrator." That case, however, was decided under the law as it stood before the codes went into operation, and it probably goes further than would be warranted under our Code of Civil Procedure, which is usually understood as presenting remedies which, "when applicable to the relief sought, exclude or supplant all other modes of relief." Freem. Ex'ns, § 394; Herrlich v. Kaufmann, 99 Cal. 271, 33 Pac. 857. Ordinarily, an action to recover property fraudulently conveyed by a decedent in his lifetime should be brought by his executor or administrator, and such an action by a creditor would not lie, at least unless he shows an exhaustion of all means to procure such an action to be brought by the proper person. But in the case at bar the alleged fraudulent grantee is the executrix. She could not sue herself. This condition of things does not seem to be a statutory cause for her removal, and we see no remedy other than a suit in equity by the creditors themselves. It is a case where the Code provision is not "applicable to the relief sought." The circumstances here are analogous to those under which a creditors' bill will lie under our Code. In general, proceedings supplementary to execution are regarded as a substitute for a creditors' bill in chancery, and the former must be followed, instead of the latter. But there may be cases in which the statutory proceedings would not afford adequate remedy; "exceptional cases in which it appears that equity must be invoked because legal remedies are unavailing." Herrlich v. Kaufmann, supra. In such cases the Code provisions may be departed from, for it is the province of equity to relieve where legal remedies fail. The case at bar comes within this rule, and a creditor, under the circumstances here disclosed, was entitled to bring this action, for the benefit of all the creditors. A demand upon the appellant to bring the suit would have been fruitless. (It is to be observed, however, that in a case like this the judgment should be that property fraudulently conveyed, or so much thereof as is necessary, be applied to the satisfaction of the debts, and that the residue, if any, go to the grantee. It is not to go into the assets of the estate for any purpose other than the payments of the debts. The residue does not go to the heir, for he stands in the shoes of the fraudulent grantor.)

There are some other objections to the complaint and to the sufficiency of the findings, which are not tenable, and which, in our opinion, need no special notice. The judgment and order appealed from must, however, be reversed for erroneous rulings touching the admissibility of evidence, and for want of evidence to support the material finding. The conveyance in question was made by the decedent to his wife, the appellant, on July 1, 1890, in consideration of love and affection, "and for her better maintenance and support"; and it was recorded the same day. At that time the decedent had commenced the erection on the lots conveyed of a large building called the "Barton Opera House," upon which a small amount of work had been done. The claims of respondent and his assignors are for materials furnished for and work done upon that building, and they mostly accrued after the execution of said conveyance. We do not see that any money remains unpaid which was due before July 1st. The respondent and his assignors had not only constructive but actual notice of the execution of this conveyance at or about the time of its execution. After this, and having this knowledge, they went on furnishing materials, etc., for the building without filing any liens, and relying entirely upon the statements and promises and personal responsibility of the decedent. It appears that the building cost about $105,000, and that decedent did pay all of that large sum except the amounts due respondent, which are, exclusive of interest, about $12,000. The respondent called the appellant as a witness and asked her what the decedent told her at the time of the conveyance as to his purpose in making it. To this appellant objected upon the ground, among others, that it was a privileged communication. The objection was overruled, and appellant excepted. This ruling was erroneous. Code Civ. Proc. § 1881, provides as follows: "A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage." Respondent has cited no authority and has made no suggestion that would tend to take the ruling here in question out of this apparently plain provision of the Code. On the other hand, the point was substantially decided in favor of appellant's contention in Re Flint's Estate, 100 Cal. 391, 34 Pac. 863. In that case the attempt was to prove by a physician communications made to him by a patient who had afterwards died; and the court held that it could not be done, and that the heir could not waive the privilege. Certainly the creditors are in no position to waive such a privilege. That case construed a clause of this same section 1881, and the principle there decided seems directly applicable to the case at bar.

Statements of the deceased husband concerning the title to the property conveyed, made after the execution of the conveyance, were also erroneously admitted, over the objections of appellant. This occurred particularly in the testimony of the respondent and the witness Kirby. The declarations of a grantor made after the grant are not admissible in evidence against the grantee. Under section 1849, Code Civ. Proc., the declarations, etc., of a grantor of real property are evidence against the grantee only "while holding the title." Tompkins v. Crane, 50 Cal. 478; Ord v. Ord, 99 Cal. 523, 34 Pac. 83; Bury v. Young, 98 Cal. 446, 33 Pac. 338. And the fact that the grantor was in possession of the real property conveyed at the time of the alleged subsequent declarations does not change the rule. Bigelow, Fraud, p. 171. There are cases which hold that, where personal property has been left after sale in the possession of the vendor, the declarations of the latter while in possession are evidence against the vendee.

For the reasons above stated the judgment must be reversed. We may say, however, that we do not see how it can be successfully maintained that the evidence justifies the finding that said conveyance was made "for the purpose of delaying, hindering, and defrauding the said several creditors and other creditors of said Robert Barton." It is clear that a conveyance made by a husband or father to his wife or child is valid as against creditors although the consideration was love and affection alone, unless it was made with intent to defraud his creditors. Peck v. Brummagim, 31 Cal. 441; Barker v. Koneman, 13 Cal. 9; Wells v. Stout, 9 Cal. 480; In re McEachran, 82 Cal. 219, 23 Pac. 46; Cohen v. Knox, 90 Cal. 266, 27 Pac. 215; Knox v. Moses, 104 Cal. 502, 38 Pac. 318. If such a conveyance be made with intent to defraud creditors, it is void as against the creditors; but the intent is a question of fact, and must be averred and proved. A voluntary conveyance is not prima facie fraudulent, and a fraudulent intent is not to be arrived at as a presumption of law. Civ. Code, § 3442; Threlkel v. Scott, 89 Cal. 351, 26 Pac. 879; Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557; Bull v. Bray, 89 Cal. 286, 26 Pac. 873. Therefore, in a case like the one at bar, there must be evidence upon which the jury or court can base a finding of the fact that the intent of the grantor, at the time of the grant, was to defraud his creditors. And in the case at bar we see no evidence sufficient to support such a finding. Pronounced insolvency at the time of the grant would, no doubt, be a strong circumstance tending to show fraudulent intent, and, in the absence of other controlling facts, it would be sufficient to justify a finding of such intent. But in the case at bar we see no evidence of such insolvency. The decedent died about a year after the execution of the deed to his wife, and afterwards it was found that there would be a few debts of the estate which its assets would not satisfy; the aggregate being exceedingly small when compared with the volume of his business. As stated above, the building cost about $105,000, which seems to have been all paid by the decedent except the amounts alleged to be still due respondent, aggregating about $12,000 and interest, while the appraisement shows assets of the value of over $9,000. Nearly all of the $105,000 was paid after the date of the deed, and was for debts accruing after that date. So far as the evidence which bears directly upon his financial condition at the time of the deed is concerned, there is nothing in it tending to show insolvency at that time. On the other hand, it affirmatively appears that at that time his financial standing was exceedingly good, and that he had property, apart from the land conveyed to his wife, which was amply sufficient to pay all debts which he then owed. Indeed, it is quite apparent that his financial condition at the time of his death was caused, as suggested by his banker, the witness Ernstein, by his unwise investment after the deed of too much money in an unprofitable enterprise. It is true that the deed to his wife was of the greater part of his property, but that which he retained was more than was necessary to meet all demands of creditors at that date. Respondent asked appellant, when a witness, this question: "It was not intended that this deed should operate to take away the property from the creditors?" and she answered, "No, sir"; and some importance is attached by respondent to this answer. We do not, however, consider it of any more significance than the following question and answer: "Was this deed made with any intent to hinder, delay, or defraud any creditor of Mr. Barton?" to which she answered, "Positively, no." These questions and answers merely meant that the deed was not made with any intent to defraud creditors.

Respondent's assignors will no doubt feel aggrieved if they shall fail to get all the money owing them from the estate, but knowing that the conveyance had been made, they chose to rely upon the statements of the deceased, and neglected to protect themselves by filing liens for their materials and work. And they should not be surprised because a widow, whose deceased husband had been in affluent circumstances, takes all legal means to save what she can of his wrecked fortune. The judgment and order appealed from are reversed.

We concur: TEMPLE, J.; HENSHAW, J.

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5 Cal. Unrep. 176

AUSTIN v. PULSCHEN et al. (No. 15,835.) [1]

(Supreme Court of California. Oct. 12, 1895.)

VENDOR'S LIEN—WAIVER—SUBROGATION.

1. A finding that, after plaintiff sold her land she signed and delivered to a certain person "two unacknowledged deeds to said premises," should not be held to constitute an abandonment of a lien for the purchase price where it was also found that plaintiff did not waive her lien, and that said person, "being a mortgagee, must account to plaintiff for the profits." Beatty, C. J., and Temple and Henshaw, JJ., dissenting.

2. Where plaintiff, in possession of land, which she held under a recorded contract of sale, and upon which there was a lien for the purchase price, agreed to sell the same in consideration that the vendee discharge said lien, and give his notes to her for the payment of a further sum, and that she retain possession until they were paid, and the vendee borrowed money from another, giving him a mortgage on the land therefor, and the sum borrowed was paid to the holder of the first lien, who conveyed directly to the vendee, the mortgage must be postponed to plaintiff's lien, the mortgagee not being entitled to be subrogated to the original lien. Beatty, C. J., and Temple and Henshaw, JJ., dissenting.

In bank. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Mary A. Austin against Gustav Pulschen, R. H. McDonald, and others, to enforce a vendor's lien. A judgment refusing her a preference of lien was reversed in department (39 Pac. 799), and R. H. McDonald appeals to the court in bank. Commissioners' decision affirmed.

J. R. Welch, for appellant. Sawyer & Burnett, Dorn & Dorn, and Morehouse & Tuttle, for respondent.

McFARLAND, J. After full consideration of this cause in bank we are satisfied with the opinion delivered and the conclusion reached in department. 39 Pac. 799. The petition for a rehearing in bank is mainly concerned with the proposition that Mrs. Austin, after her sale to Pulschen, conveyed the land to Rosencrantz, and thereby destroyed her vendor's lien. But there is no finding that she conveyed to Rosencrantz. The court finds that at a certain time Pulschen made a deed of the premises to Rosencrantz, which was intended and understood to be a mortgage to secure $600. It is also found that shortly afterwards plaintiff sold some personal property to Rosencrantz, and also "signed and delivered to said Rosencrantz two unacknowledged deeds to said premises"; but it is also found that she did not by said deeds "waive any lien which she had or claimed to have upon said premises." What kind of "deeds" those were does not appear. A deed is simply a sealed instrument, and may be a grant, a mortgage, a bond, or any kind of contract. In some connections a "deed to said premises" might, no doubt, be construed to mean an absolute conveyance of the fee; but here the court evidently did not use the phrase in that sense. It is immediately added that by said deeds plaintiff did not waive her lien; and, moreover, it is found that Rosencrantz, by said deeds or otherwise, became the owner of the premises; but it is adjudged "that said Rosencrantz, being a mortgagee only of said premises, must account to said plaintiff for all the profits," etc. Whatever those deeds were,—whether mortgages or otherwise,—they disappear from the case; and there is no appeal by plaintiff from the judgment in favor of Rosencrantz as a mortgagee.

There is nothing in the point that the money borrowed by Pulschen from McDonald—$2,500—was paid to the original owners, Bruce and Kent. That payment was in accordance with the contract between plaintiff and Pulschen. When that payment had been made to avoid a circuity of conveyance, Bruce and Kent, at plaintiff's request, conveyed directly to Pulschen, and plaintiff and others, supposed to have some shadow of title, joined in the conveyance. But her vendor's lien for the balance of the purchase money coming to her was as perfect as if Bruce and Kent had conveyed to her before she made her contract with Pulschen. That part of the judgment appealed from is reversed, and the lower court is instructed to modify the judgment in accordance with the opinion of Mr. Commissioner VANCLIEF delivered in department.

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[1] Rehearing granted.

We concur: GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.

TEMPLE, J. (dissenting). I cannot concur in the judgment in this case. The finding that for a valuable consideration plaintiff signed and delivered to Rosencrantz two deeds to said premises is not ambiguous. It can only mean that she conveyed the premises to Rosencrantz. It is idle to claim that the meaning is rendered uncertain because at common law a deed was simply a sealed instrument. The word is never so used here. On the contrary, it always means a conveyance of land. But this is not important. McDonald was certainly entitled to be subrogated to the position of Bruce and Kent, as security for the $2,700 paid to them. It is said in the opinion that he cannot be subrogated, because he paid the money under contract with Pulschen. That is why he is entitled to be subrogated. Had he paid it as a mere volunteer, he would not have been so entitled. Had plaintiff foreclosed her lien against Pulschen, she would have taken the land subject to the charge. As McDonald paid it for her, why should he not retain a lien for it? It was a claim against her estate. How has she become discharged from it? The debt was a charge against the land, which plaintiff was bound to pay. When one—not as a volunteer, but to protect his own interests—pays such a debt, he is entitled to be subrogated to the rights of the creditors whose debt he has paid, so far as necessary to secure repayment from the estate which was subject to the charge. Carpentier v. Brenham, 40 Cal. 221; Randall v. Duff (Cal.) 40 Pac. 20.

We concur: BEATTY, C. J.; HENSHAW, J.

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109 Cal. 451

PEOPLE v. HECKER. (Cr. 24.)

(Supreme Court of California. Oct. 9, 1895.)

HOMICIDE—SELF-DEFENSE—EVIDENCE—INSTRUCTIONS.

1. Deceased, whose two strayed horses had been found by defendant, had some altercation with the latter as to whether he was entitled to a reward which had been offered, and in defendant's endeavor to regain possession of the animals, in order to secure his lien, deceased, upon interfering, was killed. *Held*, that there was no error in admitting evidence with regard to a similar interference by deceased in a previous attempt of defendant to regain possession of the animals.

2. Though defendant was in the act of committing a forcible trespass, deceased was not justified in trying to kill him in attempting to prevent it.

3. Defendant would be justified in killing deceased if the circumstances of a felonious assault by the latter upon him were sufficient to excite defendant's fears as a reasonable man that he was in danger of death or great bodily injury.

4. Where, at the time of the affray, defendant was a trespasser in endeavoring to secure possession of an animal belonging to deceased upon which he claimed a lien, and deceased resisted his attempt by a deadly assault upon him with a pistol, it was defendant's first duty to decline to strike; but, if the suddenness of the assault precluded this, he was justified, so long as the imminence of his danger was apparently continued, in meeting it by a deadly return.

5. If defendant was not a wrongdoer in seeking to obtain possession of an animal belonging to deceased upon which he claimed a lien, and deceased met his attempt by a felonious assault with a pistol, defendant, if the assault was sudden and the danger great or apparently great, would have been justified in pursuing and killing his adversary to win his safety.

6. Where, in an attempt to obtain possession of an animal belonging to deceased, upon which defendant claimed a lien, defendant made the first deadly assault, his right to kill deceased in self-defense did not exist, even though willing thereafter to decline further combat, until he had in good faith declined, and had clearly made known to deceased his willingness to do so.

7. Though one may have been guilty of a felonious assault upon another, as a result of which the latter, in self-defense, assaulted and even pursued defendant, yet if defendant in good faith withdrew, and declined further combat, and made this fairly known to deceased, his killing of deceased in the combat immediately forced upon him was justifiable.

8. One in the exercise of the right of self-defense not only has the right to stand his ground and defend himself when attacked, but he may pursue his adversary until he has secured himself from danger.

9. There was no error in refusing an instruction that the jury must return a verdict of not guilty unless convinced to an "absolute moral certainty" of defendant's guilt.

10. It is the better practice with reference to instructions requested by defendant to give them as requested where they submit the law, but the exclusion from one of the many requests of the closing formula, "And if, under the circumstances, he killed deceased, you must find as your verdict, not guilty," is not reversible error.

11. In order to justify the taking of life upon the ground of self-defense, it must not only appear that defendant had reason to believe, and did believe, that he was in danger of his life or of receiving great bodily harm, but it must also appear to defendant's comprehension as a reasonable man that, to avoid such danger, it was absolutely necessary for him to take the life of the deceased.

12. The right to stand one's ground should form an element of the instructions upon the necessity of killing and the law of self-defense.

13. Where deceased, whose two strayed horses had been found by defendant, was killed in attempting to take them from defendant, who claimed a lien thereon, defendant was entitled to instructions defining the rights of a finder of lost property to compensation for its care and preservation and to any promised reward, and the nature of his lien upon it, and how such lien could be lost or extinguished.

In bank. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Charles Hecker was convicted of murder, and, from a verdict of guilty and judgment of conviction, he appeals. Reversed.

The following instructions, referred to in the opinion as requested by defendant, were not given:

"(7) I instruct you as law that the finder of a thing lost, upon taking charge of it, stands in the same legal position as though the owner of the lost property had deposited it with him for hire; and, furthermore, that the finder of lost property is entitled to compensation for all expenses necessarily incurred by him in its preservation, and is also entitled to a reasonable reward for keeping it; and the finder of lost property has a lien upon it for the expenses incurred in its preservation, and for the reasonable reward to which he is entitled; and, in the event of the owner refusing or neglecting upon demand to pay the lawful charges and reward of the finder, the finder may refuse to surrender the property found to the owner, and may retain possession of it until his lien for charges and reward is satisfied.

"(8) If you find from the evidence in the present case that Riley, the deceased, lost his horses, and that Hecker, the defendant, found them, and took charge of them, then I instruct you as law that Hecker had a lien on the horses for his compensation for all expenses necessarily incurred by him in their preservation, and for any services necessarily performed by him for the horses, and for a reasonable reward for keeping them; and, until these charges were paid, Hecker had the legal right to retain possession of the horses, and Riley, the deceased, had no right to take the horses away from Hecker, or to in any manner interfere with him, until he first paid or satisfied Hecker's lien.

"(9) I charge you that where a person has a lien on property found for the charges and reward, that such lien depends upon possession. A voluntary surrender by the finder to the owner extinguishes the lien, but an involuntary surrender or loss does not. If, therefore, you find from the evidence in the present case that defendant found the horses of deceased, and brought them to the town of Briceland, and placed them in the barn of one John Briceland, and that, at the time of bringing said horses to Briceland, deceased was absent; and if you further find that defendant did not voluntarily surrender said horses to deceased, but held them for the payment of his charges against them,—then I instruct you that he had not parted with his lien on them, and that if any one took one of said horses from said barn without defendant's consent, that said horse would still be subject to defendant's lien, and he would have the right to take possession of it wherever he might find it."

"(13) I further charge you as law that a person, in the exercise of the right of self-defense, as I have stated it to you in the foregoing instructions, not only has the right to stand his ground and defend himself when attacked, but he may pursue his adversary until he has secured himself from danger; and if, in so doing, it be necessary, or upon reasonable grounds it appear necessary, to kill his antagonist, the killing is excusable on the ground of self-defense."

"(19) Gentlemen of the jury, I charge you that in this case you are the sole and exclusive judges of the truth of the facts that have been adduced in evidence, and of the credibility of the witnesses who have testified in your hearing; and, in this connection, I further charge you that you are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, as against a less number or against a presumption or other evidence satisfying your minds. In other words, notwithstanding the number of witnesses that may testify, or the amount of evidence that may be introduced upon the part of the prosecution in a criminal case, unless the jury are thereby convinced to an absolute moral certainty of the guilt of the defendant, they must not return a verdict in accordance with such testimony. Upon the other hand, notwithstanding the small number of witnesses that may testify, or the small amount of material evidence that may be introduced upon the part of the defense, if the jury are thereby led to believe the defendant is innocent of the crime charged, it is their solemn duty so to find, and their verdict must be, not guilty."

"E. The law of self-defense is founded upon necessity; and, in order to justify the taking of life upon this ground, it must not only appear that the defendant had reason to believe, and did believe, that he was in danger of his life or of receiving great bodily harm, but it must also appear to the defendant's comprehension as a reasonable man that, to avoid such danger, it was absolutely necessary for him to take the life of the deceased."

"O. A homicide is justifiable when committed in the lawful defense of such person, but such person, if he was the assailant, must really and in good faith have endeavored to decline any further struggle before the homicide was committed. If the defendant himself brought on the fight, and went into it armed, and assaulted Riley in the first instance with a deadly weapon, he cannot justify killing him, unless he had really and in good faith endeavored to decline any further struggle before the killing occurred. If, however, the defendant was the assailant, if he had really and in good faith endeavored to decline any further struggle, and thereafter Riley assaulted him with a deadly weapon, the killing then might be justified by the defendant in self-defense.

"P. In other words, gentlemen of the jury, if you believe from the evidence that the defendant was the aggressor, and made an assault upon Riley with a deadly weapon, he cannot justify killing him, unless he had really and in good faith sought to avoid further conflict before the fatal shot was fired. In case, however, that the defendant was the assailant, if he had really and in good faith endeavored to decline any further struggle before the mortal wound was given, and thereafter Riley renewed the conflict and made an unlawful assault upon Hecker, then Hecker could justify the killing if it was done in necessary defense of his own life, or to prevent his receiving great bodily injury. In order to determine whether there was any such attempted withdrawal, and whether the defendant really and in good faith endeavored to decline any further struggle, the jury are to take into consideration all the surrounding circumstances, the situation and conduct and relation of the parties at the time of the shooting, and all the other evidence in the case.

"Q. If you believe from the evidence beyond a reasonable doubt that the defendant was the assailant, and fired the first shot that was fired, and did not thereafter really and in good faith endeavor to decline any further struggle, and that the shots fired by Riley were shot by him in necessary self-defense, as I have defined it to you, and that thereafter Riley ceased to fire, and then ran away to avoid the defendant; and if you further believe from the evidence that the defendant, Charles Hecker, with intent to willfully and deliberately kill and murder the deceased, pursued the deceased towards the granary, with his pistol in his hand, for the purpose of overtaking the deceased and killing him; and you further believe from the evidence that the defendant, Charles Hecker, did pursue and overtake the deceased while he was thus fleeing and showing no disposition to kill and murder the defendant, Hecker, and that the defendant then and there, without believing himself in danger of losing his own life or receiving great bodily injury at the hands of the deceased or having reasonable ground to believe himself in such danger, fired the fatal shot, and killed deceased,—then I instruct you that in such case the defendant would not be justified under the law of self-defense."

Chamberlain & Wheeler, for appellant. L. M. Burnell and Atty. Gen. Fitzgerald, for the State.

HENSHAW, J. The appellant, Hecker, was tried for the murder of one Patrick Riley, and by the jury found guilty of murder in the second degree. The killing was admitted, but it was claimed to have been done in self-defense.

It appeared by the evidence that Riley peddled wares through the country, using for the purpose a two-horse team and wagon. He had camped near the farm house of one Briceland, and turned his horses into Briceland's inclosure. From this they strayed, and were lost in the hills. They had been gone for several days when Riley, who had been in vain pursuit of them, met Hecker, and offered to give him $10 if he would find and return them. Hecker was an old resident of the vicinity, and owned a sheep range, which was contiguous to the land of Briceland. He searched for the horses that day, and found them, put them in his corral over night, and the next morning proceeded with them to Briceland's. Riley was away at the time of his arrival, and Hecker either made a voluntary surrender of the horses to Mrs. Riley, who put them in Briceland's barn, as was claimed by the people, or, as was contended by the defense, they were put there by Mrs. Riley for Hecker, who thus still retained constructive possession of and a lien upon them for the promised reward of $10. The point is one in dispute. Hecker rode on to the little town of Briceland, and passed the day in waiting for Riley. He did not see him, and went home. The next day he returned to town, and met Riley about 11 o'clock in the morning. Riley called him to one side, and the finding of the horses was discussed. There having been no one else present at that interview, the only account of it is Hecker's. But it appears from other evidence that Riley suspected that his horses had been taken and secreted in the hills in expectation of a reward, and the promptness with which Hecker found and returned them seems to have confirmed him in his suspicion, and created the conviction that Hecker had purloined them. There was no question but that Riley's suspicions were unfounded and unjust. It was in evidence that Riley said he would kill the man who stole his horses. Hecker testified that Riley accused him of stealing the horses, and refused to pay him any money for their recovery. The men parted. Hecker returned to the store and saloon, and, after thinking and talking the matter over, as he says, concluded he would take the horses from Briceland's barn, and put them elsewhere until he was paid. Hecker was a cripple; Riley, a powerful man. Hecker armed himself, thinking that Riley would be at Briceland's, and knowing that "he would be trying to get a row." Arriving at Briceland's a little after noon, Hecker found but one horse, the other having been ridden off by Sam Pollock, who had gone to find Riley, and tell him the search was at an end. Hecker took possession of the animal, and led it from the stable. Riley saw him, and came forward, calling to him, and forbidding the act. Hecker half drew his pistol from the bosom of his shirt, and, in turn, told Riley to advance no further. Riley answered that he was unarmed, and turned out his pockets in proof; and a second time the two men parted, Hecker leading away the horse. He returned with it to the town, where he spent the afternoon discussing his grievance. As was shown, he used some loose talk and indulged in some threats: He would not let Riley beat him out of his money; he would have the money, or would have Riley's blood; while, to add to the bitterness of the matter, he was informed that Riley had gone off to procure his arrest for stealing the horses. This information was brought to him by men whom he had sent to see Riley to fix up the matter, telling them that he wanted no fuss, and to take what they could get and settle it for him. So the time passed until about half past 6 of this July afternoon, when Hecker espied Pollock riding by on the other horse. Hecker, who was himself then mounted, hailed him, and demanded the horse, believing, as he testified, that he "had to have both horses in order to make the lien good." Pollock declined to surrender the animal, saying he would put it where he got it; and so Hecker rode on once more to Briceland's, and to the fatal meeting with Riley. As the two men rode up to the stable, Riley came forward to take his horse. Pollock dismounted. Riley started to remove the saddle. Hecker leaned forward to seize the bridle. There was a struggle for possession, and then, by the evidence for the people, Hecker drew his pistol, and with it struck Riley over the head, and, as he staggered back, fired at him. Hecker's account is that he spurred his horse that he might seize the other's bridle; that, as his horse sprang forward, her fore shoulder struck Riley, and staggered him. "When I broke his hold, he ran right back, and had his hand twisted to pull his pistol, and at last he pulled his pistol out, and pointed at me, and I saw him shut his eye to pull the trigger; and, just as he was about to pull the trigger, I threw myself out of the saddle like that [shows] over the side of my horse, and grabbed my pistol at the same time; and, as I raised mine up, he had his pistol up, and we both shot about the same time. If anything, he shot a little before I did." The defendant was riding a nervous two year old colt, using a "hackamore" in lieu of bridle, and at the shooting she either bolted, or, as Hecker says, he started her to go around Briceland's house, and get out of the way. Riley fired again at him as he went. At some beehives, Hecker reined up, and the two men exchanged shots. Hecker then rode on in another direction, to a place in the yard where there were four stumps, having abandoned, as he says, his first intention to pass around Briceland's house, and endeavoring to get away by another route, or, as the people claim, coming back to engage Riley at closer quarters. Riley ran towards a granary, calling upon one of the bystanders, of whom there were several, to lend him his pistol, and to his wife and daughter to go to the wagon and bring him more cartridges. Whether Riley ran to the granary to escape further combat, or whether he designed to use it as a shield that he might fire with more security upon Hecker, is disputed. Near the granary, and, as Riley was about to pass a corner of it, there was shooting, and Riley, struck through the heart, ran a few yards, and fell dead.

Nothing of the foregoing narrative is to be taken as expressing the views of this court upon the weight of the evidence. That consideration is not before us. The account is designed to throw into prominence the claims made by prosecution and defense for the better understanding of the propositions of law which we are called upon to consider.

The first complaint of defendant is that the court erred in admitting testimony as to the occurrences at the meeting between himself and Riley at noon of the day of the affray. But this complaint is not well founded. Hecker's plea was self-defense. Whether Hecker was within or without his legal rights in seeking to gain possession of the horses, whether he or the deceased first committed a felonious assault, were disputed questions for the jury's determination. The attempt to retake the first horse, though separated in time from the taking of the second, was a part of the same occurrence and transaction which led up to and culminated in the fatal affray. The recovery of the first horse, and the manner of it, the conduct of the two men upon that occasion, their previous difficulty, their threats against each other, whether communicated or not, all tended to enlighten the jury as to the mental attitudes of the men towards each other at the time of the affray, and thus to assist in determining the disputed question as to which in fact first put himself in the wrong, and which first made a felonious assault upon the other; for only by so determining could the jury justly decide upon the defendant's plea. People v. Lyons, 110 N. Y. 618, 17 N. E. 391; State v. Perigo, 70 Iowa, 657, 28 N. W. 452; Monroe v. State, 5 Ga. 85; Williams v. State, 3 Heisk. 376; State v. Zellers, 7 N. J. Law, 220; Keener v. State, 18 Ga. 194; State v. Tarter, 26 Or. 38, 37 Pac. 53.

But having admitted, and properly admitted, this evidence, the court erred in refusing to give the instructions asked by defendant (defendant's proposed instructions Nos. 7, 8, and 9) defining the rights of a finder of lost property to compensation for its care and preservation and to any promised reward, the nature of his lien upon it, and how such lien could be lost or extinguished. It is conceded by the prosecution that these instructions correctly embody the law, but it is contended that they were properly refused as irrelevant. This contention cannot be upheld. One of the questions of primary consideration for the jury was which of the two men was the aggressor at the time of the fatal affray, which of the two first overstepped the boundaries of the law, which of the two first trespassed upon the legal rights of the other,—in short, which of the two, by his acts and conduct, first put himself in the wrong; for it is obvious that the determination of this must throw a flood of light upon the other question, second in consideration but first in importance, namely, whether, at the time the defendant first fired, he was acting in self-defense.

The opposing claims of counsel upon this evidence have been suggested. Upon the one hand it was argued that defendant, after voluntarily surrendering his possession of the horses, and so extinguishing his lien, came with a lawless hand to retake them from their owner, prepared for this end to do murder if resisted; and that this motive dominated his conduct in the meeting at noon and the fatal later one. Upon the other hand, it was argued that the surrender of possession had been involuntary, and that, consequently, defendant's right to possession still existed even against the owner; that his intent was therefore proper, and his purpose lawful. The absence of instructions upon these questions of law left the jury without rudder or compass. The true rule for measuring the acts of the parties not having been given them, each was at liberty to set up his own independent standard, and approve or condemn in accordance with it. The refusal to give these instructions thus constituted reversible error. People v. Taylor, 36 Cal. 255; People v. Keefer, 65 Cal. 232, 3 Pac. 818; People v. Fice, 97 Cal. 457, 32 Pac. 531.

The court gave an instruction prepared by defendant after modification. That instruction is as follows, the modification complained of being the italicized phrase, inclosed in brackets: "I charge you that the law does not permit the taking of human life or the infliction of great bodily harm in the resisting of a mere trespass against personal property. Therefore, in the present case, should you find from the evidence that defendant attempted to regain possession of the horse returned by Pollock [*in a peaceable manner*] for the declared purpose of holding him for a reward, and that the deceased, Riley, resisted such attempt on the part of defendant by resorting to the use of a deadly weapon, or by attempting to kill Hecker or inflict upon him great bodily harm,—and there was imminent danger of his doing so,—then I charge that Riley was acting unlawfully and without right; and if, under these circumstances, you find that Hecker, in order to protect himself from death or great bodily harm at the hands of Riley, shot and killed Riley, then I instruct you that he was justified in so doing, and you must acquit him. And, in this connection, I further instruct you that, if you so find, it makes no difference whether Hecker had a right to take the horse or not; Riley had no legal right to attempt to kill Hecker in resisting a mere trespass." The instruction was offered under defendant's claim of self-defense. As given, it was unobjectionable as a statement of the law excepting for the italicized insertion. One is not justified in taking human life to prevent the commission of a mere trespass, though any person in defense of property has the legal right to prevent the commission of a felony attempted by violence or surprise, and in so doing may use all necessary force, even to the taking of life. Pen. Code, § 197, subd. 2; People v. Payne, 8 Cal. 341; People v. Flannagan, 60 Cal. 2; People v. Dunn, 80 Cal. 34, 21 Pac. 1130. The amendment left the instruction confused and erroneous. The defendant was entitled to have the jury instructed that even if he was in the act of committing a forcible trespass in endeavoring to take the horse, if his act amounted to no more than a trespass, Riley was not justified in trying to kill him, if he did try, in attempting to prevent it. And if, under these circumstances, Riley did make the first felonious assault upon defendant, defendant, in turn, would be justified in killing Riley, if the circumstances of Riley's felonious assault were sufficient to excite defendant's fears as a reasonable man that he was in danger of death or great bodily injury, and he acted under these fears alone, and had in good faith, declined further struggle before firing the fatal shot, or was put in such sudden jeopardy by the acts of deceased that he could not withdraw, and if it was thus that Riley met his death. But, as given, the court in effect told the jury that the defendant's rights were to be governed by their determination whether or not he was endeavoring to take possession of the horse in a peaceable manner. Even if a peaceable trespass be conceded, the jury was substantially told that Hecker's plea of self-defense under the hypothesis could not be upheld unless his act was a peaceable trespass. But such is not law. "Where the trespass is forcible against personal property, an owner may resist it, but he is not justified in killing the trespasser unless it is necessary, to prevent a felonious destruction of the property, or to defend himself against loss of life or great bodily harm." Carroll v. State, 58 Am. Dec. 282, 26 Am. & Eng. Enc. Law, p. 572; State v. Tarter (Or.) 37 Pac. 53; State v. Perigo, 70 Iowa, 657, 28 N. W. 452.

The acts which a defendant may do and justify under the plea of self-defense depend primarily upon his own conduct, and secondarily upon the conduct of the deceased. There is no fixed rule applicable to every case, though certain general principles, well established, stand forth as guides for the action of men and measures for the jury's determination of their deportment:

First. Self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue, and thus, through his fraud, contrivance, or fault, to create a real or apparent necessity for killing. People v. Robertson, 67 Cal. 646, 8 Pac. 600; Stewart v. State, 1 Ohio St. 66.

Second. It is not available as a plea to one who, by prearranged duel or by consent, has entered into a deadly mutual combat, in which he slays his adversary. In both of these cases the same rule applies. A man may not wickedly or willfully invite or create the appearances of necessity or the actual necessity which, if present to one without blame, would justify the homicide. State v. Partlow, 90 Mo. 608, 4 S. W. 14; State v. Underwood, 37 Mo. 225; Lambert's Case, 9 Leigh, 605; 1 Bish. Cr. Law, § 870; Gilleland v. State, 44 Tex. 356; Clifford v. State, 58 Wis. 478, 17 N. W. 304; Tate v. State, 46 Ga. 151.

Third. Where one, without fault, is placed under circumstances sufficient to excite the fears of a reasonable person that another designs to commit a felony or some great bodily injury upon him, and to afford grounds for reasonable belief that there is imminent danger of the accomplishment of this design, he may, acting under these fears alone, slay his assailant, and be justified by the appearances; and as, where the attack is sudden and the danger imminent, he may increase his peril by retreat, so situated he may stand his ground, that becoming his "wall," and slay his aggressor, even if it be proved that he might more easily have gained his safety by flight. People v. Herbert, 61 Cal. 544; People v. Gonzales, 71 Cal. 569, 12 Pac. 783; People v. Ye Park, 62 Cal. 204; People v. Robertson, 67 Cal. 650, 8 Pac. 600; Runyan v. State, 57 Ind. 84; Erwin v. State, 29 Ohio St. 186. So, too, under such circumstances, he may pursue and slay his adversary. But the pursuit must not be in revenge, not after the necessity for defense has ceased, but must be prosecuted in good faith, to the sole end of winning his safety and securing his life. Carroll v. State, 23 Ala. 28; Young v. Com., 6 Bush, 312; Collins v. State, 32 Iowa, 36; Horr. & T. Cas. p. 230.

Fourth. Where one is making a felonious assault upon another, or has created appearances justifying that other in making a deadly counter attack in self-defense, the original assailant cannot slay his adversary and avail himself of the plea, unless he has first and in good faith declined further combat, and has fairly notified him that he has abandoned the contest. And if the circumstances are such. arising either from the condition of his adversary, caused by the aggressor's acts during the affray or from the suddenness of the counter attack, that he cannot so notify him, it is the first assailant's fault, and he must take the consequences (People v. Button, 106 Cal. 628, 39 Pac. 1073; State v. Smith, 10 Nev. 106; Stoffer v. State, 15 Ohio St. 47); for, as the deceased, acting upon the appearances created by the wrongful acts of the aggressor, would have been justified in killing him, he whose fault created these appearances cannot make the natural and legal acts of the deceased looking to his own defense a justification for the homicide. Before doing so, he must have destroyed these appearances, and removed, to the other's knowledge, his necessity, actual or apparent, for self-preservation.

Fifth. Where one is the first wrongdoer, but his unlawful act is not felonious, as a simple assault upon the person of another, or a mere trespass upon his property, even though forcible, and this unlawful act is met by a counter assault of a deadly character, the right of self-defense to the first wrongdoer is not lost; for, as his acts did not justify upon the part of the other the use of deadly means for their prevention, his killing by the other would be criminal, and one may always defend himself against the criminal taking of his life. But in contemplation of the weakness and passions of men, and of the provocation, which, though inadequate, was wrongfully put upon the other, it is the duty of the first wrongdoer, before he can avail himself of the plea, to have retreated to the wall, to have declined the strife, and withdrawn from the difficulty, and to have killed his adversary, under necessity, actual or apparent, only after so doing. If, however, the counter assault be so sudden and perilous that no opportunity be given to decline or to make known to his adversary his willingness to decline the strife, if he cannot retreat with safety, then, as the greater wrong of the deadly assault is upon his opponent, he would be justified in slaying forthwith in self-defense. People v. Robertson, 67 Cal. 646, 8 Pac. 600; People v. Westlake, 62 Cal. 303; State v. Perigo, 70 Iowa, 657, 28 N. W. 452. The distinction between this principle and the one preceding it consists in this: In the former case the provocation for making a deadly counter attack in self-defense is adequate, and therefore the first aggressor must remove the necessity for it, and make that fact known before his own right of self-defense can exist; in the latter case the provocation is inadequate, and if the other, by his own unlawful act, deprives the first wrongdoer of the opportunity to decline a deadly strife, that fault lies not at the door of the slayer, but of the slain.

So much it has seemed necessary to say in view of the varying theories upon the facts attending this homicide, and in contemplation of a new trial.

If, at the time of the affray, Hecker was a trespasser, and no more, in his endeavor to take the horse, and Riley met his endeavor by a deadly assault upon him with a pistol, it was Hecker's first duty to decline the strife; and, if the suddenness of the assault precluded this, he was justified, so long as the imminence of his danger continued, or apparently continued, in meeting it by a deadly return. If, however, Hecker was not a wrongdoer in seeking to take the horse, and Riley met his attempt by a felonious assault with a pistol, Hecker, if the assault was sudden, and the danger great, or apparently great, would have been justified in standing his ground, or even, as above set forth, in pursuing and slaying his adversary, to win his safety. If, on the other hand, Hecker made the first deadly assault, his right to slay Riley in self-defense did not exist, even though willing thereafter to decline further combat until he had in good faith declined and fairly made known to Riley his willingness to do so. And, if he did not do this, even though he failed because of his own imminent danger, and under these circumstances killed Riley, his act was criminal. And, lastly, if, upon the other hand, he made the first felonious assault, and thereafter, and before firing the fatal shot, did in good faith withdraw and decline further combat, and this was fairly made known to Riley by his conduct, and thereafter Riley pursued him, and forced a new combat upon him, and under these circumstances Riley was killed, the killing was justifiable.

Defendant's proposed instruction No. 13, as to the right to pursue and slay to secure safety, is, in itself, a correct, if not a full, exposition of the law, and it cannot be said that it does not address itself to a theory permissible under the evidence. It, or an equivalent instruction, should therefore have been given.

It was not error to refuse defendant's proposed instruction 19. The jury was advised as to the weight of evidence, number, and credibility of witnesses. The vice of the rejected instruction was that it declared that the jury must be convinced to an "absolute moral certainty." The refusal to give such an instruction has more than once been upheld. People v. Davis, 64 Cal. 440, 1 Pac. 889; People v. Nelson, 85 Cal. 430, 24 Pac. 1006; People v. Ferry, 84 Cal. 31, 24 Pac. 33; People v. Smith, 105 Cal. 676, 39 Pac. 38.

The instruction lettered O is not erroneous. Standing by itself, it would be of little value to the jury, since it merely declares that the killing after withdrawal from a struggle might be justified. However, it is obviously but a preliminary declaration, as, in the instructions immediately succeeding (P. and Q.), there are set forth in detail the circumstances under the assumed state of facts which would and would not justify. These instructions will be construed together. People v. Turcot., 65 Cal. 126, 3 Pac. 461.

The court gave an instruction substantially as asked by defendant, but struck therefrom the closing sentence, as follows: "And if, under these circumstances, he killed deceased, you must find as your verdict, not guilty." The complaint is founded upon this excision. It is the natural tendency of advocates to bear with emphasis upon the favorable points both in argument and in instructions, and all the cases are replete, as is this case, with instructions asked by attorneys for the prosecution and defense, and closing with this or an equivalent formula. It cannot be said that to eliminate it from one instruction is error. Yet the practice is not wise. If the instruction offered is not the law, the court may reject it; if it be law, it is better to give it as presented, for not only has either party the right to emphasize by instructions a true principle, but the danger of modifying an instruction which is correct in itself is that it may occasion some just ground for complaint that the modification devitalizes and emasculates the proposition of law whose exposition was sought. We are far from implying that such was the effect in this case, still further from implying that such was the intent, but it certainly is not amiss to suggest the wiser and better practice.

Instruction E, which is complained of, has often been given and as often approved by this court. The cases, in which it is discussed, are reviewed in People v. Bruggy, 93 Cal. 476, 29 Pac. 26. As was said by this court in People v. Herbert, 61 Cal. 544: "To justify a homicide, there must be a necessity, actual or apparent; and this we understand to be true under our statute as well as at common law." Those cases where the assailed is not required to look to escape as an avenue of safety arise, as has been before discussed, where the peril is swift and imminent, and the necessity of action immediate. Therein the law does not weigh in too nice scales the conduct of the assailed, and say he shall not be justified because he might have resorted to other means to secure his safety. The suddenness of the attack puts him to the wall. Upon the duty of retreat there was a contrariety of opinion by the writers of common law, and this difference has found its way into the decisions of our states,—some, as Alabama and Iowa, holding to the rule that retreat is necessary; others, as Indiana, Michigan, and our own state, declaring for the contrary doctrine. But it is not stating it too strongly to say that the trend of later judicial decisions is in favor of the latter rule. So that while the killing must still be under an absolute necessity, actual or apparent, as a matter of law, that absolute necessity is deemed to exist when an innocent person is placed in such sudden jeopardy. The right to stand one's ground should form an element of the instructions upon the necessity of killing and the law of self-defense.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: BEATTY, C. J.; TEMPLE, J.; McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.

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109 Cal. 13

PAULY v. MURRAY. (L. A. No. 14.)[1]

(Supreme Court of California. Nov. 9, 1895.)

NEGOTIABLE INSTRUMENTS—ACCOMMODATION PAPER—CONSIDERATION.

It matters not that an accommodation maker affixed his signature to the note in question after the bank discounting it as payee had paid the money thereon to his comaker, for whose benefit the note was executed, if, before such comaker received the money, he promised the bank that he would cause the accommodation maker to sign the note, and the bank advanced the money relying in good faith upon that promise, not entering the note as discounted until after the other signature was obtained.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; James A. Gibson, Judge.

Action by Fred. N. Pauly, as receiver of the California National Bank, against Eli H. Murray, on a promissory note. There was judgment for plaintiff, from which defendant appeals. Affirmed.

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[1] Rehearing denied.

Cassius Carter and Withington & Carter, for appellant. Allen & Flint, for respondent.

VANCLIEF, C. Action on a promissory note made by defendant to said bank July 20, 1891, for the sum of $578.80, payable 90 days after date, with interest at the rate of 1 per cent. per month from date. It is alleged in the answer of the defendant that this note was made by him as a renewal of a former note for the sum of $500 and interest, jointly made by him and one Hugh Burns to said bank, on which joint note he was a mere surety, of which the bank had notice at the time it was signed by him; that said joint note was given to secure a loan of $500, made and advanced to Burns by the bank on a note signed by Burns alone, several hours before defendant signed the same as a joint maker with Burns; that at the time defendant signed the last-mentioned note he was ignorant of the alleged facts that the bank had, some hours before, on the same day, actually advanced to Burns the $500 loaned, and had accepted as security therefor the note signed by Burns alone; that he was induced thus to sign said joint note by a collusive and fraudulent suppression by Burns and the bank of the facts that the loan had been made, and that Burns' individual note had been accepted therefor, before he was induced to sign said note as a joint maker; that he remained ignorant of said suppressed facts until long after he individually made the note in suit as a renewal of said joint note; and for these reasons he alleges that there was no consideration for his signature to said joint note, and consequently no consideration for the renewal thereof by the note in suit. The court below found as facts that the loan to Burns by the bank was solicited by Burns on January 21, 1890, he having been introduced to Collins, the president of the bank, by defendant; that at the time he solicited the loan Burns represented to the bank that defendant would sign a note for the money, if loaned, jointly with him, though defendant was not then present, and had not then promised the bank to sign the note; that thereupon the bank agreed to make the loan on the condition that Burns would procure the signature of defendant to the note as a joint maker; that Burns then signed the note, and passed it to the note clerk of the bank, promising that he would cause defendant to sign it, but the president of the bank then directed the clerk not to enter the note as discounted by the bank until it should be signed by the defendant, but at the same time advanced and delivered the $500 loaned to Burns; that thereafter, during banking hours on the same day, the defendant called at the bank, and signed the note, and after it was signed it was, in the regular course of business on the same day, entered as a discounted note; that in advancing said money to Burns the bank relied upon the promise of Burns that he would cause defendant to sign the note; that defendant signed the note merely as an accommodation to Burns, and received no other consideration therefor, and did not know, at the time he signed, that Burns had before that time received the money loaned; that, after the maturity of the note, the defendant, at the request of the bank, renewed it by making the note in suit, without any consideration additional to that for the joint note; and "that no fraud or misrepresentation of any kind or character was used, practiced, or made by said bank, or by any one in its behalf, in or about the procurement of the signature of defendant, Murray, either to said original note or to the note sued on in this action." Upon these findings of fact judgment passed in favor of plaintiff for the amount sued for. The defendant appeals from the judgment and from an order denying his motion for a new trial.

Appellant contends (1) that the findings of fact are not justified by the evidence, and (2) that the facts found do not warrant the judgment. The only material controversy about the facts relates to the consideration for the first note. If there was a sufficient consideration for the joint note, the surrender thereof to defendant was undoubtedly a sufficient consideration for the individual note of the defendant upon which this action is founded. In order to establish a sufficient consideration for the first note, it was only necessary, in addition to the admitted facts, to find, as the court did find, an affirmative answer to the following questions: Did Burns, before he received the money, promise the bank that he would cause defendant to sign the note? Did the bank advance the money relying in good faith upon that promise, so that the agreement for the loan and the security therefor was not completely executed until after defendant signed the joint note? I think the evidence, direct and circumstantial, sensibly tended to prove, and therefore justified, these findings. As to the fraud and collusion charged, there is no evidence tending to prove it. The facts of this case plainly and materially distinguish it from that of Leverone v. Hildreth, 80 Cal. 139, 22 Pac. 72. In that case the note signed by the defendant had been completely executed by his father, and was two months overdue when defendant signed it; and there was no plausible pretense of any consideration moving to the defendant. By implication that case justifies the judgment in this. Speaking of the authorities cited by the respondent in that case, the court, by the chief justice, said: "They are to the effect that if the payee parts with his money on the faith of a promise by the borrower that he will procure the signature of a surety to his note, the surety is bound if he sign the note after the money is advanced; but such is not the case here." Such, however, is the case at bar. The authorities referred to by the chief justice, so far as reported, are McNaught v. McClaughry, 42 N. Y. 22, and Harrington v. Brown, 77 N. Y. 72. In the first of these cases the court said: "The authorities are clear upon the two propositions involved in the question: First. If Abram had given his note to the plaintiff, and the same had been accepted in performance of the contract without further condition, and the note was yet unmatured, the obtaining an additional indorser would have been a gratuitous act on the part of Abram, and the indorser would not be bound. * * * On the other hand, if Abram had originally agreed with the lender that he would obtain the new indorser, and had obtained the money upon the faith of that promise, then his finding the additional indorser was based upon a valid consideration, and the indorser was held by his signature. To this precise point is the case of Moies v. Bird, 11 Mass. 436, recognized and affirmed in Hawkes v. Phillips, 7 Gray, 284; Lovering v. Fogg, 18 Pick. 540; Leonard v. Wildes, 36 Me. 265. See, also, Parks v. Brinkerhoff, 2 Hill, 663; Clark v. Rawson, 2 Denio, 135." I think the judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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100 Cal. 673

PEOPLE v. SHATTUCK. (Cr. 30.)

(Supreme Court of California. Nov. 7, 1895.)

HOMICIDE — EVIDENCE — DECLARATIONS — EXCEPTION—DEFENSE—INSANITY—WITNESS —CREDIBILITY.

1. On trial of a mother for the murder of her daughter's seducer, declarations of the deceased to his mother, several days before the murder, on his return from a visit to the defendant and her daughter, made in answer to a letter from the daughter, as to what occurred at the meeting, are purely hearsay.

2. An objection by the defense to the admission of what the deceased did on a certain visit to the defendant will be held to include what he said on that occasion, when it appears that the parties to the prosecution and the court so understood it.

3. Where, on a trial for murder, insanity is relied on as a defense, an expert may testify to statements made to him by the defendant of previous sufferings, which formed the basis of, and are declared by him to be necessary to, his diagnosis of the case.

4. Where, on trial of a mother for the murder of her daughter's seducer, the defense is insanity, caused by discovery of the fact of the seduction, and the prosecution claim that defendant knew from the beginning that the relation was immoral, correspondence between deceased and the daughter, of which defendant had no knowledge, is inadmissible.

5. An instruction in a criminal prosecution, requiring the jury to consider the relationship and interest of witnesses to the defendant, as affecting their credibility, is erroneous.

Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belchers, Judge.

Jane Shattuck was convicted of murder, and from the judgment, and an order denying a new trial, appeals. Reversed.

Burnett G. Haskell, J. J. Guylfoyle, and T. J. Lannon, for appellant. Atty. Gen. Fitzgerald, for the State.

TEMPLE, J. The defendant was tried upon the charge of murder, and convicted of murder in the first degree, and appeals from the judgment and from an order refusing a new trial. Her defense was insanity. The prosecution and defense each made an opening statement at the beginning of the trial. Among other things the district attorney stated that he would prove that the deceased, Harry G. Poole, was a young man who had expectations, and that defendant desired to induce him to marry her daughter. There had been some love passages between them, but deceased never expected to marry Miss Shattuck. On the 4th of January defendant sent Poole a note, demanding that he declare his intentions. Miss Shattuck was a chorus girl in an opera troupe, and was expecting to go East on Monday, January 8th. On the Sunday preceding, defendant caused her daughter to write deceased a letter, couched in endearing and yet alarming terms, requesting his immediate presence. Deceased received this letter, and in response went to the house, when defendant shot him through the head, and he immediately died. He claimed that the killing was deliberate and malicious, and out of revenge, because Poole would not marry her daughter. Defendant's counsel announced that they would rely to a great extent on the same facts. He claimed that deceased pretended an honest attachment for Miss Shattuck, and pretended that he desired to marry her, and so won her affections and the confidence of her mother. His visits to the residence of the Shattucks were frequent, and his engagement understood, and he addressed the defendant as "ma" and her mother as "grandma." He claimed that the pretended affection was put on to enable him to seduce the daughter, which he finally succeeded in doing. He claimed that his client was suffering from a brain disease, and was already in the border lands of insanity. Insanity was already present in a latent form, and only required a sufficient exciting cause to render it active. This cause was furnished by the sudden discovery on that fatal Sunday that her daughter had been ruined, and she deceived, by the arts of the seducer. His defense was, therefore, insanity, pure and simple. It will be noticed that, while proof of the charge was not waived, the defense assumes that, the corpus delicti being made out, defendant was guilty as charged, unless she was insane. The killing was shown, and in the proof on the part of the prosecution there were no circumstances in mitigation.

1. The first objection which it is necessary to notice relates to the objections of defendant to the evidence of a conversation between

Mrs. Newlands, mother of the deceased, and the deceased, January 4th, three days and more before the homicide. The witness testified that at half past 6 o'clock on that evening her son received a letter from Mrs. Shattuck,—the letter alluded to in the opening statement,—and immediately went out. He returned about 8 o'clock. The district attorney asked: "What did he do then?" Here counsel for the defense objected, when the following occurred. "Mr. Peixotto: It is part of the res gestæ. Mr. Lennon: I object to it as irrelevant, immaterial, and incompetent. The Court: The objection is overruled. Mr. Lennon: We take an exception. Mr. Peixotto: We introduce, may it please the court, what was done upon the evening of January 4th, as being part of the res gestæ, as the first matter which led to the unfortunate matter on the Sunday. The Court: I suppose, for the purpose of leading up to the motive or intent? Mr. Peixotto (interrupting): Also showing motive, deliberation, and malice. Mr. Peixotto: You said he came home about eight o'clock? Answer. Yes, sir. Question. What did he do then? A. I was sitting in the kitchen, reading, and he came in, and his eyes looked as though he had been crying. I did not say very much. I watched him, and he took his things off, and he said he never was going into that house again. He spoke of the woman. I said, 'What woman?' He said, 'That girl's mother.' I asked him, 'Why?' 'Well,' he said, 'she was no good.'" As this was 3½ days prior to the homicide, we need not discuss the question as to whether this conversation was res gestæ. It is suggested that the conversation was res gestæ as to the receipt of the letter, and, if such proof of the fact was proper, this must be so. But proof characterizing his receipt of the letter was not material, and the conversation did not occur at the time he received the letter, and had no reference to it. It was only to show something which had transpired during his absence, between himself and defendant, and was purely hearsay. It is not disputed that it was proper for the prosecution to show malice, deliberation, and motive, but this must be done by competent evidence, and the declarations of the deceased are not competent. It is said that the defense did not make a proper objection, because the question was what did he do then, not what did he say, and there was no motion to strike the testimony out. What he did was to have the conversation with his mother, and the record shows that all parties, including the court, understood that the evidence came in under the exception. What he did then would have been no more relevant than what he said. When it is plain that the defense intended to take the exception, and his intention could not be misunderstood, we are not disposed to criticise, in order to find a reason for not considering it, especially in a criminal case. See People v. Yee Fook Din, 106 Cal. 163, 39 Pac. 530. A great deal was made of this evidence by the prosecution. It was contended that there had been an estrangement; that in fact the deceased had answered the letter by refusing to marry the daughter; and hence arose a desire for revenge. It was error which would of itself necessitate a reversal.

2. A medical witness was called by the defense to show the mental condition of the defendant, and establish the defense of insanity. It was contended that defendant was suffering from a tumor upon the brain, which caused pressure there, and a mental condition which made her liable to become insane upon any great excitement. The witness proceeded to tell of what pains the patient complained, and said that it was necessary to give a clinical history of the case to understand the significance of her symptoms. He was asked if he got the history of her past sufferings from the defendant herself, and he said he did. Thereupon the district attorney objected to her statements as to past suffering and condition. The objection was sustained. The witness then said: "It is necessary to refer to previous condition in order to explain why I treated her, and why I came to the conclusion. The Court: The previous condition of the defendant, as she may have told him, is hearsay testimony, and cannot be permitted." Due exception was taken. Such declarations and statements, when they constitute in part the basis upon which the opinion of an expert is based, and are by him declared to be necessary to enable him to form an opinion as to the nature of the disease, are admissible. Rogers, Exp. Test. § 74; Railroad Co. v. Newlands, 104 Ind. 264, 3 N. E. 836; Yeatman v. Hart, 6 Humph. 375. The party is entitled to have the reasons for the opinion, so that the jury can estimate its value. If the evidence justifies it, they may conclude that the sufferings were feigned, or may themselves form an independent judgment upon the facts. It is contended that injury did not result from this error. But that we cannot tell. His opinion might have carried much more weight had he been permitted to state all the facts upon which he based it. He himself said, in effect, that his opinion and treatment could not be explained without it.

3. The next exception was to the introduction by the prosecution of certain letters written by Miss Truly Shattuck to Harry G. Poole. As stated, both the prosecution and the defense had claimed in their opening statements that the relation of lovers had existed between the deceased and Miss Shattuck, and that Harry G. Poole had not intended marriage. The prosecution really claimed that the relation was immoral, and that defendant knew it, and yet insisted that deceased should marry her daughter, and, when he refused, killed him out of revenge. The theory of the defense has already been stated. That was that deceased was engaged to Miss Truly, and that the relation was, on their side, honest and honorable, and that defendant did not suspect that there was anything wrong, or that her daughter had been seduced, until the morning

of the homicide. The letters were introduced as a part of the cross-examination of Miss Truly Shattuck. At the very commencement of her testimony she said: "He [Poole] was keeping company with me. I was in love with him, and engaged to marry him." The defense had never denied the relation, or that both defendant and her daughter encouraged and favored the attentions paid by Poole to Miss Shattuck. It was part of their defense that they did so under the belief that his intentions were honorable. During the testimony of Miss Shattuck counsel for the defense read three letters from deceased to Miss Truly, which had no apparent significance, except as showing that he sought Miss Shattuck's society. The letters introduced by the prosecution had no other relation to the letters read by the defense than that they were a part of the same amatory correspondence. There was nothing in them tending to disprove anything contained in the letters read in defense, nor did they explain anything contained therein, or testified to by the witness. The real purpose of the letters was to argue, from some dubious expressions contained in them that Miss Shattuck was not then a chaste woman; in other words, that she had been seduced. I do not say that I think they tended to prove that; but, if they did, they would not disprove the charge that Poole was the seducer. Furthermore, upon that subject the witness had given no testimony. It was not shown, nor was it claimed, that the defendant knew of these letters. Evidence that her daughter was unchaste had no bearing upon any question in the case except to show malice, and to rebut the claim that the defendant discovered the fact for the first time on the morning of the homicide. Without proof that the defendant knew of the correspondence, I am at a loss to discover upon what principle they were admissible. If the fact of the seduction or want of chastity—admitting that it was shown by the letters—was material, it does not matter when the daughter was seduced or became unchaste, but when did the defendant discover it. But it is said, if this was error, it was invited error. But, as we have seen, the evidence did not tend to disprove or explain anything which the letters put in by the defense tended to prove. Had the character of the relation between the deceased and Miss Shattuck been, of itself, independently of the knowledge of the defendant, a matter in controversy, I think the letters would have been relevant; but the character of that relation was immaterial, except as it affected the defendant's state of mind. This could not have been affected by such facts if she were ignorant of them. There was nothing in these letters which tended to show that the young people were not engaged to be married, or that deceased had not won the confidence of the defendant by pretending an honorable affection for her daughter.

4. It is next objected that the court erred in giving an instruction as follows: "Certain relatives of the defendant, to wit, the husband, mother, and daughter, have been examined as witnesses in behalf of the defense. This is their right. It is proper, however, for the jury to bear in mind the relationship between them and the defendant, and the manner in which they may be interested by your verdict, and the very grave interest they must feel in it. And it is proper for the jury to consider whether their position and interest may not affect their credibility, or color of their testimony." A charge of this character was held to be error in People v. Hertz, 105 Cal. 660, 39 Pac. 32. The court has frequently hinted that a similar instruction in regard to the defendant is erroneous, because it violates the constitutional provision that judges shall not charge juries with respect to matters of fact. The court has heretofore declined to reverse for such instruction, as it had been approved in some former cases. The reason for this was that cases might have been already tried where such instruction had been given in reliance upon the former decisions, and in regard to the defendant the instruction would not be likely to be so harmful, as the situation was obvious without being specially pointed out. This case was tried before the profession had become aware of the rule laid down in People v. Hertz. We do not care to modify that rule.

There are other alleged errors which I do not deem it necessary to discuss. In view of the fact of a new trial, however, I suggest that the hypothetical question put to the medical expert be revised. Judgment and order reversed, and new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.

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5 Cal. Unrep. 192

LEVERONE v. HILDRETH. (No. 18,382.)

(Supreme Court of California. Nov. 13, 1895.)

APPEAL—REVIEW—EVIDENCE.

Where there is a substantial conflict in the evidence, the findings of the trial court will not be disturbed.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by William M. Leverone against George W. Hildreth. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Tupper & Tupper, for appellant. Craig & Meredith, for respondent.

PER CURIAM. The plaintiff brought this action on a promissory note, dated August 1, 1885, and payable one day after date, and the defendant pleaded as a defense thereto that there was no consideration for the execution of the note by him. The note was originally made by Thomas Hildreth, the father of defendant, and some months later was signed by defendant. The case was tried and the findings and judgment were in favor of the plaintiff. From that judgment, and an order denying a new trial, the defendant appealed. After a hearing by this court in bank, the judgment and order were reversed, and the cause remanded, upon the ground that the findings as to the consideration for the execution of the note by defendant were against all the evidence. The court said: "There is no material conflict of testimony as to the circumstances under which he added his signature to the note. Respondent was pressing his father for payment, and, at the father's request, the son signed. There was no extension of credit, no promise of forbearance, written or oral." 80 Cal. 139, 22 Pac. 72. The case was again tried, and the court found that "there was no consideration for the execution by the defendant of the promissory note set forth in the complaint of the plaintiff," and gave judgment accordingly for defendant. From that judgment, and an order denying his motion for a new trial, the plaintiff prosecutes this appeal.

In support of the appeal it is earnestly contended that the finding that there was no consideration for the execution of the note by defendant was not justified by the evidence, because "it appears from the evidence, without any conflict, that defendant, George W. Hildreth, at the request of plaintiff, signed the note upon plaintiff's agreeing not to sue or attach defendant's father, Thomas Hildreth, at once, but to wait, and to give him a few months within which to pay the note," and that "plaintiff waited from November, 1885, the time of the agreement, until February 9, 1887, before bringing suit." It is true that the evidence introduced by the plaintiff tended strongly to support his theory, but it was not without conflict. On the contrary, the evidence introduced by defendant was, in our opinion, quite sufficient to raise a substantial conflict upon the question in controversy. It would subserve no useful purpose to state the evidence in detail. The case falls within the well-settled rule that, when there is a substantial conflict of evidence, the findings of the trial court will not be disturbed on appeal.

The judgment and order must be affirmed, and it is so ordered.

115 Cal. 330

MARSHALL et al. v. FARMERS' BANK OF FRESNO. (No. 18,448.)[1]

(Supreme Court of California. Nov. 25, 1895.)

PURCHASE OF LANDS—NOTICE OF TRUST.

Under Pol. Code, § 3519, requiring the register to prepare a patent on surrender of the certificate of purchase by the person entitled to it, and to certify to the governor that the party named in the prepared patent is entitled to it, a purchaser from one to whom a patent is issued absolutely on such a certificate of the register is not chargeable with notice that the certificate of purchase had been transferred to the patentee merely as an attorney.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by Rebekah Marshall and others against the Farmers' Bank of Fresno. Judgment for plaintiffs. Defendant appeals. Reversed.

W. D. Tupper, for appellant. James H. Budd, Nutter & De Vries, and F. H. Short, for respondents.

BRITT, C. Plaintiffs seek in this action to have the defendant declared the trustee for them of the title to certain land situate in the county of Fresno, and to compel conveyance thereof. Plaintiffs are the heirs at law of one Thomas Marshall, who died October 25, 1882. On June 13, 1868, said Thomas Marshall made application in the state land office to purchase the land in question, the same being the east half of a certain sixteenth section. His application was approved May 10, 1869, and a certificate of purchase was issued to him on July 6, 1869. These proceedings were under the act then in force (St. 1867–68, p. 507), providing for the sale of lands belonging to the state. Marshall made a quitclaim deed of the land, bearing date January 8, 1868, to one B. F. Langford, which the court finds was delivered February 5, 1869. This deed purported to authorize Langford to receive a certificate of purchase or patent for the land in his own name. April 29, 1886, Langford executed a deed of the land to David S. Terry. On July 10, 1886, the state commenced an action in the superior court of Fresno county to annul said certificate, as provided in section 3548, Pol. Code, for nonpayment of interest on the deferred installment of purchase money. Thomas Marshall was the sole defendant named in that action. Publication was made of the summons, and on December 28, 1886, judgment was entered declaring said certificate of purchase null and void, and that all persons claiming under Marshall were barred of all right in the certificate and in the land after the filing of a certified copy of the judgment with the register of the state land office, and a like notice with the recorder of Fresno county. Such copies were filed accordingly within 20 days after the entry of the judgment. Pol. Code, § 3550. Before the expiration of a year from the entry of the judgment, said Terry made to the county treasurer the payments necessary for redemption therefrom, as permitted by the act of March 7, 1881 (St. 1881, p. 65), and also paid the balance of principal and interest then due the state for the land. He then had possession of the certificate of purchase, and in January, 1888, he surrendered the same to the register, and thereupon received a patent for the land, dated January 24, 1888, signed by the governor, and otherwise attested as required by law. The patent recited a certificate of the register, to be presently noticed, and by its terms the land was granted to Terry and his heirs and assigns forever. In March, 1888, Terry exhibited the patent to the defendant bank, and, upon his title so evidenced, obtained a loan of $10,000, he executing a mortgage on the land and some other parcels to secure payment of the loan. Terry died, and the money was not repaid to the bank. It brought its action to foreclose said mortgage, and obtained judgment for that purpose, and caused the land to be sold by the sheriff pursuant to such judgment. It became the purchaser at the sale, and on January 16, 1891, it received the sheriff's deed of the land.

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[1] Rehearing granted.

There was testimony at the trial—uncontradicted, so far as we discover—that Langford had possession of the land from the time of the approval of the location until the death of Terry, leasing it to "sheep men." The court held, however, that the deed to Langford, being executed before Marshall's application was approved, was ineffectual to pass any interest to the former; that the register mistook the law in subsequently holding that it did; and further found that Marshall delivered the certificate of purchase to Terry, but never made any assignment thereof; that Terry held the same as attorney and agent for Marshall and as trustee for his heirs; that he fraudulently induced the register to believe him to be the owner of the certificate, and so obtained the patent in his own name, and held the title in trust for plaintiffs; and that defendant had knowledge of the relation of trust occupied by Terry at the time of its loan to him. The judgment required defendant to convey the land to plaintiffs.

The sufficiency of the evidence to justify the conclusion of Terry's trusteeship seems doubtful, but we need not examine that question. There is neither finding, allegation, nor proof of the time, circumstances, or purpose of the delivery of the certificate by Marshall to Terry, and it is obvious that, if Terry held the title in trust at all, it was so by implication of law only; and no trust so arising can prejudice the rights of an incumbrancer or purchaser of real property for value, and without notice of the trust. Civ. Code, § 856. We are unable to find in the record any evidence to support the finding that defendant had such notice. It is not claimed, indeed, that the defendant had actual knowledge of any interest of plaintiffs in the land, but it is said that such knowledge is imputed to it because of the existence of circumstances which it was bound to know. The patent ran to Terry absolutely. It was the highest evidence of transfer from the state of its title, and was also evidence that all the steps prescribed for its issuance had been properly taken. Heinlen v. Heilbron, 97 Cal. 101, 31 Pac. 838; Minter v. Crommelin, 18 How. 87. The certificate of purchase was assignable. Pol. Code, § 3515; St. 1867–68, p. 508. The law made it the duty of the register to prepare the patent "upon the surrender of the certificate of purchase by the person entitled to the same," and to certify to the government that the party named in the prepared patent is entitled to it. Pol. Code, § 3519. The patent recited a certificate conforming to said section 3519, stating that the land had been located in accordance with law, and that Terry was entitled to receive the patent for the same. There is no claim that the patent misrecited such certificate. Certainly on its face there appeared no ground to suspect that the register had mistakenly determined that Terry was the legal holder of the certificate of purchase, and of right entitled to the patent. The defendant was not required, as regards the alleged interest of plaintiffs, to peer behind the patent to see whether the register had not erred or been duped when he made that determination. Schnee v. Schnee, 23 Wis. 377, is a case much resembling the present in several important features. The record of the judgment annulling the certificate of purchase gave no notice of the rights of plaintiffs. If, as is contended by respondents in their argument, it was void for want of jurisdiction in the court, owing to the fact of Marshall's death long prior to the commencement of the state's suit, then, since a void judgment is in legal effect no judgment (1 Freem. Judgm. 117), it could impart no constructive notice; but, if it was valid, it operated to extinguish the rights of all persons claiming under Marshall, including plaintiffs. And, if defendant was bound to know further that Terry redeemed from the judgment, here again the patent was presumptive evidence that he had done so in his own right. As to the further matters suggested, that defendant had notice that the land was school land, and that patents for such land could only be issued upon certificates of purchase, from which respondents seem to draw the inference that defendant should have known who was owner of the certificate, it may be observed that these mean no more than that the land was public, and salable in the manner provided by law,—facts which cannot charge defendant with notice that the patent issued fraudulently. People v. Swift, 96 Cal. 170, 31 Pac. 16. The judgment and order denying defendant's motion for new trial should be reversed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying defendant's motion for new trial are reversed.

110 Cal. 117

PEOPLE v. WONG CHONG SUEY. (Cr. 32.)[1]

(Supreme Court of California. Nov. 19, 1895.)

LARCENY — CIRCUMSTANTIAL EVIDENCE — SUFFICIENCY.

In a prosecution for larceny, evidence that defendant was in a situation where he could have taken the money stolen; that, shortly after the robbery, he claimed that he had been robbed of all his money, and also some clothing which he claimed he had just purchased; that he had not purchased the clothing; and that the exact amount stolen was found on his person,—is sufficient to sustain a conviction.

Department 1. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Wong Chong Suey was convicted of larceny, and appeals. Affirmed.

Lyman I. Mowry, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. Defendant appeals from a judgment convicting him of grand larceny, and an order denying him a new trial, and makes the single point that the evidence is insufficient to sustain the verdict. We were strongly of the impression at the oral argument that the contention of appellant could not be sustained, but the point was urged with so much earnestness and evident sincerity on the part of counsel in the correctness of his position as to induce at our hands a further careful examination and consideration of the evidence in the light of the criticisms passed upon it. The result is only to confirm our impressions into conviction, and to satisfy us that we would not be warranted in disturbing the verdict.

The specific charge was the taking of $60 in money belonging to one Hervey, on October 26, 1894, and the evidence of the prosecution tended to show these facts in substance: Defendant was a domestic in the family of Hervey, having been recently employed therein as cook. His sleeping room was in the basement. In another room in the basement his employer had a safe, in which he kept valuable papers, and at times a limited sum of money, for current household expenses. On this occasion it contained $60 in gold, in $20 pieces. The defendant had opportunity to know the general purposes for which the safe was kept, and had access to the room wherein it stood. On the date in question, between 7 and 8 o'clock in the evening, just after finishing his work for the day, the defendant came upstairs, and announced in an apparently excited manner that he had lost all his money, every cent he had, and some clothing; that his room had been entered, and $34 in money, a pair of new trousers, that he had just got the day before, and an overcoat, taken. Upon immediate investigation by Mr. Hervey, it was discovered that the safe door stood open, and that the $60 had been abstracted from the money drawer, but that nothing else in the safe had been in any way disturbed, nor was any further evidence discovered in the basement of the presence of an intruder. The defendant's room was in order and undisturbed, except that defendant claimed that his clothing had been taken from the wall, with the money, which he claimed had been left in the pocket of one of the garments. A small window stood open near the safe, but the blinds were closed, and a heavy layer of dust on the sill was wholly undisturbed, and there was nothing to indicate that any one had passed in or out by that means. The door leading out of the basement was locked, and defendant had the key. The police were at once called, and on their arrival they accused defendant of the theft, and searched his person. In one of his pockets was found his purse, containing a small sum of money, but in a small fob pocket of his trousers were discovered three $20 gold pieces. It appeared that Mr. Hervey had had occasion to go to the safe for some money that afternoon about 2 o'clock, and was of the impression that he had neglected to turn on the combination when leaving it. The defendant was at the time in the basement, and saw his employer go to the safe. It was also shown that, when Mr. Hervey went to call the police, he told the defendant to wait until they came, but that he started down town, and reluctantly came back on being requested. At this time he had on an overcoat, but whether the one he claimed to have lost does not appear. It was further shown that the statement of defendant about buying a new pair of trousers the day before was untrue.

The theory of the prosecution was that defendant found the door of the safe unlocked, took the money, and then, to divert suspicion from himself, made up the story of having been himself robbed; and it is perfectly obvious that, if the jury believed the evidence of the prosecution, it was sufficient to sustain this theory. It is true the evidence is wholly circumstantial, and that the evidence on behalf of defendant tended to account for the money, and rebut the suspicious circumstances; but the only effect of this was to raise a conflict, which it was the province of the jury to determine. It was not required that the prosecution should definitely identify the money found on the person of the defendant as that taken from the safe. It was shown to be the same in amount, and in the same coin and denomination, and that defendant was in a situation where he could have taken it, and in connection with the statements of defendant that he had just been robbed of all his money, and the other circumstances of a more or less suspicious nature appearing, was sufficient evidence to go to the jury upon the point. Its sufficiency to establish the fact was for the jury. When there is any evidence legally tending to sustain a fact, the question whether it amounts to proof of that fact is to be left to the jury, and their finding will not be disturbed by this court, unless the evidence preponderates so greatly against the verdict as to make it manifest that the verdict is the result of passion or prejudice. People v. Freeman, 92 Cal. 359, 28 Pac. 261; People v. Ah Jake, 91 Cal. 98, 27 Pac. 595; People v. Estrada, 53 Cal. 601. This case does not disclose such a state of facts; and, however much merit there may be in fact in appellant's claim of innocence, the verdict of the jury is, under the circumstances, conclusive upon us. The judgment and order are affirmed.

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[1] Rehearing denied.

We concur: HARRISON, J.; GAROUTTE, J.

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110 Cal. 128

TRUMAN et al. v. BOARD OF SUP'RS OF CITY & COUNTY OF SAN FRANCISCO. (S. F. 272.)

(Supreme Court of California. Nov. 19, 1895.)

MUNICIPAL CORPORATIONS—POWER OF MAYOR TO VETO RESOLUTIONS OF THE BOARD OF SUPERVISORS.

The mayor has no power to veto the action of the board of supervisors of the city of San Francisco in fixing the rate of taxation.

In bank.

Petition by J. J. Truman and others against the board of supervisors of the city and county of San Francisco for a writ of mandamus. Denied, and proceedings dismissed.

Charles Wesley Reed and McKinstry & McKinstry, for petitioners. H. T. Creswell, for respondents.

PER CURIAM. Petition for writ of mandate. Assuming, but not deciding, that this court could control legislative action of the board of supervisors, as prayed for in this proceeding, the writ must be denied, because under present statutory law the board of supervisors of the city and county of San Francisco have the power to fix the rate of taxation, and the mayor has no veto of their action in that matter. If other duties of the court permit, reasons for this conclusion will be more fully given in an opinion to be hereafter prepared. The writ is denied, and the proceeding dismissed.

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5 Cal. Unrep. 185

THRESHER v. GREGORY et al. (No. 18,421.)

(Supreme Court of California. Nov. 5, 1895.)

SALE—ACTION FOR PRICE—CONSTRUCTION OF CONTRACT—PAROL EVIDENCE—EXAMINATION OF WITNESSES.

1. In an action for the price of peaches sold on a contract fixing the price per pound for each of several sizes of fruit "per box packed," where no method of measurement is provided, evidence of prior negotiations between the parties, out of which the contract grew, is admissible.

2. In such action, where defendant contended that the size and weight of the boxes determined the size and weight of the fruit, an experienced fruit raiser and packer, who saw plaintiff's fruit packed, could testify that peaches could not be graded in that way, as they were packed in "break joints," by placing the upper layer in the space between the fruit in the lower layer; and he could also testify as to the average size of plaintiff's fruit, and the average weight of the several sizes as packed.

3. In an action for the price of fruit sold on a contract which merely fixed the price per pound for each of several sizes of fruit packed, correspondence subsequent to the contract, showing that the method of measuring the fruit had not been agreed on, is admissible on the issue as to measurement.

4. Where, in such a case, defendant testifies that the contract with plaintiff is his usual form of contract, he may be asked on cross-examination to write out a contract in his usual form, and such contract may be put in evidence.

5. Where, in an action for the price of peaches under a contract fixing the price according to the size and weight of the fruit, there is a disagreement as to the method of measurement, and defendant testifies that measuring boards like those used by plaintiff injured the fruit, and rendered it unfit for shipping, plaintiff may, in rebuttal, testify that he had seen defendant and others use such boards, and then use the fruit.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by C. W. Thresher against Gregory Bros. & Co. for the purchase price of peaches. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Johnson & Johnson, for appellants. Holl & Dunn, for respondent.

BELCHER, C. The plaintiff brought this action to recover the sum of $376.65, balance alleged to be due for peaches sold and delivered by him to defendants in 1892, and also to recover the further sum of $332.95, balance alleged to be due for peaches sold and delivered by George and P. B. Thresher to defendants in 1892, and by the sellers assigned to plaintiff. The defendants, by their answer, admit the purchase of the peaches, but aver that the balance remaining due and unpaid to plaintiff for his peaches is only $22.40, and that the balance remaining due and unpaid to plaintiff's assignors for their peaches is only $77.90, and they offer to allow judgment to be taken against them for the aggregate of these amounts. The case was tried by the court without a jury, and the findings were that for the peaches purchased of plaintiff there was still due and unpaid the sum of $174.86, and for the peaches purchased of plaintiff's assignors there was still due and unpaid the sum of $172.20, and that plaintiff was entitled to judgment for the aggregate of these sums, $347.06, with legal interest thereon from September 30, 1892, until the rendition of the judgment. Judgment was accordingly so entered, from which, and from an order denying a new trial, defendants appeal.

The contracts between the parties were in writing. Defendants agreed with plaintiff to pay him for his fruit the following prices: "One and one-half cents per pound for two and one-quarter to two and one-half inch fruit, and one and three-quarters cents per pound for two and one-half to three inch fruit, and two cents per pound for all above three inches, per box, packed." A similar contract was made with plaintiff's assignors. The fruit was packed by experienced packers, and in boxes furnished by defendants. There was no dispute as to the number of boxes delivered, but the controversy between the parties was as to the method of determining the sizes of the fruit. The defendants claimed that a four-inch box should be deemed to contain two-inch peaches, and a five-inch box two and one-half inch peaches, and so on; and the plaintiff claimed that such boxes would contain peaches of larger sizes than those named. The court found: "That the contracts do not provide by what method the size of the fruit shall be determined, or how the fruit shall be measured to ascertain the quantity of each size specified in the contract. That there was no agreement at any time between the parties as to how the fruit should be measured, or as to how the size of fruit should be determined, or as to how the fruit should be graded, so as to ascertain the quantity of fruit of each size stated in the contract delivered to the defendants. That the size of the boxes used in packing the fruit will not determine and fix the size of the fruit packed in the boxes as fruit of the size of one-half the depth of the boxes in which it is packed. That all of this fruit was packed by what is known as 'broken joints'; that is, so that each peach in the upper layer would rest between peaches in the lower layer, and so as to touch on two or three, and sometimes four, peaches in the lower layer. That all the fruit was packed with two layers to the box, and that two layers of peaches two and one-half inches in size could be, and often were, packed in the four and one-half inch boxes. That all the fruit in the four and one-half-inch boxes was fruit from two and one-quarter of two and one-half, and including fruit two and one-half, inches in size. That all of this fruit was packed by experienced packers in the employ of the defendants. That a large number of the five-inch boxes, by reason of the size of the fruit packed in them, were what is known as 'cleated,'—that is, a strip of wood varying from three-eighths to one-fourth inches in thickness was placed under the ends of the covers to the boxes so as to raise the covers the thickness of such cleats, and thereby increase the space inside the boxes, from the bottom to the cover, from five inches to five and three-eighths or five and one-quarter inches,—and that in such boxes two layers of peaches over three inches in size could be and were packed, and that a number of five-inch boxes, after being packed, were double cleated—that is, two cleats were placed under each end of the cover so as to increase the depth of the boxes between the cover and the bottom; but I cannot tell from the evidence how many of the five-inch boxes were single cleated and how many were double cleated, and I cannot, therefore, fix the amount of fruit delivered to and received by the defendants that was over three inches in size. But I find that all the fruit in the five-inch boxes, whether cleated or not, was over two and one-half inches in size." Counsel for appellants make no point as to the insufficiency of the evidence to justify the findings, but insist that numerous errors in law were committed by the court during the trial which call for a reversal.

The first point made is that the court erred in overruling objections to questions propounded to the witness E. J. Gregory on cross-examination. The witness, on his direct examination, had testified very fully as to the negotiations between the parties prior to the making of the written contracts, and had said: "In these contracts the size of the boxes was to determine the size of the fruit"; that "it was then determined between us that a four and one-half inch box would represent two and one-fourth inch fruit; a five-inch box would determine the size of the peaches to be two and one-half inches, and a six-inch box would determine the size to be three inches"; and that was what "per box packed" meant in the contract. And again: "We agreed with the Threshers that the size of the boxes would grade the fruit, because it is the custom and the experience, and because we have never done anything different before." The questions objected to were as to the prior negotiations, and the objections were that they were irrelevant, immaterial, incompetent, and not cross-examination, and that the matters sought to be elicited were merged in the written contract. There was no controversy as to the prices to be paid for the fruit when its sizes were ascertained, but the question was as to how its sizes were to be determined. Upon this question the written contract was silent, and evidence to overcome the theory of appellants that the size of the boxes would determine the size of the fruit was admissible. The rule invoked by appellants that, when the terms of an agreement have been reduced to writing, "no evidence of the terms of the agreement other than the contents of the writing" can be given (section 1856, Code Civ. Proc.), is not in point. We conclude, therefore, that the court did not commit any prejudicial error in allowing the cross-examination complained of.

The next point made is that the court erred in overruling objections to certain questions put to T. B. Hutchinson, a witness called for plaintiff. The witness had a fruit ranch which was separated from the plaintiff's ranch only by the Feather river, and had a similar contract with defendants for the sale of his fruit. He testified that he had been in the business 12 years, and had had experience in packing fruit for shipping and other purposes, and that he did not think one could grade fruit by the size of the box, and be able to tell the size of the fruit in the box. He was asked to explain why, and said: "Well, in packing peaches they pack what we call 'break joints'; that is, they put peaches of the upper layer in the spaces between peaches in the lower layer. So you can put larger than two layers of two-inch peaches in a four-inch box, and you can put larger than two layers of two and one-half inch peaches in a five-inch box. That is the usual way of packing peaches." He also said that he was present at plaintiff's place, and saw the packing, and that it was done that way right along. He further said that he was at plaintiff's orchard during the packing season, and saw his peaches, and that he measured his own peaches frequently during the season, for the purpose of ascertaining what size they were running, and what he should receive for them. He was then asked if, from the grading of his own orchard, he could tell in reference to the size of plaintiff's peaches, and again, as to what would be the average weight of 4½-inch boxes of freestones, and if he knew the average weight in that neighborhood of clingstones that season. These questions were objected to as irrelevant, immaterial, and incompetent, and the objections were overruled. It is admitted that his was expert testimony, but it is claimed that it was incompetent, because the weight of the peaches in controversy was capable of actual demonstration. It was evidently offered to overcome the defendants' theory that the size and weight of the boxes conclusively determined the size and weight of the fruit, and for this purpose we think it admissible. The witness also, in answer to a question put to him, said: "E. J. Gregory said to me he made the contract, and said he never saw such a fool contract." Counsel for defendants moved to strike out the answer, and the motion was denied. When E. J. Gregory was on the stand as a witness for defendants, he admitted that he "said something about the contract being a 'fool' contract." Conceding, then, that the objections to the answer were well taken, still we fail to see that defendants could have been prejudiced in any way by the ruling.

The plaintiff offered in evidence two letters, and they were admitted over the objections of defendants. The first was from defendants to plaintiff, dated August 10th, and stating that they were paying others in his section 35 cents per box for peaches, and asking if that price would be satisfactory to him. The second was a reply by plaintiff, stating that the price named was not satisfactory, and that nothing less than 30 cents for a 4-inch box, 35 cents for a 4½-inch box and 40 cents for a 5-inch box would satisfy him. It is evident from these letters that the written contract was not regarded by the parties as fixing the method by which the grade and weight of the fruit were to be determined, and that that was left an open question for subsequent settlement. It was proper, therefore, to admit the letters in evidence to show the understanding of the parties, and the necessity for some agreement upon the question in controversy.

Complaint is made that the court refused to permit the defendants to show the size of the fruit in neighboring orchards, as plaintiff had been permitted to do. But the question objected to was not as to the size of the fruit in neighboring orchards, but "What was the average size of boxes used at all these points?" The points referred to were Chico and other places many miles away. Obviously the answer to the question would in no way have helped to solve the question in hand, and it was therefore properly excluded.

On his direct examination the witness E. J. Gregory testified that the contract with plaintiff was exactly the same form of contract that had been used by defendants for 20 years; that there was no other method of grading the fruit agreed upon; and that the method claimed by him was what the words "per box packed" in the contract meant. On his cross-examination the witness was asked about the usual contracts made by defendants, and to then and there write out a specimen of them. He then wrote out a contract and the plaintiff offered it in evidence. It stated that the seller sold to Gregory Bros. Co., and that Gregory Bros. Co. bought of the seller, "all his present crop of sound, merchantable, shipping peaches now in bearing in his orchard, at the agreed price of thirty cents per box packed." All this evidence was admitted over the objections of defendants that it was irrelevant, and not proper cross-examination; but, in our opinion, the rulings were obviously correct. Several other questions put to the witness Gregory on cross-examination were objected to, and the objections overruled. These rulings are assigned as errors, but they, too, were, in our opinion, so clearly correct that no special notice of them is required.

E. A. Light was called as a witness for plaintiff in rebuttal, and testified that he worked for Hutchinson between July and October, 1892, and was his foreman; that he knew about the packing on Hutchinson's place, and that 2¾-inch fruit was put in 4½-inch boxes, but that he did not know how they packed at Thresher's. He was asked if he weighed any fruit from Hutchinson's place, and, over the objection of defendants, was permitted to answer that he weighed most of it, and then to state what the average weight was. It is claimed that this testimony was incompetent, and was prejudicial to defendants. But it had already been proved that the ranches were separated only by a river; that the fruit on the Hutchinson ranch was sold to defendants under a similar contract, was packed by the same packers, in the same-sized boxes, and was the same variety of fruit. Under these circumstances the testimony objected to would seem to have been clearly admissible to show what was the probable weight of the boxes packed on plaintiff's ranch. The defendant E. J. Gregory and other witnesses for defendants had given evidence tending to show that measuring boards, like those used by the Threshers, were never used to measure fruit to ascertain its size, and that to use such boards would bruise and injure the fruit, and make it unfit for shipping purposes. In rebuttal George Thresher was allowed, over the objection of defendants, to testify that he had seen defendants' own packers use such boards to measure some of the fruit, and then use the fruit; and also had seen such boards used in other orchards and in canneries. The testimony was competent and admissible for the purposes for which it was offered, and we see no error in the action of the court admitting it.

The above are all the points which require special notice. We conclude that the evidence was sufficient to justify the findings of the court, and that no prejudicial error was committed in any of its rulings. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

110 Cal. 102

CHISHOLM v. KEYFAUVER. (No. 18,347.)

(Supreme Court of California. Nov. 18, 1895.)

TRIAL — INSTRUCTION NOT APPLICABLE TO EVIDENCE.

In an action of slander, in accusing plaintiff of theft, defendant pleaded that plaintiff confessed to him, and the court charged that, if plaintiff stated to defendant that he, plaintiff, had stolen the hog and the halter strap mentioned in plaintiff's complaint, and defendant, without malice, made the statements charged in pursuance of such belief, if he did make it, plaintiff cannot in such case be heard to complain, for it is a well-settled rule that no man has a right to take advantage of his own wrong. *Held*, that the instruction was erroneous, in the absence of any evidence that plaintiff so confessed to defendant.

Department 2. Appeal from superior court, Sutter county; E. A. Davis, Judge.

Action by James Chisholm against Washington Keyfauver, in which there was a verdict for defendant. From an order sustaining a motion by plaintiff for a new trial, defendant appeals. Affirmed.

Reece Clark and K. S. Mahon, for appellant. W. H. Carlin and M. E. Sanborn, for respondent.

PER CURIAM. Action for slander. The complaint is composed of three counts. The first charges, in substance, that the defendant maliciously and falsely spoke and published of and concerning the plaintiff, in the presence and hearing of one R. M. Rockholt, at a specified time and place, that he (defendant) believed that plaintiff stole a certain hog then in plaintiff's possession, thereby meaning and intending to accuse the plaintiff of being guilty of grand larceny, and that said Rockholt so understood the words spoken. The second count is in substance the same as the first, except that the speaking and publication were at a different time and place, and in the presence and hearing of a different person, viz. one J. R. Young. The third count charges that defendant, in the presence and hearing of said J. R. Young, accused plaintiff of having stolen a certain halter strap, intending thereby to charge plaintiff with being guilty of petit larceny, and being so understood by Young, etc. The answer of the defendant is, perhaps, justly criticised, on the ground that it does not specifically nor unqualifiedly deny the speaking or publication of the words alleged to have been spoken; but, as there was no demurrer to the answer, and as the cause appears to have been tried as if the denials were sufficient, it is unnecessary to consider this point. In addition to denials, the defendant alleged in his answer the following: "For a further and separate defense, defendant alleges that the plaintiff in said action did, in the month of February, 1893, at Sutter county, admit and state to defendant that he, the plaintiff, had been guilty of stealing hogs; that plaintiff stated to defendant that he, plaintiff, had stolen a pig or young hog, of a fine breed of hogs, from one Mumaw, and that plaintiff pointed out said pig or hog to defendant, and insinuated that he had stolen the same. That, at about the time and place last aforesaid, plaintiff stated to the defendant that he, plaintiff, had lain hidden in the brush near the barn of one Frazier nearly a whole day, for the purpose of stealing pigs belonging to said Frazier, and did at said time succeed in stealing about five of said pigs, and did carry said pigs away from said Frazier's in a sack, and bring them to the premises of this defendant, where plaintiff resided, and turn them out, where they now remain. That, as to the said hog, which plaintiff charges the defendant with having stated that plaintiff did steal said hog, defendant alleges that plaintiff told him conflicting stories as to the manner in which plaintiff had acquired said hog, and did, in the opinion of defendant, act suspiciously when questioned as to how he, plaintiff, had become possessed of said hog, and if defendant ever made any statement in regard to plaintiff, and the manner of his acquisition of said hog, that was in any way derogatory to the good name of plaintiff, such statement was brought about by the admission aforesaid in regard to the stealing of the hogs of Mumaw and of Frazier, and the suspicious actions and contradictory statements of plaintiff when questioned about the hog that defendant is charged by plaintiff with having stated that plaintiff had stolen. That in relation to said halter strap, defendant alleges that plaintiff made many contradictory statements about how he became possessed of the same, and that such contradictory statements, coupled with the admissions to defendant that plaintiff did steal hogs, caused defendant to believe that plaintiff might have been guilty of stealing said halter strap; and, if defendant ever made any statement touching the manner in which plaintiff had acquired said strap, such statement was made in a general way, that the plaintiff was dishonest, and was based upon the admissions of plaintiff that he had stolen hogs, and had 'swiped' the halter strap; 'swiped' being a word which plaintiff used when questioned by defendant as to his manner of acquiring said strap. That at divers times within the year last past plaintiff has taken wood from the premises of others, without their knowledge or consent, and without right, and surreptitiously and clandestinely; that is to say, plaintiff has admitted to the defendant that he has done so. That the Young mentioned in plaintiff's complaint, in 1892 or 1893, stated to defendant that plaintiff had solicited said Young to engage with him, plaintiff, in 'trapping' hogs in Colusa county, meaning thereby that plaintiff and Young should steal hogs in said county. That if defendant ever used any language towards plaintiff that could be construed into the meaning that plaintiff stole hogs or halter straps, defendant made such statement fully and honestly believing that the same was true, and that he made the same without malice, and for justifiable ends, and without intending to injure or damage plaintiff; and that such statements were caused by the admissions of plaintiff to the defendant aforesaid, and by the suspicious conduct and equivocal actions of plaintiff when questioned as to his manner of the acquisition of said hogs and halter strap. That if defendant ever made the statement imputed to him about plaintiff, or anything that could be construed to imply that plaintiff did steal said strap and hog, that defendant verily believes that such statement was true, as the plaintiff had, as hereinbefore alleged, stated that he, plaintiff, had been guilty of both grand and petit larceny in stealing pigs and in 'swiping' [stealing] the halter strap. Wherefore, defendant demands judgment against plaintiff for his costs."

The verdict of the jury and the judgment of the court were in favor of the defendant. The plaintiff moved for a new trial on the grounds of insufficiency of the evidence, that the verdict is against law, and errors in law. The court granted a new trial, but upon what ground the record does not show. The appeal is from the order granting a new trial.

Counsel for appellant says in his brief that the new trial was granted solely on the ground that the court erred in giving the following instruction at request of defendant: "Subdivision 3 of section 1962, Code Civ. Proc., of this state, which declares the law, reads: 'Whenever a party has by his own declarations, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot in any litigation arising out of such declaration, act or omission be permitted to falsify it.' I therefore instruct you that if you believe from the evidence that Chisholm stated to defendant that he, Chisholm, had stolen the hog and halter strap mentioned in plaintiff's complaint, and that Keyfauver, without malice, made the statements charged in pursuance of such belief, if he did make them, Chisholm cannot in such case be heard to complain; for it is a well-settled rule of law that no man has a right to take advantage of his own willful and deliberate wrongs."

Counsel for appellant further says in his brief that in granting the motion for a new trial the court said: "That if said instruction is correct law, it provides a new mode of justification, and that a defendant may justify a slanderous charge without proving its truth. * * * Besides, I find no evidence in the statement showing that plaintiff confessed to the defendant that he stole either the hog or the strap. This instruction, therefore, constitutes an error which must be deemed prejudicial to plaintiff, and it is by reason of this error alone that I shall grant a new trial."

Counsel for respondent does not deny that the court used this language, but contends, not only that the giving of this instruction was error, and also contends that the order granting a new trial is justifiable on other grounds, and especially on the grounds that the evidence was insufficient to justify the verdict of the jury, and that the court erred in striking out plaintiff's evidence of his good character.

Without deciding as to the merits of the instruction in question as an abstract proposition of law, I think the court was right in saying it was not applicable to the evidence, and yet might have been prejudicial to plaintiff. The order appealed from is affirmed, with leave to the defendant to amend his answer, if so advised.

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110 Cal. 27

HIBERNIA SAVINGS & LOAN SOC. v. CLARKE et al. (S. F. 27.)

(Supreme Court of California. Nov. 13, 1895.)

STATUTES — CONSTRUCTION — JUDGMENT AGAINST HUSBAND AND WIFE ON HUSBAND'S OBLIGATION — VACATION — REVERSAL.

1. Pol. Code, § 4176, requiring the sheriff to serve "all" process in the manner prescribed by law, means only such process as comes to his hands, and does not, as a general law, requiring him to serve all process, render Code Civ. Proc. § 410, authorizing service of certain process by a

person other than him, as a special law, a violation of Const. art. 4, § 25.

2. Code Civ. Proc. § 410, in requiring a summons, when served by a person other than a sheriff, to be returned, with such person's affidavit of service, to the office from which it issued, does not require the affidavit, when returned, to be filed.

3. Where, in a suit to foreclose a mortgage, judgment by default is entered against the mortgagors for foreclosure of a lien set up in a cross complaint, a motion by them to vacate the judgment should be granted, where the record does not show that the cross complaint was served on them, and their affidavit that it was not served is uncontradicted.

4. A mortgage, and note secured by it, executed by the husband alone, and in which the wife has no interest, will not support a judgment against husband and wife jointly.

5. Where defendants suffered default, and failed to appear at the trial, they waive findings, under Code Civ. Proc. § 634.

Commissioners' decision. Department 1. Appeal from superior court of city and county of San Francisco.

Action by the Hibernia Savings & Loan Society against Alfred Clarke and others for foreclosure of a mortgage. From a judgment of foreclosure, and an order denying a motion for its vacation, defendants appeal. Reversed.

Alfred Clarke, for appellants. Tobin & Tobin, for respondent.

BELCHER, C. The plaintiff brought this action to foreclose a mortgage executed by the defendant Alfred Clarke to secure payment of his promissory note for $10,200, dated January 11, 1889, and payable to plaintiff, or order, one year after date, with interest. Johanna F. Clarke and several other persons were made parties defendant, upon the ground that they had or claimed interests in, or liens upon, the mortgaged premises, which interests or liens were alleged to be subsequent and subject to the lien of said mortgage. The defendants Alfred Clarke and Johanna F. Clarke did not appear, and their defaults were entered. The defendant Samuel G. Murphy answered, and filed a cross complaint, setting up that he held a deed of a part of the said mortgaged premises and of other land, which was executed to him in June, 1891, by the defendants Clarke, and which was absolute in form, but was intended as a mortgage to secure payment of two promissory notes made by defendant Alfred Clarke for $3,000 each, with interest, and praying that the said deed be adjudged to be a mortgage to secure payment of said notes, etc. The defendant the Gray Bros. Artificial Stone Paving Company answered, setting up that it had recovered a judgment in the superior court in and for the city and county of San Francisco against the defendant Alfred Clarke, for the sum of $986, and $93.30 costs of suit, which judgment was still in full force and effect, and was a lien on the mortgaged premises superior to the plaintiff's mortgage and the claim of defendant Murphy. The defendant E. J. Wilson answered, setting up that he held a grant, bargain, and sale deed of a part of the said mortgaged premises, and of other lands, which was executed to him in September, 1891, by defendant Alfred Clarke, in trust, to secure payment of a promissory note for $12,000 and interest, made by said Clarke, on which there was still due and unpaid the sum of $10,450, with a prayer for proper relief.

The cause came on regularly for trial on August 29, 1894, upon the pleadings of the respective parties, and a decree of foreclosure was entered on November 17, 1894. The decree recites that: "Findings having been duly waived herein, and the court having heard the proof of the respective parties, and the evidence produced in support thereof, and having considered the same, and it appearing to the satisfaction of the court (1) that the defendants Alfred Clarke and Johanna F. Clarke were duly served with summons, together with a copy of the complaint, and that the defaults of said defendants for not appearing and answering were duly entered on August 11, 1894; (2) that the separate answer and cross complaint of the defendant Samuel G. Murphy was duly and personally served upon the defendants Alfred Clarke and Johanna F. Clarke; (3) that there is due and owing to the plaintiff from the defendants Alfred Clarke and Johanna F. Clarke, upon the note and mortgage mentioned and set forth in the complaint, the sum of $11,426.43, that all the allegations of the complaint are true, and that $350 is a reasonable amount to be allowed plaintiff as counsel fee in the action; (4) that there is now due and owing the defendant Murphy, upon the notes mentioned and set forth in his answer and cross complaint, the sum of $7,280, and that the deed therein set forth was intended as a mortgage, to secure the payment of the moneys due and to grow due upon said notes; (5) that there is now due and owing to the defendant the Gray Bros. Artificial Stone Paving Company, under a judgment set forth in its answer, the sum of $986 principal, $120.75 interest, and $13 costs; (6) that there is due and owing upon the note set out in the answer of E. J. Wilson, secured by a trust deed to said Wilson, described in his answer, a certain sum in U. S. gold coin, the amount of which is to be subsequently determined by the court in case any money shall remain applicable to said trust after satisfying the prior liens of the plaintiff and said Murphy,—it is then adjudged that the plaintiff recover from the defendants Alfred Clarke and Johanna F. Clarke the sum of $11,426, with legal interest and counsel fees, as aforesaid; that the defendant Murphy recover from the defendant Alfred Clarke the sum of $7,280, with interest; that the defendant the Gray Bros. Artificial Stone Paving Company recover from the defendants Alfred Clarke and Johanna F. Clarke the sum of $1,106.75, with interest, and $13 costs; that the defendant E. J. Wilson is entitled to recover, as trustee, from the defendant Alfred Clarke, under the note and trust deed set forth in his answer, the amount due, etc.; and that all of the real property described in the complaint of plaintiff, and in the answer and cross complaint of defendant Murphy, be sold as by law provided, and the proceeds of the sales applied in a manner specified."

In January, 1895, in pursuance of previous notice, the defendants Clarke moved the court to vacate and set aside the judgment and decree entered in the action, upon the grounds that no summons was served on either of said defendants by any person authorized or qualified to serve the same, and there was no appearance by either of them, and hence the court never acquired jurisdiction of their persons; that no findings were filed, and findings were not waived by said defendants, or either of them; that the pleading of the defendant the Gray Bros. Artificial Stone Paving Company and the pleading of the defendant E. J. Wilson were not served on said defendants, or either of them, and the trial was had in the absence of, and without notice to, said defendants. The motion was made upon the judgment roll, and the affidavits served and filed with the notice. The court denied the motion, and the defendants Clarke appeal from the order denying the same and from the judgment and decree of foreclosure.

1. The record contains an affidavit, made by one H. Monahan, in which, after stating the title of the court and cause, he deposes and says that at all the times mentioned therein he was over the age of 18 years, and not a party to the said action; that on a day named, at the city and county of San Francisco, state of California, he personally served the summons issued in said action, "which is hereunto annexed and made a part hereof, on Johanna F. Clark, one of the defendants therein named, and personally known to me to be the defendant therein named, by then and there personally delivering to said Johanna F. Clarke a copy of said summons." The affidavit then states the same facts as to the service of the summons by the affiant on Alfred Clarke, and that "copies of the complaint in the above-entitled action were attached to the copies of summons delivered to the defendants, as aforesaid, which copies of complaint were delivered by me to said defendants, and each of them, personally, at the same time and place as the copies of summons, as aforesaid." This affidavit shows a sufficient service of the summons, if such service could be made by a person other than the sheriff, as provided by section 410 of the Code of Civil Procedure. It is objected, however, that, under the general law declared in section 4176 of the Political Code, and in the county government act, "the sheriff must * * * serve all process and notices in the manner prescribed by law," and that service can be made by no other person; that section 410, Code Civ. Proc., in so far as it authorizes service by a person other than the sheriff, is a special law, in conflict with the general law, and the passage of which was inhibited by section 25, art. 4, of the constitution, and hence the attempted service thereunder on appellants was insufficient to give the court jurisdiction of their persons.

Without following the very elaborate argument of counsel on this point, it is enough to say that the same point was made in reference to the service of an injunction, and held untenable, in Golden Gate Con. H. M. Co. v. Superior Court, 65 Cal. 190, 3 Pac. 628. In that case the court, referring to the language above quoted from the Political Code, said: "The section is found in the chapter defining the duties of sheriff, and does not give to or impose upon him exclusively the duty of serving all process and notices, but requires of him to serve all process and notices directed to him, or placed in his hands for service, which the law commands him to serve when addressed or handed to him." Section 410, Code Civ. Proc., was not repealed by the county government act, as claimed, but was amended and reenacted in 1893. St. 1893, p. 207.

It is further objected that the affidavit of service was never filed, and that it was improperly included in the judgment roll. But the statute did not require the affidavit to be filed. It required only that the summons be returned to the office of the clerk from which it issued, with an affidavit of its service. Code Civ. Proc. § 410. The summons was returned and filed, and the affidavit, as it states, was "annexed" thereto. This was sufficient.

2. The objection that no findings were filed, and that findings were not waived by appellants, is clearly untenable. When they suffered their defaults to be entered, and failed to appear at the trial, they waived findings. Code Civ. Proc. § 634. Besides, the recitals in the decree constitute sufficient findings, if findings were required.

3. The objection to the judgment and decree, in so far as it is in favor of the Gray Bros. Artificial Stone Paving Company and of E. J. Wilson, must be sustained. The court found that the answer and cross complaint of Murphy were served on appellants, but there is no finding, and nothing in the record to show, that the pleadings of the paving company and Wilson were ever so served; and the uncontradicted affidavits of appellants, which were filed and used on the hearing of their motion, state positively that the said pleadings were not served on either of them. But without such service the court had no power or authority to grant the said cross complainants any affirmative relief. Society v. Fella, 54 Cal. 598.

4. The note and mortgage, which were the basis of plaintiff's action, were executed only by Alfred Clarke. It was clearly error, therefore, for the court to find that there was due and owing to the plaintiff "from the defendants Alfred Clarke and Johanna F. Clarke," upon the said note and mortgage, the sum stated, and to adjudge that plaintiff "recover from the defendants Alfred Clarke and Johanna F. Clarke" the said sum. So the judgment pleaded by the Gray Bros. Artificial Stone Paving Company was against Alfred Clarke only, and it was error therefore for the court to adjudge that that company "recover from the defendants Alfred Clarke and Johanna F. Clarke" the amount of said judgment.

For the errors above noted, the judgment and decree should be reversed, and the cause remanded for further proceedings.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and decree are reversed, and the cause remanded for further proceedings.

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109 Cal. 643

Ex parte MILLER. (No. 21,185.)

(Supreme Court of California. Nov. 6, 1895.)

GUARDIAN OF INFANT—APPOINTMENT—PROCEDURE —COLLATERAL ATTACK.

1. An order appointing a guardian of an infant, from which appeal will lie, cannot be attacked by a habeas corpus proceeding, except for want of jurisdiction to render it.

2. Civ. Code, § 203, declaring that abuse of parental authority is the subject of judicial cognizance in a civil action, and, when the abuse is established, the child may be freed from dominion of the parent, and the duty of support and education enforced, does not limit the authority to appoint a guardian on petition to the superior court, as provided by Code Civ. Proc. § 1747. Beatty, C. J., dissenting.

In bank.

Habeas corpus proceeding to obtain custody of Lilley Miller. Writ discharged.

H. C. Grant, for petitioners. Martin Stevens and James L. Robinson, for respondent.

HARRISON, J. The return to the writ issued herein shows that the said Lilley Miller is an infant of the age of about 11 years, and that she is in the custody and under the control of John McComb, by virtue of an order of the superior court of the city and county of San Francisco, made May 8, 1894, appointing him guardian of her person. On February 28, 1894, McComb filed a petition in said superior court, praying to be appointed guardian of her person, and thereupon the court appointed a day for hearing said petition, and directed notice to be served upon her parents by citation, at least five days before said hearing. The citation was thereupon issued out of the court, and served upon the parents, and at the hearing the said parents appeared in person and by attorney; and the court, after hearing the petition and considering the same, made an order on the 8th of May appointing McComb the guardian of the infant, and on the 12th of May letters of guardianship were issued to him, and he has since had the custody and control of said infant.

Section 243 of the Civil Code provides: "A guardian of the person or property, or both, of a person residing in this state, who is a minor, or of unsound mind, may be appointed in all cases other than those named in section 241, by the superior court, as provided in the Code of Civil Procedure." Section 1747 of the Code of Civil Procedure provides that: "The superior court of each county, when it appears necessary or convenient, may appoint guardians for the persons or estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or other person on behalf of the minor, or on the petition of the minor if fourteen years of age. Before making such appointment the court must cause such notice as such court deems reasonable to be given to any person having the care of such minor, and to such relatives of the minor residing in the county, as the court may deem proper." As the parents of the child appeared in person and by attorney at the hearing upon the petition, the giving of the notice to that extent became immaterial, but it may be noted that they were also served with the notice directed by the court.

The action of the superior court in appointing the respondent as guardian of the infant was a judicial proceeding, from which an appeal could have been taken to this court (Code Civ. Proc. § 963, subd. 3; In re Get Young, 90 Cal. 77, 27 Pac. 158); and, unless the appeal was taken within 60 days after the order of appointment was entered (Code Civ. Proc. § 1715), it became final. The right of the guardian to the custody of the infant can be attacked collaterally only upon the want of jurisdiction in the superior court to make the order; and when, upon proceedings in habeas corpus, the respondent justifies his custody of the infant by this judgment, an impeachment of the judgment is a collateral attack. The constitution (article 6, § 5) has conferred upon the superior court jurisdiction in all matters in probate; and that court is thus given control over the persons and estates of minors (Wilson v. Roach, 4 Cal. 366), and the power to appoint their guardians (Murphy v. Superior Court, 84 Cal. 576, 24 Pac. 310). As the filing of the petition for the appointment of a guardian gave to the superior court jurisdiction of the subject-matter, and the appearance of the parents at the hearing of the petition, as well as the service upon them of the citation, gave to the court jurisdiction over their persons, it was incumbent upon them to present to that court any matter, if such existed, which would have justified the court in denying the petition. They cannot afterwards, upon proceedings in habeas corpus, assert a right to the custody of the infant as against the guardian, which they might have presented in that proceeding, but which they neglected to present.

Section 203 of the Civil Code is not a limitation upon the jurisdiction which has been conferred by the constitution upon the superior court, nor is it a limitation upon the exercise of that jurisdiction which is authorized by section 243. Section 243 authorizes this jurisdiction to be exercised "in all cases other than those named in section 241"; and section 1747 prescribes the procedure to be observed in the exercise of the jurisdiction. The primary purpose of section 203 is to confer a right of action in favor of a child against its parent for the abuse of parental authority, and as an incident thereto, upon establishing the cause of action, to emancipate the child from the control of the parent, and at the same time enforce in its favor and against the parent the parent's obligation of support and education. The authority for appointing a guardian for the child is not conferred by this section, and it is dependent upon an enforcement in behalf of the child of the right of action thereby authorized. In Hunt's Case (Cal.) 37 Pac. 206, the judge of the superior court had made an ex parte order directing the respondent, Kane, to take the custody of the children before any hearing had been had upon his petition for guardianship, or a judicial determination that any grounds existed for appointing a guardian for the minors. The order was also made without any notice whatever to the parents, or either of them, and without the issuance of any letters of guardianship, or requiring from Kane any undertaking; and it was held that this proceeding of the court was wholly unauthorized. What was said in the opinion concerning section 203 was merely illustrative, and was not required by the facts of the case, and cannot be invoked as authority under the facts of the present case.

The writ is discharged, and the infant is remanded to the custody of the respondent.

We concur: GAROUTTE, J.; McFARLAND, J.; VAN FLEET, J.

TEMPLE, J. I concur in the order dismissing the writ, and remanding the child to its guardian. I do not think section 203, Civ. Code, throws any light whatever upon the question here involved. It does not purport to be, nor is it, a limitation upon the power conferred upon the judge of the superior court in other sections. The argument that it has such effect is, I think, founded upon a mistaken view of the policy of the law. If, it is said, a guardian can be appointed in such a case on the application of any person whomsoever, in a summary proceeding, then section 203 serves no useful purpose. Why should the right to bring such an action be confined to certain specified persons, and why must it be determined in a regular action, if the same purpose can be attained in this summary proceeding? The answer is that the same purpose is not attained in the summary proceeding. When a parent is deprived of the custody of his child, and therefore of the right to its services and earnings, by the summary proceeding, he is no longer liable for its support and education. This is true as a general proposition of law, and it is recognized by our Code. Section 196, Id., provides that a parent entitled to the custody of a child must give him support and education suitable to his circumstances; plainly implying that the parent does not owe that duty to a child when he is not entitled to its custody. Section 204, Id., is: "The authority of a parent ceases: (1) Upon the appointment by a court of a guardian of the person of a child." In accordance with this idea, section 205 of the same Code provides for the case of the death of a parent chargeable with the support of a child; and section 207, that, when a parent neglects to provide necessaries for a child "who is under his charge," third persons may provide, and recover their value from such parents. In cases of divorce, and in controversies between the parents in regard to the custody of children, other sections provide for the support of the children (sections 137 and 199, Id.); but in no other case, except as provided in section 203, has the court the power to deprive the parent of his authority, and yet hold him liable for the maintenance of his child according to his condition. If a parent, because of his own incompetency or moral worthlessness, neglects his child, it would ordinarily be of no importance to have a decree requiring him to support a child which he is neglecting or abusing; but, if a wealthy parent were to abuse his authority, it would be of the first importance to the child that it should be educated as a child born in that condition of life is entitled to be. That this is the purpose of section 203 I cannot doubt, and it has no bearing whatever upon the construction to be given to section 243, Civ. Code, or section 1747, Code Civ. Proc. I therefore concur in the order.

BEATTY, C. J. I dissent. It appears from the return to the writ that on February 28, 1894, John McComb filed his petition in the superior court of the city and county of San Francisco, describing himself as secretary of the California Society for the Prevention of Cruelty to Children, and alleging that Lena Miller, a minor, has no guardian legally appointed by will, and is a resident of said city and county; that Benjamin Miller and Rena Miller, her parents, are "unfit and improper persons to have the custody of said minor"; that she is ten years of age; that her parents reside in San Francisco; and that it is necessary to appoint a guardian of her person. Upon the filing of this petition, an order was made appointing Friday, March 19, 1894, for the hearing, and directing five days' notice thereof to be served upon the parents. Upon this a citation was issued, requiring the parents to appear on March 9th, and show cause why John McComb should not be appointed such guardian, which citation was served on March 6th, only three days before the day appointed for the hearing. The order of the superior court does not show that the parents appeared in court, but it is alleged in the return that they did, and that there was a full hearing. However this may be, the order appointing a guardian merely recites that the petition came on regularly for hearing; that due proof was made, to the satisfaction of the judge, that notice had been given to the relatives of the minor residing in the county; that the minor was a resident of the county, and needed the care and attention of some fit and proper person. "Wherefore it is ordered that John McComb be appointed guardian of the person and estate of said minor, and that letters issue upon his giving a bond in the sum of five dollars." It further appears that the required bond was given, and letters of guardianship thereupon issued. It is now held that, by these proceedings, the natural right of the parents to the custody and society of their minor child has been finally determined, and that she is henceforth subject to the exclusive control of the guardian so appointed, or of such others as may be appointed in his place.

This decision is, in my opinion, in conflict with section 203 of the Civil Code, which reads as follows: "The abuse of parental authority is the subject of judicial cognizance in a civil action brought by the child, or by its relative within the third degree, or by the supervisors of the county where the child resides; and, when the abuse is established, the child may be freed from the dominion of the parent, and the duty of support and education enforced." In Re Hunt this court rendered a decision in bank, which is reported in 103 Cal. 355, and 37 Pac. 206, and in which it was held that "the father and mother, being the natural guardians of a child, can be deprived of the custody of its person only by a proceeding under section 203 of the Civil Code." In that case a stranger had asked to be appointed guardian of two minor children of the petitioner, upon an allegation that the parents were persons of intemperate habits, and not fit to have the custody of their children. Upon the filing of the petition, an ex parte order was made by the judge of the superior court, awarding the custody of the children to the petitioner pending a hearing. After the day appointed for the rehearing, but before its completion, and before any final order in the matter, the writ of habeas corpus was issued out of this court, and afterwards the case was decided in the manner and upon the ground above stated.

It has been contended in the argument here that the point decided in the Hunt Case was not necessarily involved, or involved at all, and consequently that the expression above quoted from the opinion was obiter, and of no authority. I cannot assent to this view. While it is possible that the case might have been decided upon another ground, it cannot be denied that the ground upon which the decision was expressly put was presented by the case. It clearly appeared that an attempt had been made, in a summary statutory proceeding for the appointment of a guardian, to determine the question whether the parents of minor children had not by their misconduct (their intemperate habits) forfeited their natural right to the care, custody, and society of their children. If the issue tendered by the petition was one which the court had no jurisdiction to try in that proceeding, it is clear that the provisional order made therein, awarding the temporary custody of the children to the petitioner, was in excess of the jurisdiction of the court, and void. Upon whatever other grounds, therefore, the order might have been attacked, it is very clear that, if it was open to attack upon this ground, the petitioner was at liberty to plant himself upon it, as the report shows that he did, and the court was at equal liberty in making its decision to ignore other grounds, if any such there were, and to confine itself to this ground, if it was deemed sufficient to support its conclusions, as in fact it was. Under these circumstances, to say that the expression above quoted from the opinion is obiter is equivalent to saying that nothing can ever be decided in a case in which the same conclusion is sustained upon two independent lines of reasoning, which seems to be absurd. But the authority of that decision is assailed upon the further ground that the point decided, not being necessarily involved, was not duly considered, and, for want of due consideration, was erroneously decided, and a rule thereby established, not only contrary to the intention of the legislature, but extremely inconvenient and even dangerous in its operation. This contention deserves serious consideration. It may be conceded that the language of the decision in Re Hunt, taken in its broadest sense, and unqualified by reference to the facts of that case, goes too far. The case before the court was one of alleged unfitness of the parents, arising out of their own misconduct,—a case, in other words, of forfeiture of parental rights on the ground of parental abuse, and the language of the opinion must be understood as having reference to that state of facts. A parent might become unfit to have the custody of his children without any fault or misconduct on his part, as in case of insanity, permanent or temporary. In such a case it would generally be convenient, and often necessary, to appoint a guardian of the persons of his minor children during the continuance of his disability. To such and similar cases section 203, Civ. Code, has no application. But, in my opinion, it does apply to all such violations or neglect of parental duty as jeopardize the safety and welfare of a child to an extent justifying a forfeiture of parental dominion, and, when it applies, I see no reason why the remedy therein prescribed should not be held exclusive, as was decided in the case referred to.

The meaning of this and other provisions of our Code relating to the subject of guardianship will be rendered plainer by comparing them with the doctrines and rules of the common law in regard to the same matter. The common law recognized the natural right of parents to the care and control, and to the society, services, and earnings, of their minor children. It also recognized the duty and necessity of guarding against the abuse of parental authority. The parent, though guardian by nature of his minor children, was but a guardian after all, and, as such, subject, like all other trustees, to the jurisdiction of the chancellor. Guardians in socage and guardians in chivalry were designated by the law, and had the custody of the persons of their wards, as well as of their estates. There were also guardians appointed by will or deed under the statute 12 Car. II. c. 24. All these were trustees, subject to removal, discipline, or correction by the chancellor for any neglect or misconduct prejudicial to the ward. And upon the same grounds, and for the same reasons, the natural guardian was subject to the same jurisdiction, and it extended to every sort of misconduct or neglect by which a parent could forfeit his parental rights. It is no doubt true that, in the matter of guardianship of the person, the jurisdiction of the chancellor was exercised less freely in the care of parents (guardians by nature) than in the case of guardians designated by law, or appointed by will or deed, or appointed by the chancellor himself, in default of other designation. But, if so, it was only because the mutual benefits flowing from the natural relation of parent and child are so manifest and important as to outweigh breaches of duty which in any other guardians would be ground of removal. The interest of the child, however, was always the paramount consideration; and, when its safety or welfare was menaced, the chancellor had power to free the child from the parental dominion, and to take it under his own protection. The means by which this jurisdiction was invoked and exercised was a suit in equity against the offending parent. Pom. Eq. Jur. § 1307, and cases cited. This being the state of the law before the Codes, our legislature, in enacting section 203 of the Civil Code, has done little more than to put into the statute what was the law already. The abuse of parental authority is the subject of judicial cognizance in a civil action, and so it always was. And there is no reason to suppose that the words "abuse of parental authority" were used in a sense less comprehensive than I have attributed to them, viz. a sense which will comprehend every sort of neglect or misconduct by which a parent may justly forfeit his parental rights; or, in other words, every case in which the unfitness of the parent is predicated upon his own fault, whether of omission or commission. If this is so, it seems clear to my mind that the further intent of the provision is that, when a child is to be forever freed from the dominion of its parents upon the ground of parental abuse, the issue must be tried and determined in a civil action prosecuted in the name of the child or of a near relative or of the board of supervisors of the proper county. It is intended that the acts and facts constituting the abuse should be alleged in issuable form; that the offending parent should be summoned into the court in the usual way, and should have the ordinary right of a defendant in a civil action to defend by demurrer and answer, and to have the issue tried as other issues are tried in civil actions. And it is further intended (for such would be the necessary consequence) that a trial and determination of the issue in favor of the parent should be a bar to another action for the same cause.

In this case the proceeding was not instituted by nor conducted in the name of the child or of a relative or of the board of supervisors, and it was not a civil action, as defined in the Code (Code Civ. Proc. § 30), but a special and summary proceeding, in which, upon a petition containing no specific allegations, but couched in the baldest and vaguest general terms, the parents were cited upon five days' notice (five prescribed, three actually given) to show cause why the petitioner—a mere stranger—should not be appointed guardian, and they, as a necessary consequence, deprived permanently of the custody and society of their child. If such procedure is allowable, section 203 of the Civil Code might as well not exist. Why limit the right of action to certain designated persons, and why require or authorize a civil action, if any stranger may pass the statute by, and have a trial of the issue in a summary proceeding, the only effect of which, if the decision should happen to be in favor of the parent, would be to leave him exposed to the necessity of litigating the same matter the next day in a new proceeding, commenced by some other stranger volunteering in the child's behalf? If, instead of the proceedings by which this child was transferred to the custody of Gen. McComb, an action had been commenced as the statute provides, these parents, as defendants in such action, must have been served with a summons and copy of a complaint containing a statement of specific facts; they would have had at least 10 days to demur or answer, and the cause when at issue would have gone upon a trial calendar; there would have been time to subpœna witnesses; and, in short, the proceedings would have been conducted with that deliberation, and with the opportunities to defend, which the law deems essential where the controversy involves the smallest property or contract right. And, in case of a judgment adverse to the parents, they would have had one year to appeal, instead of the 60 days within which they were compelled to appeal from this order.

The question involved, therefore, although merely a question of procedure, is one of some practical consequence. But, even if it were otherwise, the mere fact that the statute has prescribed the remedy by action brought by some one of certain enumerated persons is a sufficient reason for insisting upon that course, unless there are other concurrent remedies allowed by law. It is said that, under section 1747 of the Code of Civil Procedure, the superior court of any county has a general authority to appoint guardians of the persons or property of resident minors, and to determine, upon the petition for guardianship therein prescribed, any and all questions upon which the necessity or propriety of such appointment depends. In a certain sense this is true. The court not only may, but must, determine whether or not "it is necessary or convenient" to appoint a guardian. But it is entirely consistent with this proposition to hold that as to one occasion for exercising the power of appointment, viz. the forfeiture of parental rights by abuse of parental authority, it must look solely to the judgment of a competent tribunal given in a proper action, brought by a proper party, in order to determine whether the occasion has arisen; or, in other words, it is entirely consistent with the conceded power and jurisdiction of the probate court in the matter of guardianship to hold that, when abuse of parental authority is the ground of application, the necessary and material allegation of the petition must be, not merely that the parent is unfit, or that he has abused his authority, but that a competent tribunal has duly given a judgment to that effect. And not only are these two propositions entirely consistent with themselves and with every provision of the Codes upon which counsel rely, but it is only by insisting upon both that all parts of the statute, and especially section 203 of the Civil Code, can be given effect. In this view, all parts of the statute are perfectly harmonized, and each operates as it was clearly intended to operate. But to hold that the legislature, while taking the pains to declare that the abuse of parental authority is the subject of a civil action, and to limit the number of those who may prosecute the action, has at the same time given full liberty to any stranger or volunteer to ignore at his pleasure the prescribed method of procedure, is to convict the lawmakers of the merest folly. I do not think such folly should be imputed. On the contrary, I think the provisions of section 203 of the Civil Code should be strictly upheld and enforced; not only because it is the law, but because it is a law which, while it conserves rights which certainly are as sacred as any rights of property, is capable of strict enforcement without incurring any of the dangers to children which counsel has supposed would ensue. The statute, as we have seen, introduces nothing new. The jurisdiction of the chancellor in England and the courts of equity in this country to try actions involving questions of parental abuse, and to dispose of the custody of children subjected to such abuse, has long been thoroughly established; and there is no reason why, independent of section 203, Civ. Code, such actions should not be maintained in this state, except that, all matters of procedure being here regulated by statute, it might be held, in the absence of any provisions similar to those of said section 203, that the provisions relating to the appointment of guardians were intended to be exclusive. As it is, however, it is plain to my mind that they were not intended to be exclusive, but that they must be administered in conjunction and in harmony with section 203.

The argument against this view is altogether based upon the supposed hardships, inconveniences, and dangers that it involves; but these, I think, may be easily shown to be purely imaginary, and, even if they were more real than imaginary, the argument from inconvenience could not be regarded if the law is plain, as it seems to me. The inconveniences resulting from the operation of a law are for the consideration of the legislature, and the courts must assume that they have been duly weighed and deliberately encountered, as being of less concern than those which the law was designed to remedy. But, I repeat, these supposed inconveniences are purely imaginary.

The substance of the argument under this head is that it is necessary in view of the welfare of children, which is the paramount consideration, that the court should have the power to proceed summarily in order to prevent the irreparable ruin which might ensue if, in the cases supposed, the children were not removed without delay from the control and influence of their wicked and depraved parents. But, conceding that such cases as counsel suppose have occurred and will hereafter occur, I cannot see why the remedy by action is not just as efficacious as the remedy pursued in this instance. The action is an equitable action; the judge is armed with all the powers of the chancellor. Whatever provisional orders it is necessary to make pending the litigation, to protect the interests or insure the safety of the child, he has as much and more authority to make than he has when sitting in probate or in a guardianship proceeding. The Code provisions relating to guardianship confer no power upon the judge to provide for the temporary custody of the child. If he has authority to make any such order, he must derive it from the equitable jurisdiction conferred upon the superior court; and, if it is derived from that source, he can exercise it as well and as amply in an action as he possibly can in a special proceeding. So far, therefore, as the exigencies of the case may demand immediate action on the part of the judge, the child is certainly as well protected, if not much more amply protected, in an action than in the special proceeding. If it is contended that provisional orders for the temporary custody of the child, made after the commencement of an action, will not be sufficient to meet the exigencies of some cases, the answer is that an action may be commenced as easily and expeditiously as a special proceeding, and what will answer in one case will answer equally well in the other. But counsel seem to claim that there may be delays in commencing an action owing to the absence or unwillingness of relatives or inattention on the part of the board of supervisors. We do not think it ought to be assumed that the board of supervisors, being advised of their duty and power in the premises, would neglect to interpose in a proper case; but allowing that they would, and that there were no relatives willing to act, there would be nothing to prevent the society for the prevention of cruelty to children, or any other charitable organization or private person, from applying to the proper court to be appointed guardian ad litem, so as to commence the action in the name of the child. And, if the case was of such pressing exigency as to justify the extreme course resorted to in this and other instances, of taking the child from its parents without any legal warrant, but with a view to legal proceedings, such a course would be as appropriately followed by an action as by a special proceeding. There is no reason, therefore, for ignoring the statute in these matters. Indeed, the minor would enjoy a much more ample measure of protection in the civil action provided for in section 203 of the Civil Code than under a mere petition for guardianship; for in that proceeding the superior court acts under a statute which confers no power to issue an injunction against the offending parent pendente lite, as may be done by the chancellor. See cases cited by Pom. Eq. Jur. § 1307, and Schouler, Dom. Rel. § 249.

To take this case as an illustration: What would have become of the infant child during the nine days intervening the filing of the petition and the day appointed for the hearing if her protection had depended upon the statutory provisions relating to the appointment of guardians, and her parents had been wicked and depraved enough to subject her to the contamination and outrage that counsel have instanced as occurring in other cases? She must have been left during that interval of time in the power of her parents, and that would have sufficed for her ruin if the courts and the law are as impotent as the argument supposes. But, in truth, they are not. To protect a child from immediate danger, the law will justify the same measures as were taken in this case; and, if the parent seeks to regain her custody by habeas corpus, a court will not put her back in his power when it appears that her welfare would be imperiled by so doing, especially when proceedings have been commenced, or are about to be commenced, to determine the parental right; and, upon commencement of the action, the court, as has been shown, could see that she was protected pendente lite.

It remains to be noted that section 203 of the Civil Code does not in itself provide for the appointment of a guardian, or even infer the necessity of such appointment in all cases covered by it. It provides a method of establishing parental unfitness arising out of parental misconduct, and for a judgment freeing the child from the parental dominion, as well as a judgment enforcing the duty of support and education. When, in such an action, the abuse of authority is established, and a judgment has been given freeing the child from parental authority, a case is then presented in which it may be necessary or convenient to appoint a guardian of the child's person. But when a child has living parents (or a living parent), in whose custody he is, and who are otherwise fit, the superior court has no authority in a summary proceeding to take him away from his natural guardians upon the ground that they have forfeited their rights by their misconduct, unless such forfeiture has been established by a judgment in the action provided for in section 203, Civ. Code.

Counsel have cited many provisions of the Civil Code and Code of Civil Procedure which they contend are inconsistent with the construction here given to section 203. There is nothing in any of these objections, and I shall not review them in detail, but I will notice the one upon which counsel seem to rely with the greatest confidence.

Subdivision 3 of section 246 of the Civil Code reads as follows: "Of two persons equally entitled to the custody in other respects, preference is to be given as follows: (1) To a parent; (2) to one who was indicated by the wishes of a deceased parent; (3) to one who already stands in the position of the trustee of a fund to be applied to the child's support; (4) to a relative." It is contended that, on the construction here given to section 203, no room is left for the operation of a provision which assumes that there may be two persons equally entitled to the custody of a minor in other respects, and one of them a parent. It is not difficult to suppose a great variety of cases to which this section would apply without trenching upon the operation of section 203. Suppose a guardian of the person of a minor child to have been appointed because its only living parent was insane, or had been convicted of a felony, or was a fugitive from the state, or was an habitual drunkard, or was living in adultery; and suppose that the parent had recovered his reason, had been pardoned, had returned to the state, had been cured of his drunkenness, or abandoned his scandalous mode of life. In the first case he would become entitled to the custody of his child on recovering his reason, if, in other respects, he was equally entitled with the guardian. In the other cases, although adjudged guilty of parental misconduct, and his natural right gone, he might still claim the guardianship by appointment in preference to a stranger no better qualified in other respects. In all these cases, and in many others that might be supposed, there would be room for the operation of section 246, which, after all, amounts to little more than the statement of a general principle to be applied in any possible case that might arise in which two persons equally entitled in other respects, but one of them the parent, were contending for the custody of a minor child.

It is next urged by counsel that it has become the settled practice in this state to forfeit the natural right of parents without an action, and two cases are cited in which this court has impliedly conceded the validity of proceedings here in question. In re Get Young, 90 Cal. 77, 27 Pac. 158; In re Vance, 92 Cal. 195, 28 Pac. 229. In neither of these cases was the point raised or considered that an action was necessary. In Re Hunt it was argued and decided by the court in bank, in accordance with the views here expressed; and the doctrine of that case, I am convinced, is a salutary and a necessary one. The natural right of a parent to the custody and society of his child is certainly equal in dignity and importance to any right of property, and ought not to be taken away with less ceremony than he would be deprived of a cart or a horse.

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109 Cal. 332

TURNER v. SISKIYOU COUNTY. (No. 18,297.)

(Supreme Court of California. Oct. 2, 1895.)

CONSTITUTIONAL LAW—LACK OF UNIFORMITY.

The county government act, § 190, subd. 16 (St. 1891, p. 385), in allowing a witness in a criminal case before the superior court of counties of the twenty-eighth class alone, "subject to the discretion of the court," the same per diem and mileage as jurors in like cases, violates Const. art. 1, § 11, requiring general laws to have a "uniform operation."

Commissioners' decision. Department 2. Appeal from superior court, Siskiyou county; John S. Beard, Judge.

Action by W. W. Turner against the county of Siskiyou, individually and as assignee, for witnesses' fees. From a judgment for defendant, plaintiff appeals. Reversed.

Jas. F. Lodge, Dist. Atty., for appellant. Warren & Taylor (T. M. Osmont, of counsel), for respondent.

McFARLAND, J. The defendant demurred to the complaint. The demurrer was overruled, and, defendant declining to answer, judgment was rendered for plaintiff. Defendant appeals from the judgment.

The action was brought by plaintiff to recover for fees and mileage of himself and a number of assignors, as witnesses in a certain criminal case tried in the superior court of Siskiyou county. The action is not based on section 1329 of the Penal Code, which is general in its nature, and applies to the whole state, and which gives a judge the discretionary power to direct the county auditor to draw his warrant upon the treasurer for a reasonable sum of money, to be specified in the order, for the necessary expenses of a witness in a criminal case, where "it appears that he has come from a place outside of the county, or that he is poor and unable to pay the expense of such attendance." It is brought under subdivision 16 of section 190 of the county government act (St. 1891, p. 385), which provides that, in counties of the twenty-eighth class alone, "every person subpœnaed as a witness in a criminal case before the superior court shall, subject to the discretion of the judge thereof, be entitled to the same per diem and mileage as jurors in like case; provided, that such per diem to witnesses only be allowed for actual days' attendance." This provision is clearly unconstitutional and void. It does not apply to counties of any other class. Other counties are subject, in the matter of juries in criminal cases, either to section 1329, Pen. Code, above noticed, or to provisions very similar to those of that section. The county government act is essentially a "general law" (Dougherty v. Austin, 94 Cal. 601, 632, 633, 28 Pac. 834, and 29 Pac. 1092); and the provision in question does not have a "uniform operation," as required by section 11 of article 1 of the state constitution. The difficulty is not removed by the fact that the counties are classified, and that the provision applies to all counties of a certain class; because, under section 5 of article 11, counties may be classified only for the purposes of regulating the compensation of certain public officers therein enumerated. Dougherty v. Austin, supra; Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66. In all other respects "the legislature shall establish a system of county governments which shall be uniform throughout the state." Section 4, art. 11. Cody v. Murphey, 89 Cal. 522, 26 Pac. 1081, cited by respondent, dealt with the salary of sheriff,—the very thing for which counties may be classified. The provision in question in the case at bar is local and special, because it is not in force in all parts of the state, and does not affect equally either all the people or all individuals of a class; and it is therefore invalid in a system of county governments which must be "uniform throughout the state." It is not even uniform as to the particular individuals whom it seeks to reach, because the allowance to be made depends upon the absolute will of the judge. No rules or principles are given or hinted at by which he is to "hear and determine." No facts are to be found or conclusion reached, judicially. He is not to inquire and determine, as under section 1329, Pen. Code, whether the witness came from without the county, or is poor and unable to pay the expenses of his attendance, and what would be a reasonable sum for his necessary expenses; but the witness, if he receives anything, no matter what his condition or where his residence may be, is to receive "the same per diem and mileage as jurors," and this he is to receive or not receive as the judge may arbitrarily will. If the provision in question could be considered as an enactment independent of the county government act, which must be uniform throughout the state, it would still be a local and special law, within the prohibition of section 25 of article 4 of the constitution. It would be a law "regulating county * * * business." The judgment is reversed, with directions to the superior court to sustain the demurrer to the complaint.

We concur: HENSHAW, J.; TEMPLE, J.

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109 Cal. 353

HOLT MANUF'G CO. v. EWING. (No. 18,424.)

(Supreme Court of California. Oct. 4, 1895.)

CONDITIONAL SALE—ELECTION OF REMEDIES.

A corporation delivered to E. a machine, taking his notes, and also a contract providing that the company did not part with its title until the notes were fully paid; that, should E. make default in any of the payments, the company might terminate the contract, and take the machine; and that all payments prior to such default should be compensation for its use. After default by E., he died, and the company presented to his administratrix its claim upon the notes for the balance due, and the claim was allowed and approved by the court. *Held*, that the company waived its right to retake the machine, and elected to treat the transaction as an absolute sale. Wells, Fargo & Co. v. Robinson, 13 Cal. 142, distinguished.

Commissioners' decision. Department 2. Appeal from superior court, Yuba county; E. A. Davis, Judge.

Action in claim and delivery by the Holt Manufacturing Company, a corporation, against Rosa V. Ewing. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

W. H. Carlin, for appellant. Forbes & Dinsmore, for respondent.

HAYNES, C. Action in claim and delivery of personal property. On July 8, 1893, the Holt Manufacturing Company entered into a contract with T. S. Ewing, under which the "improved link-belt combined harvester No. 426" was delivered by respondent to said T. S. Ewing, for which said Ewing agreed to pay the sum of $1,650, and to secure the same executed two promissory notes, each for the sum of $825; the first to become due September 1, 1892, and the second September 1, 1893. By said contract, which was denominated a "lease," it was stipulated that "the Holt Manufacturing Co. do not part with their title to said harvester until said deferred payments or notes are fully paid; that time is of the essence of the agreement; that should the undersigned (T. S. Ewing) make default in any of the payments, then said the Holt Manufacturing Co. shall, at their option, and without notice, terminate this agreement, and with or without legal proceedings take and retain said harvester, wherever it may be situated, and all moneys paid by the undersigned prior to such default shall be compensation for the privilege of using said harvester prior to such default." There was paid on said first promissory note on October 3, 1892, $500, and on January 11, 1893, $100. Said T. S. Ewing died intestate on March 29, 1893, and the defendant, Rosa V. Ewing, was on the 29th day of April, 1893, duly appointed administratrix of his estate, and on May 18, 1893, letters of administration were duly issued to her. Afterwards the plaintiff presented to said administratrix its claim upon said promissory notes for the balance of $249 then due upon the first note, and the amount to become due upon the second, of $884.50; in all, $1,133.50. This claim was duly verified on May 20, 1893, and was allowed by the administratrix May 26, 1893, and allowed and approved by the court on June 24, 1893; and this action to recover possession of the said property was commenced October 12, 1893. In the presentation of said claim to the administratrix the plaintiff set out a copy of said promissory notes, with the credits upon the first, but did not set out the contract or lease, or make any reference whatever thereto. Upon this state of facts the defendant contended that the plaintiff waived its right under said contract to retake the property, and elected to treat the transaction as an absolute sale, and is therefore estopped from asserting ownership to the property, or any right to recover possession thereof in this action. The cause was tried by the court, and findings and judgment went in favor of the plaintiff, and this appeal is by the defendant from said judgment, and from an order denying her motion for a new trial.

The so-called "lease" was in fact a conditional sale, under the terms of which the seller had either one of two remedies for the violation of the contract by the purchaser. It might, upon the default of the purchaser in meeting the stipulated payments, or any of them, have retaken the property, or recovered its possession in an action of claim and delivery; or, on the other hand, treated the sale as an absolute one, and brought its action upon the notes to recover the contract price of the property sold. These remedies being inconsistent, the plaintiff could elect which he would pursue, but he could not have both. Parke & Lacy Co. v. White River Lumber Co., 101 Cal. 37, 35 Pac. 442, and cases there cited. The question, therefore, is whether the presentation of the plaintiff's claim for the unpaid purchase money to the administratrix of Ewing's estate, and its approval by her and by the court, was such an election as debarred the plaintiff from pursuing its subsequent action to recover the possession of the property upon the assumption that the title had never passed to the purchaser. I think it clear that the plaintiff was bound by its election in presenting the claim. Default had been made by the purchaser long before Ewing's death. In fact, no payment had been made until more than a month after the first note became due. The right, therefore, of the plaintiff to have pursued and retaken the property existed before Ewing's death. If no default had been made prior to the presentation of the claim to the administratrix, it could properly have been presented as a contingent claim against the estate, the facts all being stated in the claim as presented; for, if no default had been made, the seller could not retake the property, and it would have been the right of the estate to have performed the contract by payment, and thus have acquired the absolute right to the property for the benefit of the estate. But, the default having occurred, and the plaintiff having the right, at and before the time of the presentation of the claim, to pursue the remedy secured to it in the contract of retaking the property, there was clearly an election not to avail itself of this right, but of looking to the estate for the payment of the balance due upon the contract. And this is the more apparent from the fact that in the claim, as presented, no mention was made of the terms of the contract, nor any assertion of any right other than the enforcement of the payment of the notes by the estate.

There are many cases cited by appellant to the effect that bringing an action for the recovery of a demand under like circumstances is such an election as debars the creditor from recovering the property under the claim that the title had not passed. That proposition is so well settled that these cases need not be cited; the only question being whether the presentation of the claim, and its allowance, was such election. Section 1497, Code Civ. Proc., provides: "Every claim allowed by the executor or administrator, and approved by a judge of the superior court, or a copy thereof, as hereinafter provided, must within 30 days thereafter be filed in the court and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. * * *" It was held in Re McKinley's Estate, 49 Cal. 152, that when a claim is allowed the executor cannot afterwards contest it. In Walkerly v. Bacon, 85 Cal. 137, 24 Pac. 638, that an allowed claim against the estate has the force and effect of a judgment payable in due course of administration. In Ormsby v. Dearborn, 116 Mass. 386, it was held that the creditor who had proved a claim against an estate in bankruptcy as for goods sold and delivered to the bankrupt cannot maintain an action of replevin for the goods by proof that he did not sell them to the bankrupt. Louis v. Triscony, 58 Cal. 304, does not conflict with the foregoing authorities.

Respondent claims that plaintiff was not bound to make an election until all the circumstances are known, and the condition and value of the funds belonging to the estate are clearly ascertained; that, until so known and ascertained, it is impossible for a party to make a discriminating and deliberate choice such as ought to bind him in reason and justice; that, therefore, if he should make a choice in ignorance of the real condition of the estate, or under a misconception of the extent of claims upon the fund, it is not conclusive on him. And this, the respondent contends, is the case, whether the election has resulted in a claim being allowed by the court in the estate, or where a supposed election has been prosecuted and a judgment against the estate obtained on the rejected claim. This contention appears to be based upon the fact, disclosed upon the trial, that the claims allowed against the estate largely exceeded the value of the assets as shown by the inventory; but there is nothing in the record tending to show that the plaintiff was misled by any one as to the condition of the estate. If the plaintiff failed to investigate and ascertain whether the estate was solvent or insolvent, it cannot shield itself from the result of this want of care. So far as the record discloses, the plaintiff filed its demand against said estate voluntarily, and without in any manner being misled by the defendant.

Counsel, however, cite the case of Wells, Fargo & Co. v. Robinson, 13 Cal. 142, in which the general proposition is stated that, "before any presumption of an election can arise, it is necessary to show that the party acting or acquiescing was cognizant of his rights," and that, "when this is ascertained affirmatively, it may be very necessary to consider whether the party intended the election." That case, however, is clearly distinguishable from this. In that case Frierson, the defendant's intestate, had embezzled and converted to his own use money belonging to the plaintiffs to the amount of $195,889. After his death, and the appointment of his administrator, the plaintiffs presented to defendant their claim for said sum, with an affidavit appended averring that the estate was indebted to the plaintiffs in that amount, and also that $50,000 of this sum was paid by Frierson to the Sacramento Gas Company, and that for this amount the plaintiffs claimed a lien upon all the gas stock of the estate, and all bonds of the gas company held by defendant as administrator. The administrator rejected the whole claim. Thereafter the plaintiffs commenced a common-law action against the defendant for the whole amount of the claim as a money demand, and recovered judgment for the whole sum. Pending this suit, and before judgment, plaintiff filed a bill in equity to reach the gas stock and bonds in the hands of the administrator, being the same stock and bonds mentioned in their claim as filed. The plaintiffs recovered in that action also, and the administrator appealed from the decree in equity. The same contention was made there as here, that plaintiffs, by presenting their claim for a money demand, and obtaining judgment thereon, were debarred from prosecuting their action in equity. It was said, however, by this court, in addition to the quotations above made, that the claim presented to the administrator was for the bonds and stock as a part of the subject of the embezzlement; and the court held that under the circumstances of that case both remedies might be pursued, the judgment at law to be credited with whatever should be realized in the equitable action. The claim filed with the administrator referred to the bonds and stock, and claimed a lien thereon, thus indicating plaintiffs' intention to secure, as against other creditors, the benefit of the stock and bonds; and, the claim having been rejected, a resort to equity to secure the stock and bonds was appropriate, and not inconsistent with the claim as filed; and, this proceeding being in equity, the court had ample power to protect the estate from a double liability, as was done by the provision in the decree that whatever should be realized in the equitable proceeding should be credited upon the judgment recovered at law, which fixed the amount of Frierson's defalcation. The distinction between that case and this is apparent. The judgment and order appealed from should be reversed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

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109 Cal. 340

LIND v. CITY OF SAN LUIS OBISPO. (No. 19,448.)

(Supreme Court of California. Oct. 3, 1895.)

NUISANCE—SPECIAL INJURY.

A riparian lot owner, by the maintenance by a city of a cesspool on a stream above his lot, which, besides being offensive to all persons living in the neighborhood, causes, when the cesspool is flushed, offensive sewerage matter to be deposited on his lot, suffers a special injury, entitling him to sue to abate the nuisance.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Joseph Lind against the city of San Luis Obispo. There was a judgment for defendant, and plaintiff appeals. Reversed.

Wilcoxon & Bouldin and J. M. Wilcoxon, for appellant. William Shipsey, for respondent.

VANCLIEF, C. Action to abate a nuisance, in which, at the close of the evidence for plaintiff, a judgment of nonsuit and for costs was rendered against him, from which he appeals on a bill of exceptions, containing a statement of the evidence.

The defendant is a municipal corporation of the sixth class, having a population of about 3,000. Plaintiff is the owner of a lot of land within the corporate limits of the city, and a dwelling house thereon, in which he and his family reside. His lot has a frontage of 112 feet on Higuera street, and extends back westerly from said street to the center of San Luis Obispo creek. In August, 1892, while plaintiff owned and was residing upon said lot, the defendant constructed a system of sewerage in and for said city, by and through which all excremental and malodorous matter is conveyed to and discharged into a vault constructed for the purpose of receiving the same. This vault is vertically cylindrical, about 10 feet in diameter and 11 feet in depth, and is situate in the bank at the margin of said creek, about 300 feet above plaintiff's dwelling house. It has two openings on the side next to the creek, one at the bottom, and the other near the top; the lower one being closed during the dry season of about six to seven months, during which the vault is filled with solid matter, which, during the rainy season, is flushed out through the lower opening into the creek. The vault is constructed of cemented masonry, and is ventilated through a chimney or pipe about 40 feet high. The evidence shows that the stench from the vault and from the creek below for a distance of half a mile or more is so disagreeable and offensive to the residents along the creek for a distance of 1,000 feet or more below the vault as to make the occupancy of their dwelling houses extremely uncomfortable, and nearly intolerable to those who reside within 500 feet below that vault, except during times of very high water in the creek; that plaintiff and one or two of his near neighbors are most affected by the odors, but that from 150 to 600 of the resident population of 3,000 are affected by them in the same way, but less in degrees; also, that considerable quantities of the solid malodorous matter from the vault are annually deposited upon plaintiff's lot along the borders of the creek, which remain there during the greater part of the year, and intensify the stench arising from the vault. Such deposits, however, are limited to lots adjoining the creek, and to less than 20 residences.

In granting the nonsuit the court said: "In conclusion, the facts as proven on the part of plaintiff establish the existence of a nuisance disgusting and offensive to all persons who live anywhere in the vicinity of the trap or cesspool, as maintained by the defendant, and also to all persons who pass that vicinity. Divers persons who live in the vicinity have testified to the noxious odors and discharge from the cesspool, and of the discharge from the cesspool that is deposited for a long distance in the creek, and left along the creek, polluting the waters and creating a stench; that it is offensive to a great number of persons. There has been but one kind of nuisance shown, and it is common to the public and vicinity of the city in which the plaintiff lives. It may be that it is more offensive to plaintiff than to others, but the nuisance is of the same kind to the plaintiff that his neighbor suffers. If plaintiff is left to maintain this action, then the city may be subject to a like action by many other persons alike situated. The testimony shows that from one hundred and fifty to six hundred persons are alike affected, and about thirty-five families in a greater or less degree than the plaintiff. The nuisance complained of is a common public nuisance, as defined in section 3480 of the Civil Code. I think the motion for a nonsuit should be granted."

I think the court erred in granting the nonsuit. Section 3493 of the Civil Code provides: "A private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise." In the case of Sullivan v. Royer, 72 Cal. 248, 13 Pac. 655, a smokestack in the city of San Francisco, from which the smoke invaded private residences in the neighborhood of its location, to the annoyance and discomfort of the dwellers therein, was adjudged to be a private nuisance, for which damages were recovered, and which was ordered to be abated. The same effect is Tuebner v. Railroad Co., 66 Cal. 171, 4 Pac. 1162. In Gardner v. Stroever, 89 Cal. 26, 26 Pac. 618, it was adjudged that the owner of a slaughterhouse situated on the public highway, whose business was interrupted and injured by an obstruction of a road, was entitled to maintain an action for damages and an injunction against the maintenance of the nuisance. To the same effect is Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106, where it is said: "If a substantial right has been invaded, especially if the wrong be in the nature of continuing trespass, of such a character that its continuance will create a right against the plaintiff's estate, or operate to deprive plaintiff of a substantial right incident to her property, the nuisance will be abated, although the damage is merely nominal." The substantial right mentioned in the above extract means a substantial private right, as distinguished from a public right enjoyed by plaintiff in common with the public at large. The injury which may entitle a private person to maintain an action to abate a public nuisance must be an injury to plaintiff's private property, or to a private right incidental to such private property; and, where the injury is of this nature, the injured person may maintain the action, although the private rights of an indefinite number of other persons may be infringed and injured in the same way by the same nuisance. The distinction here attempted to be made is more clearly expressed by Bigelow, C. J., in the case of Wesson v. Iron Co., 13 Allen, 95, as follows: "The real distinction would seem to be this: That, when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals. In such case the act of itself does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. This, we think, is substantially the conclusion to be derived from a careful examination of the adjudged cases. The apparent conflict between them can be reconciled on the ground that an injury to private property, or to the health and comfort of an individual, is in its nature special and peculiar, and does not cause a damage which can properly be said to be common or public, however numerous may be the cases of similar damage arising from the same cause. Certainly, multiplicity of actions affords no good reason for denying a person all remedy for actual loss and injury which he may sustain in his person or property by the unlawful acts of another, although it may be a valid ground for refusing redress to individuals for a mere invasion of a common and public right." Besides the paragraph above quoted, the opinion is very instructive on the question under consideration, and should be entirely read. See, also, Stetson v. Faxon, 19 Pick. 147, as reported in 31 Am. Dec. 123, with notes; also, Wood, Nuis. §§ 602–605, and cases there cited.

In the case at bar the stench arising from the nuisance not only enters plaintiff's dwelling house through every open door and window, and deprives him and his family of the comfortable use and enjoyment thereof, and is deleterious to their health, but large quantities of the material from which the noxious odors arise are deposited upon his land near his house. Surely, all this constitutes a special injury to his private property, and private rights incidental thereto, which is not common to the public generally, nor to more than one-sixth part of the population of the small town in which the nuisance is located. I think the judgment should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; HAYNES, C.

McFARLAND, J. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded for a new trial.

HENSHAW, J. (special concurring). It appears by the complaint, supported by the evidence, that plaintiff suffered peculiar and special damage by reason of the deposit upon his land of quantities of offensive sewage matter. That the stench was more offensive where he resided than it was elsewhere, or that his family was exposed to greater danger of disease by reason of the nuisance, does not, in my opinion, constitute a special injury, but merely a greater injury of a general kind. But for the reason first above given, which is noted in the learned commissioner's opinion, I concur in the conclusion he reaches, and in the judgment of reversal.

I concur: TEMPLE, J.

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109 Cal. 346

BONNEY v. TILLEY. (No. 18,388.)

(Supreme Court of California. Oct. 4, 1895.)

CORPORATIONS—DIRECTOR—PURCHASE OF CLAIMS.

1. A director has the right to take an assignment of a claim against an insolvent corporation for the unpaid purchase price of land, and enforce the same for the amount paid, and a judgment entered thereon will be prior to subsequent judgments, though the original vendor's lien be lost by the assignment.

2. A director purchasing at a discount an outstanding claim against an insolvent corporation can enforce the same only for the amount paid.

Commissioners' decision. Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by John Bonney against Edwin Tilley to determine the priority of certain liens. Defendant had judgment, and plaintiff appeals. Reversed.

J. M. Walling, for appellant. P. F. Simonds, for respondent.

BELCHER, C. This is an appeal from the judgment entered in the case, on the judgment roll alone. The facts admitted by the pleadings and found by the court are in substance as follows: On March 7, 1893, the Midnight Gold & Silver Mining Company, a corporation, executed to the plaintiff its two promissory notes for the sum of $514 each, one payable four and the other six months after date, with interest. On the same day the said corporation also executed to one J. F. Cox its two promissory notes for the sum of $520 each, one payable four and the other six months after date. On August 20, 1893, Cox assigned his notes to the plaintiff, but no consideration for the assignment was paid by plaintiff. Thereafter, on November 24, 1893, plaintiff recovered two several judgments against the corporation on the said promissory notes, one for $1,128 and the other for $1,178. On March 10, 1893, the said corporation executed to W. H. Conly its promissory note for $14,188.80, payable on demand, and on the 16th of the same month Conly assigned the said note to the defendant, who paid him therefor the sum of $1,006 in lawful money of the United States. Afterwards, on May 13, 1893, defendant caused an action to be brought in his name, as plaintiff, to recover from the corporation the amount due on the note; and on May 24, 1893, judgment by default was entered thereon for $14,363.70, principal and interest, and for $6.75, costs of suit. On September 5, 1893, said judgment remaining unpaid, a writ of execution thereon was duly issued and placed in the hands of the sheriff of the county, with directions that he levy on, and sell in satisfaction thereof, the real property of the corporation, and on the same day the sheriff levied the writ upon certain real property of the corporation, which on October 20, 1893, after giving due and legal notice of the sale, he sold at public auction to the defendant for the sum of $2,500, that being the highest and best sum bid therefor. Thereafter the sheriff duly issued and delivered to defendant a certificate of sale of the land, and the defendant is still the owner and holder thereof. On May 11, 1893, Mary E. Gray et al., as plaintiffs, commenced an action against said corporation and said Conly to recover the sum of $1,300, and to foreclose a vendor's lien upon a certain portion of the real property of the corporation. The lien was claimed as security for the unpaid portion of the purchase money of the property, which was sold by the plaintiffs in the action to Conly on November 18, 1890, and by him transferred to the corporation. On August 25, 1893, while the action to foreclose the lien was pending, Mary E. Gray et al. assigned their claim and right to a vendor's lien to the defendant, and he paid them therefor the sum of $775. Thereafter defendant caused the action to be continued in the name of the plaintiffs, and on September 18, 1893, caused a judgment by default to be entered thereon for the sum of $1,519.90, and a decree foreclosing the vendor's lien upon said property. On September 27, 1893, defendant caused an order of sale to be issued in said action, and placed it in the hands of the sheriff of the county, and under it, after due and legal notice, the sheriff sold the premises affected by the foreclosure to the defendant for the sum of $1,619, and thereupon issued to defendant a certificate of sale of said premises, which he still owns and holds. During all the times mentioned in the complaint the said corporation was insolvent. On March 7th, when the corporation executed its notes to Cox, he was a stockholder and a director of the corporation, and he so continued until April 17th. On March 10th, when the corporation executed its note to Conly, he was a director and the president of the corporation, and he so continued until May 3d. And on March 16th, but not till after Conly assigned his note to the defendant, the latter became a stockholder and a director of the corporation. This action was commenced in January, 1894, and the prayer of the complaint was for judgment declaring the liens of plaintiff's judgments against the corporation superior and prior to the claims of defendant, as against the property of said corporation.

After stating the facts, the court below found as conclusions of law in substance as follows: (1) That the judgment in the case of Mary E. Gray et al. against the corporation was a valid judgment for the sum of $775, with interest thereon at the rate of 7 per cent. per annum from the date of its entry, and was a valid lien upon the lands and premises mentioned and described therein, and was prior in point of time and superior to each of plaintiff's judgments against the corporation. (2) That the two judgments recovered by the plaintiff against the corporation were valid judgments for the sums, respectively, of $1,128 and $1,178, with interest thereon at the rate of 7 per cent. per annum. (3) That the judgment recovered by the defendant against the corporation was a valid judgment for the sum of $14,370.54, with interest thereon at the rate of 7 per cent. per annum. (4) That subject and subordinate to the lien of the judgment in the Mary E. Gray et al. case, to the extent of $775, with interest, the other judgments, with interest, were liens, equal in point of time, upon the rest and residue of all the real property of said corporation. In accordance with these conclusions judgment was entered, and from that judgment this appeal is prosecuted.

It is claimed for appellant that the judgment is erroneous: (1) "In declaring that defendant is entitled to a prior lien for the sum of $775 on that portion of the property described in the judgment." (2) "In decreeing that defendant is entitled to enforce his judgment for $14,370.54 against the property of said corporation on an equality with plaintiff."

In support of the first point the well-settled rule is invoked that a vendor's lien is not assignable, and it is said that, conceding Mary E. Gray et al. were entitled to a vendor's lien, the sale by them to defendant of their demand against the corporation, before judgment, destroyed the lien, and no right to such lien passed to defendant. It is not denied that the claim of Gray and others was a valid claim for the full amount for which judgment was entered on it. And the court expressly found that in purchasing the claim, and in causing judgment to be entered thereon and sale to be made, "defendant was not attempting to prevent plaintiff from collecting from said corporation any amount owing by said corporation to plaintiff, nor to obtain an unlawful advantage or any advantage over plaintiff, and that no acts or act done by plaintiff were or are detrimental to the interests of the creditors of said corporation." Judgment on this claim was entered in September, 1893, and about two months later the judgments in favor of plaintiff were entered. If, therefore, that part of the judgment foreclosing the vendor's lien were eliminated, there would still be left a valid judgment which was a lien on all the real property of the corporation, and was prior and superior to the lien of plaintiff's judgments. In Mor. Priv. Corp. § 787, it is said: "Directors of an insolvent corporation, who have claims against the company as creditors, must share ratably with the other creditors in a distribution of the company's assets. They cannot secure to themselves any advantage or preference over other creditors by using their powers as directors for that purpose. These powers are held by them in trust for all the creditors, and cannot be used by them for their own benefit. It is to be observed, however, that a person who is a creditor of an insolvent corporation is not deprived of any of his rights as creditor by the fact that he also occupies the position of director of the company. He is merely incapacitated as director from using any of the powers of his position for his own benefit or the benefit of his codirectors." Under these circumstances, we fail to see that the court committed any error in adjudging that the defendant was entitled to a prior lien for the sum of $775, that being the amount which he actually paid Gray and others for their claim.

In support of the second point it is urged that, while defendant had a right to recover judgment against the corporation for the full amount due on the Conly note, the distribution of the company's assets should be made to him and other creditors ratably, and by taking into account only what he actually paid for the note, viz. $1,000. It seems to be well settled that directors of an insolvent corporation, who are creditors of the company, cannot secure to themselves any preference or advantage over other creditors in the payment of their claims. Hays v. Bank, 51 Kan. 535, 33 Pac. 318; Beach v. Miller (Ill. Sup.) 22 N. E. 464; Adams v. Milling Co., 35 Fed. 433; Hopkins' Appeal, 90 Pa. St. 69. In Cook, Stock, Stockh. & Corp. Law, § 660, it is said: "It is a fraud on the corporation and on corporate creditors for the directors to buy up at a discount the outstanding debts of the corporation, and compel it to pay them the full face value thereof. In such a case the directors may be compelled to turn over to the corporation the evidences of indebtedness, upon being paid the money which they gave for the same." We conclude, therefore, that the court erred in determining that defendant was entitled to have his judgment on the Conly note enforced against the property of the corporation, on an equality with the plaintiff, for the full amount thereof, and that he should have been limited to the amount which he paid for the note, with legal interest thereon. The judgment should be reversed and the cause remanded, with directions to the court below to modify its judgment or decree in accordance with this opinion.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with directions to the court below to modify its judgment or decree in accordance with this opinion.

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5 Cal. Unrep. 164

STOCKTON SAVINGS & LOAN SOC. v. PURVIS, Sheriff. (No. 18,386.)[1]

(Supreme Court of California. Oct. 9, 1895.)

PLEDGE OF CROPS FOR RENT—ORAL AGREEMENT—RIGHTS OF CREDITORS OF LESSEE.

An oral agreement between landlord and tenant that title to crops raised during the term should remain in the landlord, and that the crop was to be put in warehouse in the landlord's name, and that from a sale thereof the landlord was to retain as rent an amount equal to the rent reserved in the lease, and turn over the balance to the tenant, is merely an agreement that, after the crop was harvested and stored, it should become a pledge for payment of the rent, and does not create a lien which would support an action of conversion against a sheriff for levying on the crop while growing, and seizing it under attachment against the tenant as soon as harvested.

Commissioners' decision. Department 1. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action by the Stockton Savings & Loan Society against R. B. Purvis, sheriff. Judgment for plaintiff, and defendant appeals. Reversed.

H. G. W. Dinkelspeil and Stonesifer & Needham, for appellant. Nicol & Orr, for respondent.

HAYNES, C. Action for the conversion of 1,770 sacks of wheat. The case was tried by the court, and findings and judgment were against the defendant, who appeals from the judgment upon the judgment roll alone.

The findings show the following facts: Plaintiff, a corporation, was the owner of certain lands in Stanislaus county, and orally leased the same to one Dallas for the term of one year at a cash rental of $2,140. That it was further orally agreed and understood between the lessor and lessee "that the title to said crops raised thereon during said term was to remain in said plaintiff, it being agreed and understood that the said crop was to be hauled to the nearest warehouse, and stored in the name of the plaintiff herein; that from the sale of said crop plaintiff was to receive as rent, as aforesaid, the sum of $2,140 cash, and the overplus, if any, was to go to and be the property of said R. Dallas; * * * and that no part of said crop should be in any way subject to the disposal of said Dallas." Under this oral agreement Dallas sowed the lands to wheat and barley with his own personal means, and received no advances of any kind from or through the plaintiff. Before the crop was harvested, Eppinger & Co. brought suit against Dallas and wife to recover the sum of $8,935.77, and caused a writ of attachment to be issued therein, and the defendant, as sheriff of said county, levied said writ upon the whole of the crop of wheat then growing upon said lands, and, after harvesting and sacking the same, removed it from said lands, and refused to deliver it to the plaintiff herein upon demand. Eppinger & Co. in due time obtained judgment against Dallas. The value of said wheat, after deducting the expense of harvesting and sacking, was found to be $1,417.56, and for that sum judgment was rendered for the plaintiff.

Appellant contends: First, that the plaintiff had no such title to or lien upon the wheat as would defeat the attachment; and, second, that the claim or demand served by the plaintiff upon the sheriff was insufficient in several particulars, and did not comply with the requirements of section 689, Code Civ. Proc., as amended in 1891 (St. 1891, p. 20). The tenant, under the terms of the agreement above stated, was the owner of the crop at the time it was attached. "A tenant for years or at will, unless he is a wrongdoer by holding over, may occupy the buildings, take the annual products of the soil, [and] work mines and quarries open at the commencement of his tenancy." Civ. Code, § 819. The rent reserved in this case was not a share of the crop, whereby the landlord would have been a tenant in common with his lessee in the crops, and so in possession by his cotenant; but it was a money rent at a fixed sum, not even dependent upon the value of the crop. If the crop had been a total failure, or had been consumed by fire, Dallas would still have been liable for the stipulated sum of money as rent. In Farnum v. Hefner, 79 Cal. 575, 582, 21 Pac. 955, it is said: "It is undoubtedly true, as contended, that the landlord and tenant may, by agreement, provide that all of the crops raised upon the land may be delivered to and remain the property of the landlord and be disposed of by him, and such agreement will protect the title of the landlord in the property as against an attaching creditor of the tenant. But it will be found, upon an examination of the cases cited by counsel, that in every instance where such an agreement is upheld it is made for the protection of the landlord in case of advancements by him, or for some other reason; in other words, there is some consideration shown for the agreement by which the title remains in the landlord." It may be further remarked that we find no case in which a verbal agreement is given the force and effect contended for by plaintiff. Besides, the claim or demand served by plaintiff upon the sheriff does not claim ownership of the wheat, or that it had any title thereto, but its claim was that said crops "were and are now subject to the lien of said Stockton Savings and Loan Society for rent reserved to the amount of $2,140, and that said Stockton Savings and Loan Society was, at and prior to the time of your attachment, and is now, entitled to the possession of the whole of said harvested crop for the satisfaction of the said sum of $2,140, secured by such lien."

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[1] Reversed in banc. See 46 Pac. 561, 112 Cal. 236.

It is conceded by plaintiff that the statute gives no lien for rent reserved; nor was the alleged lien of plaintiff created by a mortgage of the crop, because a crop mortgage, though authorized by statute, cannot be created by a verbal agreement, or otherwise than as provided by law. At the most, it was an agreement that when the crop should be harvested and stored, it should then become a pledge for the payment of the rent; and, as this agreement to pledge the wheat had not been executed, the wheat was subject to attachment in the action of Eppinger & Co. v. Dallas. This conclusion, we think, is fully supported by Hitchcock v. Hassett, 71 Cal. 331, 12 Pac. 228.

Counsel for respondent have cited several cases which should receive attention. These cases are cited to the proposition that the agreement between the landlord and tenant may be so formed as to secure to the owner of the land the ownership of the products until the performance of a stated condition. This proposition need not be disputed, provided it be understood that the agreement in question is in such form as to effect the ends stated. In Howell v. Foster, 65 Cal. 169, there was a written instrument by which the plaintiff leased and demised the land to Mayfield for a certain term, with a covenant, among others, on the part of Mayfield, that he would till land, etc., and at the proper time would harvest and sack the grain, and thereupon deliver all of it to plaintiff, to be held by him as security for all advances made by the plaintiff to Mayfield; and said instrument further provided as follows: "And it is mutually covenanted and agreed that until such delivery and transfer by the party of the first part [plaintiff] all of said grain shall be the property of the said party of the first part, and the said party of the second part [Mayfield] shall have no right to dispose of any portion thereof." That case, as reported, does not disclose whether the lease was recorded, but the fact that it was in writing, and that it was to be security for advances does appear; and, as the landlord was to have a portion of the crop, whereby he became a tenant in common with the lessee in the crop, and through his cotenant was in possession thereof, the distinction between that case and this is apparent.

The next case—Wentworth v. Miller, 53 Cal. 9—is not in point, as in that case the lessee agreed to pay the lessor a part of the crop as rent, and to give the lessor possession of the whole crop until the rent should be paid, so that in that case also the landlord was a tenant in common with the lessee in the crop, and in possession by his cotenant. The same distinction also exists between this case and that of Sunol v. Molloy, 63 Cal. 370.

In Blum v. McHugh, 92 Cal. 497, 28 Pac. 592, there appears to have been a written lease. At all events, no case is cited where a verbal lease, with an agreement, also verbal, for a lien upon the crop to secure a money rent, has been held to be valid without possession taken by the landlord.

The agreement between the lessor and lessee did not even give the lessor a right of entry to take the crop; nor was there any provision in the verbal lease giving the lessor the right to the possession of the crop until it was stored in the warehouse in the name of the lessor. There was no provision for a re-entry. The only express condition which could be broken by the lessee was that which required the grain to be stored in the name of the lessor. A growing crop is necessarily in the possession of the party who is in possession of the land, whether he be the owner or the lessee; and, in the absence of a statute authorizing a mortgage of the crop independently of the land, it is difficult to see how such a lien can be vested in one not in possession of the land as will authorize him to pursue an action at law against one who takes the property. That such a lien may be created by a provision in the lease which is, in legal effect, a chattel mortgage, seems to be conceded by the great weight of authority; but in such case it is generally held to be necessary that the lease be recorded or filed as such mortgage,—in the absence of any statute giving effect to the lien,—in order to make it effectual against purchasers and creditors; but whether recording is necessary in this state need not be decided, since no case, here or elsewhere, that has been called to my attention, holds that a verbal agreement will create a lien in favor of the landlord which is valid against subsequent purchasers or creditors, unless he has obtained possession of the property upon which the lien was to operate. The judgment should be reversed, with directions to the superior court to dismiss the action.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with directions to the court below to dismiss the action.

109 Cal. 430

HERMANN v. LITTLEFIELD. (No. 15,809.)

(Supreme Court of California. Oct. 9, 1895.)

ACTION FOR SERVICES—DURATION OF CONTRACTS—PERFORMANCE.

1. When a person performing labor at an agreed price and for a stated time continues in the same employment after the expiration of the term without a new agreement, it is presumed the terms of the original contract were continued, and it is admissible in evidence in an assumpsit to recover for the extra services.

2. A contract to give one's whole time as a draftsman to the interest of his employer, an architect, is not broken by doing a little work for other parties on holidays and at night, such work not resulting in damage to the employer.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Assumpsit by E. A. Hermann against J. H. Littlefield. From a judgment for plaintiff, defendant appeals. Affirmed.

James Alva Watt and Curtis Hillyer, for appellant. W. W. Watson, for respondent.

GAROUTTE, J. This is an action in assumpsit for work and services performed by plaintiff in assisting defendant in conducting and carrying on the business of an architect. Judgment went for plaintiff, and this appeal is prosecuted from such judgment, and from the order denying the motion for a new trial.

In the year 1887, the parties entered into a written contract, by the terms of which Hermann agreed to give his services "as a draftsman and assistant architect during the necessary and reasonable working hours of each working day, for the term of three years." Hermann also agreed "to devote his whole time and services to the interest of Littlefield's business as a draftsman and assistant architect, to use at all times his utmost reasonable exertion in and for the true and best interests of Littlefield's business, as if he were a partner with him." This agreement expired in due course of time, and plaintiff continued to remain in the employment of defendant, and performed the same character of services thereafter as before such expiration. By his answer, defendant claimed that plaintiff had made a substantial default in the performance of the terms of the contract upon his part to be performed, and asked for damages. The court, by its findings of fact, declared, in effect, that plaintiff had performed the contract as agreed upon, and further found that during the time of his employment he performed work for persons not clients of defendant, from which employment he had received the compensation of $178; and it thereupon deducted that sum from the amount found due to plaintiff, and ordered judgment for the balance.

It is contended that the court committed an error in admitting the original written contract in evidence. We think there is no weight in the contention. The writing was clearly admissible, as showing the terms of the contract under which plaintiff performed the labor. It is elementary that when a person performing labor at an agreed price and for a stated time continues in the same employment after the expiration of the term, without a new agreement, it is presumed by the law, in the absence of anything to the contrary, that the terms of the original contract are continued; and the fact that the present action is one in the nature of assumpsit in no way deprives the plaintiff of the right to introduce the contract in evidence. This principle finds full support in Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127.

The findings of fact as to the performance of the contract by plaintiff are fully supported by the evidence. We see nothing in the record disclosing any substantial breach thereof. Plaintiff appears to have done some work for other parties during Sundays, holidays, and at night; but the amount of this labor was trivial, with a single exception, and in no way resulted in damage to defendant, nor in any way interfered with his business. We see no more cause of complaint by defendant in this regard than though plaintiff had passed the time so occupied in harmless amusement. The court allowed the defendant the benefit of the money received by plaintiff from this outside work. Whether or not there was justification for this action of the court is immaterial upon the present appeal, for certainly there can be no cause of complaint upon the part of defendant based thereon. A modification of the judgment in this respect could hardly be desired by him.

For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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109 Cal. 433

DEANE v. GRAY BROS. ARTIFICIAL STONE PAVING CO. (No. 16,000.)[1]

(Supreme Court of California. Oct. 9, 1895.)

PRINCIPAL AND AGENT—RATIFICATION—ESTOPPEL.

1. The mere fact that defendant knew that a physician was treating a third person, at the request of another, on defendant's account, and relied for compensation on defendant, and that it made no objection, does not render it liable to plaintiff for the services, on the ground of ratification.

2. Nor does it estop it to deny its liability.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Tenison Deane against the Gray Bros. Artificial Stone Paving Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed.

Fisher Ames, for appellant. Edward R. Taylor, for respondent.

GAROUTTE, J. This is an action by the plaintiff, a physician and surgeon, to recover the value of professional services alleged to have been rendered to one Barsotti for and under the employment of the defendant corporation. The "Gray Brothers" were the owners of a rock quarry, and George F. Gray and Harry Gray, being the Gray brothers, were president and vice president, respectively, of the defendant corporation. It is not our purpose to devote either time or labor to a detailed review and analysis of the evidence, for we have concluded that the judgment must be reversed, and the cause remanded, for other reasons.

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[1] Rehearing denied.

It appears that the plaintiff, in the first instance, attended the injured man at the solicitation of one Tesser, who was working in some capacity either for the Gray brothers or the defendant corporation, and the powers vested in him by reason of such employment it is unnecessary here to determine. Subsequent to the commencement of the plaintiff's services, Tesser informed one or both of the Gray brothers as to plaintiff's employment; and it further appeared that either the Gray brothers or the defendant corporation paid various bills for drugs, etc., ordered by plaintiff for the benefit of the injured man. There is also some other evidence likewise tending to some extent, at least, to show an employment by the defendant of plaintiff by an original hiring or subsequent ratification.

Upon the character of evidence of which we have presented a general outline, the court gave the jury the following instruction as to the law bearing upon the facts of the case: "It is an immaterial consideration whether Barsotti was or was not at the time of the accident to him in the employ of the Gray brothers or the Artificial Stone Paving Company (defendant herein). If the defendant employed the plaintiff to treat Barsotti for his injuries, or if defendant knew that plaintiff was so treating him on its account, and relied for compensation upon the defendant, and defendant made no objection thereto, then I instruct you that defendant is liable in this action."

The first part of the foregoing instruction in effect tells the jury that, as to the liability of defendant, it is immaterial in whose employment the injured man was at the time of the accident. If the principle of ultra vires is not in the case, the instruction is sound law, but certainly unsound if that question is properly presented for our consideration. In Fraser v. Bridge Co., 103 Cal. 79, 36 Pac. 1037, it was held that a moral obligation was a sufficient consideration to support a contract of this character. But in this instruction any consideration for the contract is omitted as a necessary element of the liability of the defendant corporation. Yet, even conceding that the defendant could prove ultra vires in the making of this contract upon a pleading presenting only a general denial, still there is no evidence in the record that this contract was ultra vires; and, in the absence of evidence to that effect, we must assume that it was within the powers of the corporation to so contract, for the law presumes in favor of the validity of contracts.

We then pass to a consideration of the remaining portion of the instruction, to wit: "Or, if defendant knew that plaintiff was so treating him on its account, and relied for compensation upon the defendant, and defendant made no objection thereto, then I instruct you that defendant is liable in this action." This statement does not embrace a sound principle of law, and necessitates a reversal of the judgment; and, whether it be claimed that such facts constitute a ratification or an estoppel, it is equally unsound. We do not see why the burden should be cast upon the defendant of making objections to plaintiff under the facts assumed by the instruction. Certainly, the mere knowledge of a corporation that some one, perchance a total stranger, has represented that such corporation would compensate a third party for services rendered to such stranger, casts no duty upon the corporation of taking any affirmative action. It was not for the corporation to disillusionize the plaintiff here as to the reliance placed by him upon the statements of the man Tesser, but rather plaintiff's business to substantiate Tesser's statements before rendering the services. It was no concern of defendant as to the truthfulness or falsity of these statements, nor any of its concern as to what anybody might say or was saying as to its responsibility for services rendered to third parties.

We conclude that knowledge upon the part of defendant that plaintiff was rendering services to the injured man, and also knowledge of defendant that plaintiff was relying upon it for compensation for the performance of such services, taken in connection with the fact that defendant, possessing such knowledge, made no objection thereto, are circumstances wholly inadequate to create a legal liability against defendant.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

109 Cal. 445

In re GROSBOIS. (Cr. 19.)

(Supreme Court of California. Oct. 9, 1895.)

PRESENTMENT BY GRAND JURY—VALIDITY.

Const. 1879 omits all reference to presentments as a mode of charging a person with a public offense. Pen. Code, § 682, provides that every public offense must be prosecuted by indictment or information, except offenses tried in justices' and police courts. Section 872 requires the magistrate, after a defendant has been examined, to hold him to answer if it appears that an offense has been committed, and that he is guilty. Section 883 requires the magistrate, on holding him to answer, to return the warrant and depositions to the clerk. Section 809 provides that, when so held, defendant must be proceeded against by information or indictment. Section 1426 provides that all proceedings in actions before a justice's or police court, for a public offense of which they have jurisdiction, must be commenced by complaint under oath, etc. *Held*, that a "presentment" by a grand jury is unauthorized.

In bank.

Petition by A. Grosbois for a writ of habeas corpus to obtain his discharge from arrest under a warrant issued on a presentment by the grand jury. Petitioner discharged.

Peter A. Ruef, for appellant. Wm. S. Barnes, Dist. Atty., for respondent.

HARRISON, J. A grand jury that had been impaneled in the superior court for the city and county of San Francisco presented to that court the following document:

"The people of the state of California against A. Grosbois, in the superior court of the city and county of San Francisco, state of California, the sixth day of March, A. D. eighteen hundred and ninety-five. A. Grosbois is accused by the grand jury of the said city and county of San Francisco by this presentment of the crime of misdemeanor, to wit, renting houses for the purposes of ill fame, committed as follows [describing the acts constituting the misdemeanor], contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California. William S. Barnes, District Attorney, by A. P. Black, Assistant District Attorney.

"Names of witnesses examined, and the names of witnesses whose depositions were read before the grand jury on finding the foregoing *presentment:* James Gillin. John B. Martin."

The document was indorsed as follows: "*Presentment* for misdemeanor, to wit, renting houses for the purposes of ill fame. A true bill. W. H. Gagen, Foreman Grand Jury."

The court ordered the document to be filed with the clerk, and thereupon a bench warrant was issued, and the petitioner, having been arrested by the sheriff thereunder, has sued out a writ of habeas corpus to test the legality of his arrest.

It will be observed that the document which was presented to the superior court by the grand jury conforms in all respects, except in name, to the requirements of an indictment; and, except that it is designated a "presentment" in the body of the indictment, and is so indorsed, it has none of the characteristics of a presentment. A "presentment" is defined in section 916 of the Penal Code as follows: "A presentment is an informal statement in writing by the grand jury, representing to the court that a public offense has been committed which is triable in the county, and that there is reasonable ground for believing that a particular individual, named or described therein, has committed it." The present document is, however, a formal accusation by the grand jury, charging the defendant with a public offense. It is signed by the district attorney, instead of the foreman of the grand jury, the names of the witnesses examined are indorsed thereon, and it is also indorsed "A true bill" by the foreman of the grand jury. It is prepared upon a printed form for an indictment, and, where the word "indictment" is printed therein, it is erased, and the word "presentment" is written over the same. This change is indicated by the italicized words above. It is not necessary, however, to determine whether this document can be regarded as a presentment, since we are of the opinion, from other considerations, that the action of the grand jury was unauthorized. The chief distinction between an indictment and a presentment at common law was that the former was made at the suggestion of the crown, while the latter was made upon the knowledge of one or more of the jurors, and, instead of being indorsed "A true bill" by the foreman alone, was signed by all of the jurors. Blackstone defines a presentment as "the notice taken by a grand jury of any offense, from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king." 3 Bl. Comm. 301. 2 Hawk. P. C. c. 25 (1), says: "An indictment is an accusation at the suit of the king, by the oath of twelve men of the same county wherein the offense was committed, returned to inquire of all offenses in general in the county, determinable by the court into which they are returned, and finding a bill brought before them to be true. But when such accusation is found by a grand jury, without any bill brought before them, and afterwards reduced to a formed indictment, it is called a 'presentment.'" Mr. Justice Field, in a charge to the grand jury (2 Sawy. 678), says: "A presentment differs from an indictment in that it wants technical form, and is usually found by the grand jury upon their own knowledge, or upon the evidence before them, without having any bill from the public prosecutor. It is an informal accusation, which is generally regarded in the light of an instruction, upon which an indictment can be framed. This form of accusation has fallen in disuse since the practice has prevailed, and the practice now obtains generally for the prosecuting officer to attend the grand jury, and advise them in their investigation." See, also, Case of Lloyd, 3 Pa. Law J. R. 60; State v. Darnal, 1 Humph. 292; Whart. Cr. Pl. § 86.

The constitution of 1849 (article 1, § 8) authorized a presentment by a grand jury as a part of the procedure for holding persons to answer for public offenses, and the criminal practice act that was enacted in pursuance of that provision (St. 1851, p. 212) provided for the finding of a presentment by a grand jury, and the proceedings thereon. Under that constitution the court of sessions had jurisdiction to inquire, by the intervention of a grand jury, of all public offenses committed or triable in its county. In 1862 the court of sessions was abolished by an amendment to the constitution, and the county court was invested with such criminal jurisdiction as the legislature might prescribe, and the district court was given jurisdiction in all criminal cases not otherwise provided for. Under these constitutional provisions, the legislature was authorized to prescribe the finding of a presentment, as well as an indictment, as a part of the duties of a grand jury, and the criminal practice act was intended to confer this authority. These provisions of the criminal practice act in reference thereto were incorporated in the Penal Code upon its adoption in 1872. The constitution of 1879, however, omits all reference to a presentment as a mode of charging a person with a public offense, and the provisions of the Penal Code upon that subject, that had been adopted with a view to the provision of the previous constitution, thereupon ceased to have any practical operation.

That the action of the grand jury in the present case was unauthorized further appears upon a consideration of the action required of the magistrate after the defendant has been examined. Section 872 requires him to hold the defendant to answer, if it appears from the examination that an offense has been committed, and that the defendant is guilty; and section 883 requires him, upon holding him to answer, to return the warrant and depositions "to the clerk of the court at which the defendant is required to appear." The object of section 872 is that the defendant be held to answer, and, when so held, he must, by section 809, be proceeded against by information or indictment. The provisions of section 682, however, that "every public offense must be prosecuted by indictment or information, except * * * (3) offenses tried in justices' and police courts," is equivalent to a declaration that offenses tried in justices' and police courts are not to be prosecuted by indictment or information; and section 1426 declares that "all proceedings and actions before a justice's or police court for a public offense of which said courts have jurisdiction must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place, person and property as to enable the defendant to understand distinctly the character of the offense complained of and to answer the complaint." As the superior court has no jurisdiction to try a misdemeanor, and as there is no provision for a justice's or police court to try any offense prosecuted by indictment or information, it is clear that, under the present system, there is no function for a presentment by a grand jury, and no authority for the arrest of a person charged in that form with the commission of a public offense. The petitioner is discharged.

We concur: BEATTY, C. J.; TEMPLE, J.; McFARLAND, J.; HENSHAW, J.; VAN FLEET, J.

109 Cal. 489

GIESEKE v. SAN JOAQUIN COUNTY.

(No. 18,358.)

(Supreme Court of California. Oct. 10, 1895.)

STATUTES—TITLE AND SUBJECT OF ACTS.

Act April 1, 1878 (St. 1877–78, pp. 969, 986), is entitled "An act to create the office of commissioner of transportation, and to define its powers and duties; to fix the maximum charges for transporting passengers and freights on certain railroads, and to prevent extortion and unjust discrimination thereon." Chapter 3, § 9, provides that every person who shall fraudulently evade or attempt to evade the payment of his fare for traveling on any railroad shall be fined, etc. *Held*, that the subject of section 9 is embraced in the title.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by E. Geiseke against the county of San Joaquin to recover certain fees alleged to be due constables for official services. From a judgment for defendant, plaintiff appeals. Reversed.

Gould & Baldwin and W. M. Gibson, for appellant. Atty. Gen. Fitzgerald and W. B. Nutter, for respondent.

VANCLIEF, C. Action to recover from the county certain fees alleged to be due constables for official services in criminal cases prosecuted under section 9 of chapter 3 of an act of the legislature entitled "An act to create the office of commissioner of transportation, and to define its powers and duties; to fix the maximum charges for transporting passengers and freights on certain railroads, and to prevent extortion and unjust discrimination thereon." The act was approved April 1, 1878, and took effect immediately. The following is a copy of said ninth section: "Every person who shall fraudulently evade or attempt to evade the payment of his fare for traveling on any railroad shall be fined not less than five nor more than twenty dollars." St. 1877–78, pp. 969, 986. The court below found that the services of plaintiff in criminal actions under said section 9 against persons for having evaded the payment of railroad fare was not lawfully chargeable to said county, and accordingly rendered judgment for defendant as to all that class of charges. The action was defended, and the judgment of the court is attempted to be justified here upon the sole ground that said section 9 is unconstitutional, for the alleged reason that the subject of it is not expressed in the title of the act. Without considering all the points urged by appellant, I think he is right in contending that the subject of the ninth section is sufficiently expressed in the title of the act. One branch of the subject of the act expressed in the title is "to prevent * * * unjust discrimination" in "charges for transporting passengers," and whatever may be conducive to this end is germane to, and within the scope of, the subject of preventing such discrimination. The following is one of the means provided by the act to prevent discrimination. The sixth section of chapter 2 of the act provides: "If any such company or any of its conductors shall permit any person whatever to travel free upon its cars except upon the exhibition of free passes issued as provided in said section [section 3], such company or conductor shall forfeit and pay for each offense the sum of $100." No doubt this is embraced in the subject expressed in the title; and, if so, why are not the means provided by section 9 of chapter 3, by which the companies and their conductors may more effectually prevent the evasion of payment of fares, germane to the same subject? In view of the heavy penalties to which the companies and their conductors are subjected for permitting passengers to evade the payment of fares, I think it was but just, as well as appropriate, and conducive to the same end, that the legislature also made the evasion of payment of fare by passengers a misdemeanor punishable by fine; thus enabling the companies and conductors more effectually to prevent such evasions, and at the same time depriving them of any reasonable excuse for not doing so. The case of Dyer v. Placer Co., 90 Cal. 276, 27 Pac. 197, is of the same nature as this. In that case it was held that a violation of section 9 of said act constitutes a public offense, and that a constable had a right to charge that county for his official service in arresting, transporting, and feeding prisoners charged with such offense. It does not appear, however, that the constitutionality of said section 9 was expressly questioned in that case, though it seems to have been necessarily involved. The questions expressly stated and decided are whether or not a violation of said section was a public offense, and whether or not the constable was bound to execute warrants of arrest for violations of said section. It is hardly conceivable that a violation of an unconstitutional act of a legislature constitutes a public offense. For further authority on the question whether the subject of the ninth section of the act is sufficiently expressed in the title, see Ex parte Kohler, 74 Cal. 38, 15 Pac. 436; Ex parte Liddell, 93 Cal. 633, 29 Pac. 251; Johnson v. Harrison (Minn.) 50 N. W. 923; Van Brunt v. Town of Flatbush, 128 N. Y. 50, 27 N. E. 973; Cooley, Const. Lim. p. 172 et seq. I think the judgment should be reversed, and the cause remanded for a new trial.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded for a new trial.

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109 Cal. 427

HIBERNIA SAVINGS & LOAN SOC. v. THORNTON. (No. 15,956.)

(Supreme Court of California. Oct. 9, 1895.)

MORTGAGE DEBT—WAIVING SECURITY—ACTION ON NOTE.

1. Where a mortgage on its face purports to secure a note, the mortgagee cannot release the security, and maintain an action on the note. Barbieri v. Ramelli, 23 Pac. 1086, 84 Cal. 154, followed.

2. Defendant and his wife gave a mortgage to plaintiff on their homestead, which was community property, to secure a note. On the death of the wife, plaintiff neglected to present his claim against the estate, as required by Code Civ. Proc. § 1475, and the mortgaged property was set apart to the surviving husband. *Held*, that plaintiff could not sue defendant on the note.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the Hibernia Savings & Loan Society against Charles O'Neill on a note. Defendant having died pending the action, his executor, R. S. Thornton, was substituted, and, from a judgment for plaintiff, appeals. Reversed.

B. B. Newman, for appellant. Tobin & Tobin, for respondent.

HARRISON, J. The defendant Charles O'Neill, and his wife, Elizabeth, executed to the plaintiff their promissory note August 24, 1888, and at the same time, for the purpose of securing its payment, executed a mortgage of certain real property, upon which they had previously made a declaration of homestead. The property was the community property of the said Charles and Elizabeth at the time of filing their declaration of homestead, and remained such until the death of Elizabeth. Elizabeth died March 27, 1890, and administration was had upon her estate in the superior court for the city and county of San Francisco. The plaintiff did not present any claim against her estate upon the note and mortgage; and on July 26, 1892, the superior court set apart the mortgaged premises to the defendant, Charles O'Neill, as the surviving husband. The present action is brought against Charles O'Neill upon the note alone, to recover judgment for its amount. The superior court held that, by reason of the failure of the plaintiff to present his claim to the administrator of the estate of Elizabeth, the mortgage lien was extinguished by virtue of section 1475, Code Civ. Proc., and rendered a personal judgment against the defendant for the amount of the note. The defendant has appealed from the judgment upon the judgment roll, upon the ground that the findings do not support the judgment.

In Barbieri v. Ramelli, 84 Cal. 154, 23 Pac. 1086, it was held that an action to recover a personal judgment upon a debt for which a mortgage security has been given, even though such security was originally valueless, by reason of prior mortgages which exceeded the value of the lands, cannot be maintained; that, if the mortgage on its face purports to be a security to the plaintiff, he must bring his action for its foreclosure. See, also, Porter v. Muller, 65 Cal. 512, 4 Pac. 531; Hall v. Arnott, 80 Cal. 348, 22 Pac. 200. In Hearn v. Kennedy, 85 Cal. 55, it was held that, when a mortgage is made by husband and wife upon a homestead which is afterwards set apart to the surviving widow, the mortgagee can neither maintain his action to foreclose the mortgage, nor have a personal judgment against the survivor, unless he first presents his claim against the estate, under section 1475, Code Civ. Proc. It may be that if the mortgagor's title to the land has become extinguished subsequent to the making of the mortgage, by title paramount, or if the mortgaged property has been destroyed or has ceased to exist (see Toby v. Railroad Co., 98 Cal. 490, 33 Pac. 550), the mortgagee need not go through the idle form of bringing an action for foreclosure before he can have a judgment on the note; but when the mortgagee, by his own act or neglect, deprives himself of the right to foreclose the mortgage, he at the same time deprives himself of the right to an action upon the note. He will not be permitted without the consent of the mortgagor to release the mortgage for the purpose of bringing an action upon the note. "He is not authorized to waive the security, and bring an action on the indebtedness" (Barbieri v. Ramelli, supra); and whether he release the security by some affirmative act, or by his neglect, is immaterial. In the present case the plaintiff neglected to present its claim, and have it allowed and paid out of the estate of the decedent. Whether, upon the facts as shown in this case, this neglect had the effect to release the mortgage lien, is immaterial. If it did have that effect, as it was the result of his own neglect, the plaintiff cannot rely upon such neglect as giving authority to bring an action against the defendant upon the note alone. If it did not have that effect, the plaintiff should have brought his action to foreclose the mortgage. The judgment is reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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109 Cal. 452

RODGERS v. BACHMAN et al. (No. 18,355.)[1]

(Supreme Court of California. Oct. 12, 1895.)

CONDITIONAL SALE—CONSTRUCTION OF CONTRACT—VALIDITY.

1. An executory agreement for the sale of property on condition that the owner shall not be divested of his title until the price has been paid is valid against third persons, in the absence of fraud

2. S. agreed in writing to sell to B. a number of sheep, the latter to pay a certain cash sum, and to take and "run" the sheep, and dispose of the wool for his own benefit, until he should make the last deferred payment, when he was to receive from the vendor a bill of sale. The title to the property was meanwhile to remain in S. After delivery of the sheep, and before the whole price had been paid, they were sold to defendants on execution against B., the purchasers having notice of S.'s claim. *Held*, that the contract created a conditional sale only, and that S.'s assignees were therefore entitled to recover the property.

Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Action of claim and delivery by J. V. Rodgers against H. S. Bachman and another. From a judgment for defendants, plaintiff appeals. Reversed.

Bradley & Farnsworth, for appellant. Davis & Allen, Lamberson & Middlecoff, and C. L. Russell, for respondents.

HARRISON, J. May 14, 1892, Jose Sefreno Silva was the owner and in possession of certain sheep then in the county of Tulare, and on that day entered into a written agreement with Joaquin Coelho Barberia and his copartners, which was signed and executed by all the parties thereto, and is as follows: "For and in consideration of the agreements hereinafter mentioned, I, the said Jose Sefreno Silva, of the first part, do hereby contract and agree to sell to the said Joaquin Coelho Barberia and Joaquin Goncafus Denes and Joaquin Coelho Dronellez and Jose Martins, all being copartners, 2,132 sheep, consisting of 902 lambs and 1,230 ewes, consideration to be paid as follows, to wit: $2,374.70 cash paid to-day, the receipt whereof is hereby acknowledged; the balance in two equal payments, $1,559.65 payable May 1, 1893, $1,559.65 payable October 1, 1893, all to draw interest at ten per cent. per annum, interest payable annually. It is hereby contracted and agreed by all parties that the said second parties are to take and run the aforesaid sheep until the expiration of the aforesaid named payments, free of charge to the said Jose Sefreno Silva; to have the wool, and sell or dispose of the same; to run the sheep,—it being further contracted and agreed that the sheep are to remain and be the property of the said Jose Sefreno Silva, and that the title of the sheep is to remain and vest in him, his heirs and assigns, until the aforesaid payments are made. It is further contracted and agreed that the said Silva is to give a bill of sale at the time when all the payments are made; and it is further contracted and agreed that in the event that the second parties desire to pay the said Silva on or before the time heretofore mentioned, together with the interest accrued, then he, the said Silva, hereby contracts and agrees to then make a bill of sale to the second parties or their order, or heirs or assigns. It is further contracted and agreed by the second parties that in the event anything should occur that they, the said second parties, should fail to cause the aforesaid payments to be made, or should fail to keep the sheep and their increase up to the present worth, then it is hereby contracted and agreed that the said Silva, his heirs, order, or assigns, shall have the power to take possession of this band of sheep at any time, and sell the same to best advantage, and apply proceeds to the payment of this contract, and, if any moneys be left, then same is to be paid to the said heretofore named second parties, their order, heirs, or assigns." On the day that the contract was executed the parties of the second part paid the sum therein recited to have been paid, and took possession of the sheep; and on May 2, 1893, they made the second payment therein provided for. They remained in possession of the sheep until August 8, 1893, when the sheep were sold and delivered to the defendants by the sheriff of Tulare county under an execution regularly issued against the said Barberia et al. In August, 1892, Silva sold and assigned to the plaintiff his interest in the sheep, and also assigned to him his interest in the above agreement. At the time of the purchase of the sheep by the defendants, and prior thereto, they had notice that the plaintiff claimed the sheep. The payment provided in the agreement to be made October 1, 1893, has not been made, and on October 4, 1893, the plaintiff demanded the sheep of the defendants, and on their refusal commenced the present action for their recovery, and under proceedings had therefor obtained possession of the sheep. The cause was tried by the court, who made findings in favor of the defendants and rendered judgment accordingly. The plaintiff has appealed directly from the judgment, upon the judgment roll alone, without any bill of exceptions.

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[1] Rehearing denied.

It cannot be controverted that it was the purpose of the parties, when they entered into this agreement, to provide that the ownership of the sheep should remain in Silva until he should have received the price at which he had agreed to sell them. Neither can it be controverted that the owner of property may include in any executory agreement for its sale which he makes any conditions which he may desire to insert, and make their performance essential before he shall be deprived of his ownership. One who has the absolute ownership of property "may use it or dispose of it according to his pleasure, subject only to general laws." Civ. Code, § 679. The right of an owner to sell his property upon the condition that he shall not be divested of the title thereto until the price has been paid is not only not prohibited by the laws of this state, but has been frequently recognized. Kohler v. Hayes, 41 Cal. 455; Hegler v. Eddy, 53 Cal. 597. In Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51, may be found an exhaustive discussion of this subject by Mr. Justice Bradley, in which he has presented the history of the law in reference thereto, both in England and in the several states of this country, and in which it was held "to be established by overwhelming authority that, in the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction, and that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed." The question is always one of intention, and whenever, upon a proper construction of the instrument, it is apparent that it was the intention of the parties thereto that the sale should be conditioned upon the payment of the price, it is the duty of the court to carry out that intention. The agreement in the present action is purely executory, and contains no terms consistent with a purpose to transfer the title to the sheep before the price had been fully paid. It is distinctly agreed "that the sheep are to remain and be the property of the said Silva, and that the title of the sheep is to remain and vest in him, his heirs and assigns, until all the aforesaid payments are made." This intention to retain the title to the sheep was not defeated by their delivery to the vendees. The transfer of the possession of personal property does not convey the title, except in pursuance of an agreement therefor. The vendees became only bailees of the sheep, with the obligation on their part to "run" them until the time of the last payment, and as a consideration therefor they were to have the wool grown by the sheep. The vendees were not by the agreement under any obligation to make the payments specified therein, and in this respect the agreement differs in a marked degree from that involved in Palmer v. Howard, 72 Cal. 293, 13 Pac. 858, relied upon by the respondents. In that case St. Clair made an absolute promise to pay the price named in the instrument, and this was assigned by the court as one of the chief reasons why the agreement should be construed as a sale, rather than a bailment; whereas in the present case there is no agreement to pay the price, or by which Silva could have maintained any action against the vendees for any part thereof. If the sheep had perished or been destroyed without any fault of the vendees, the loss would have been that of Silva, and if he had resumed possession under the clause authorizing him to do so upon failure to make the payments, and upon a sale of the sheep had not obtained the amount of the agreed price, he would have had no recourse against them for the deficiency.

The provision in the present instrument that Silva was to give a bill of sale at the time when all the payments should be made indicates that the parties contemplated that until that time the title should remain in him, and in this respect also the present case differs materially from the agreement which was presented in Palmer v. Howard. In Kohler v. Hayes, 41 Cal. 458, it was said:

"The provision for the giving of a bill of sale upon the payment of the price of the piano indicated that it was not the intention of the parties that the title should pass upon the making of the agreement." We are of the opinion that the instrument in question created only a conditional sale, and that the plaintiff was entitled to recover the sheep from the defendants. The judgment is reversed, and the court below is directed to enter judgment upon the findings in favor of the plaintiff.

We concur: GAROUTTE, J.; VAN FLEET, J.

109 Cal. 547

DAVIS v. MacDONOUGH et al. (No. 15,952.)

(Supreme Court of California. Oct. 12, 1895.)

MECHANIC'S LIEN—TIME OF FILING—WHAT CONSTITUTES "IMPROVEMENT."

1. Code Civ. Proc. § 1183, providing that if the contract, or a memorandum thereof, is not filed with the county recorder before work is begun, it shall be void, but that labor done or material furnished by any but the original contractor "shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof," does not relieve a claimant thereunder from compliance with other provisions as to the filing of the lien claim.

2. Code Civ. Proc. § 1183, provides that work done or materials furnished by any but the original contractor under a contract void for want of filing shall be deemed to have been done or furnished at the personal instance of the owner, and that the value thereof shall be a lien. Section 1187 requires every person but the original contractor to file his claim within 30 days after the completion of the building. *Held*, that the filing of a lien under such implied contract with the owner, prior to the completion of the building, was premature, and that the lien was not enforceable.

3. Code Civ. Proc. § 1187, requires a claim for a mechanic's lien by any but the original contractor to be filed within 30 days after the completion of the "building, improvement, or structure." Section 1183 enumerates the objects against which a lien may be enforced as "any building, wharf, bridge * * * or other structure." *Held*, that the word "improvement" embraced all such enumerated objects, or any one as a whole, except "building" and "structure," and did not mean the particular work done by a claimant, or the particular portion of any of such objects on which the work was done.

Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Thomas Davis against Joseph MacDonough and another to foreclose a mechanic's lien. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank J. Fallon and Parker & Eells, for appellant. Edward P. Cole, for respondents.

HARRISON, J. The defendant MacDonough was engaged in the construction of a building in Oakland, and made several independent contracts for doing different portions of the work required for its construction, one of which was with his codefendant, McCarty, by which the latter agreed to do all the brickwork required in the building. The contract between MacDonough and McCarty, or any memorandum thereof, was not filed for record with the county recorder, and it was admitted at the trial that this contract was void. McCarty completed the work which he had agreed to do December 21, 1892, and the building was completed March 30, 1893. The plaintiff performed certain labor on the building under an employment therefor by McCarty, and on the 19th of January, 1893, filed in the recorder's office his claim of lien therefor, amounting to $1,486. The present action was brought for the foreclosure of this lien. Judgment was rendered in favor of the defendants.

It is contended by the appellant that he sufficiently complied with the statute by filing his claim of lien within 30 days after the completion of McCarty's contract, whereas the respondents contend that his filing it prior to the completion of the building was unauthorized, and that in so doing he failed to preserve his lien. The determination of this question is the only point involved upon this appeal. Section 1183, Code Civ. Proc., provides that if the contract, or a memorandum thereof, is not filed in the office of the county recorder before the work is commenced, it shall be wholly void, and the labor done and materials furnished by all persons except the contractor "shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." If the contract is void, it is for all purposes as if no contract had been made; and the provision of the statute that the labor done shall be deemed to have been done at the personal instance of the owner, and giving him a lien therefor, makes it incumbent upon the laborer, if he would preserve the lien which is thus given him, to follow those provisions of the statute which are prescribed for preserving a lien when the laborer has in fact performed his labor at the personal instance of the owner. In Insurance Co. v. Fisher, 106 Cal. 232, 39 Pac. 758, Merritt was an original contractor, and under the express terms of the statute he could file his claim of lien within 60 days after the completion of his contract, irrespective of the time when the building was completed. Section 1187 requires "every person, save the original contractor, claiming the benefit of this chapter" to file his claim of lien within 30 days after the completion of any building, improvement, or structure; and when the labor is performed under a direct employment by the owner there is no original contractor. Sparks v. Mining Co., 55 Cal. 389. The provisions of section 1187 are universal, and, if there is no original contractor, embrace "every person," and required the plaintiff to file his claim of lien with the county recorder within 30 days after the completion of the building. Willamette Steam Mills Lumbering & Manuf'g Co. v. Los Angeles College Co., 94 Cal.

237, 29 Pac. 629. As his claim of lien was filed before the completion of the building it was premature and gave him no right of recovery. Roylance v. Hotel Co., 74 Cal. 273, 20 Pac. 573. As the owner is liable for the value of all the labor done and materials furnished in the construction of the building, and as suits to enforce the liens therefor must be commenced within 90 days after the filing of the claim of lien, there is a manifest propriety where there is no valid contract for any of the work, in requiring that the building should be completed before any claims of lien are filed, in order that they may all be adjusted in a single action. If claims could be filed prior to the completion of the building, it might happen that it would be necessary to institute actions for their foreclosure before the building was completed, and while other laborers who would be entitled to have a lien thereon would be precluded not only from filing their claim of lien, but from seeking its enforcement. But whether this was the purpose of the legislature or not is immaterial. It is the law as written, and we have no alternative but to follow it.

The contention of the appellant that the provision in section 1187 authorizing the claim of lien to be filed within 30 days after the completion of the "improvement" is to be construed as permitting the claim to be filed within 30 days after the completion of the particular work upon which the labor was performed is not only at variance with the language of the statute, but gives to the term "improvement" a different signification from that in which it is employed in other sections of the chapter. It must always be borne in mind that the remedy of a mechanic's lien is purely of statutory creation, and that the statute which creates the remedy prescribes, not only the mode of its enforcement, but also designates the objects upon which the laborer may have a lien for his labor. Section 1183 enumerates as the objects for which a lien may be enforced "any building, wharf, bridge, ditch, flume, aqueduct, tunnel, fence, machinery, railroad, wagon road, or other structure," and the labor for which a lien is given must be performed "in the construction, alteration, addition to or repair" of these objects, or one of them. In a subsequent portion of the same section these enumerated objects are grouped into "building or other improvement," and in subsequent sections they are designated as "building, improvement or structure." It is thus evident that the term "improvement," as used in section 1187, is intended to embrace the several enumerated objects in the beginning of section 1183 other than "building" and "structure." By section 1184 the notice provided in that section is to be posted upon the "improvement," and by section 1185, the land upon which the "improvement" is constructed is made subject to the lien. In all these sections—and others might be mentioned—the term "improvement" is evidently used as equivalent to the object upon which the labor has been performed, and it would be an unwarranted application of the term to construe it as equivalent to the labor itself, or to that particular class of labor for which the claimant was employed. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

5 Cal. Unrep. 178

PEOPLE v. VAN SCIEVER. (Cr. 61.)

(Supreme Court of California. Oct. 12, 1895.)

EMBEZZLEMENT—SUFFICIENCY OF EVIDENCE.

In a prosecution for embezzlement of a check, the evidence showed that one T. employed defendant as a broker to obtain a loan for him; that defendant went to complainant, who agreed to make the loan, and defendant was directed by her to attend to the matter of looking after the title to the land, and taking of a mortgage thereon; that defendant found the title satisfactory; that T. made the mortgage, and gave it to defendant, to be delivered to complainant on receipt of the money; that afterwards she drew the check in question for the balance in favor of defendant, who cashed it, and with the proceeds paid certain of T.'s obligations; and that defendant refused to deliver to complainant the mortgage until she settled with him for his services in the matter, and for certain other services which he claimed to have rendered her. *Held*, that the evidence was insufficient to sustain a conviction.

Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

T. W. Van Sciever was convicted of embezzlement, and appeals. Reversed.

D. K. Trask, W. R. Bacon, and Carter & Pierce, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. The defendant was charged with embezzlement in converting to his own use a bank check for $1,075, the property of one Mrs. Anderson. He appeals from the judgment and an order denying him a new trial.

But one point need be noticed. It is contended that the evidence does not support the verdict, and it is clear that it does not. One Taylor desired to procure a loan of $2,200, to be secured by a mortgage upon land owned by him in San Bernardino county, and employed defendant, as broker, to negotiate the loan, and get the money for him. Defendant went to Mrs. Anderson, for whom he had previously loaned money, and with whom he had had considerable other business, who agreed to make the loan to Taylor, and defendant was directed by her to attend to the matter of looking after the title to the land in her behalf, and the taking of the mortgage. Defendant accordingly examined the land and the title, and, finding them satisfactory, procured the due execution of the mortgage by Taylor, and the same was given by Taylor to defendant, to be delivered to Mrs. Anderson upon receipt of the money. Mrs. Anderson did not have the entire amount required on hand at the time of the execution of the mortgage, but certain sums were paid over to Taylor, through defendant, from time to time, until a balance of $1,075 remained. Subsequently Mrs. Anderson drew her check in favor of defendant for this balance, to enable him to pay the money over to Taylor. Defendant cashed the check, and with the proceeds paid certain of Taylor's obligations. When Mrs. Anderson asked defendant for the mortgage, the possession of which he still retained, he refused to deliver it to her, until she should settle with and pay him for his services in the matter in hand, and certain other services which he claimed to have rendered her. She denied owing him anything, and, upon his further refusal to deliver the mortgage, procured him to be arrested, upon the charge of embezzling the check in question. This is the substance of the material evidence in the case, and, in our judgment, it wholly fails to establish embezzlement of the check. Defendant was the agent of both parties to the transaction. He was Taylor's agent for the procuring of the loan and the receipt of the money, and he was the agent of Mrs. Anderson in taking the mortgage. When the mortgage was executed and delivered to defendant, it was constructively delivered to Mrs. Anderson, and when the latter paid the money over to defendant it was a payment to Taylor, and the title to the check and its proceeds immediately passed from Mrs. Anderson to Taylor, and the former ceased to have any further property therein. It was, therefore, not the subject of embezzlement as her property, and the whole question as to the disposition made by defendant of the proceeds of the check, and as to his authority to make such disposition, about which a great deal of evidence was introduced into the case, was wholly immaterial. So far as Mrs. Anderson was concerned, if defendant was guilty of appropriating any property belonging to her, it was the mortgage, and not the check; but with that defendant was not charged. The judgment and order are reversed.

We concur: HARRISON, J.; GAROUTTE, J.

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109 Cal. 544

ROSE v. ROSE. (No. 15,960.)

(Supreme Court of California. Oct 12, 1895.)

DIVORCE—ALIMONY—COUNSEL FEES.

1. Civ. Code, § 137, providing that in divorce cases the court, pending the action, may direct the husband to pay, as alimony, money necessary to enable the wife to prosecute or defend the action, does not require the court to fix the entire amount of the counsel fees at the commencement of the action, but it may from time to time make allowances, as the case requires.

2. The mere absence from the record of the evidence on which an order for payment of alimony was based is not ground for reversing the order.

3. An allegation, in a complaint for divorce by a wife, that a certain sum was a reasonable allowance for counsel fees, does not prevent the court from ordering the payment of a greater sum.

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action for divorce by Maria M. Rose against Manuel M. Rose. From an order directing payment by the defendant of money for plaintiff's counsel fees, defendant appeals. Affirmed.

G. S. Langan and C. C. Hamilton, for appellant. E. M. Gibson and Welles Whitmore, for respondent.

HARRISON, J. The plaintiff brought this action against the defendant for a divorce, and, soon after the commencement of the action, the court, upon her application, made an order requiring the defendant to pay to her a certain sum of money as alimony, and $250 counsel fees. After the cause had been at issue, and the trial had proceeded for some time, the plaintiff made application for an additional sum of money for counsel fees. and the court made an order requiring the defendant to pay, on or before the 1st day of October, 1894, "as and for her attorney's fees rendered in this case, and for attorney's services to be rendered from this time up to the conclusion of the present trial of this action," the sum of $700. From this order the defendant has appealed, presenting the action of the court below in a bill of exceptions.

Section 137, Civ. Code, provides: "While an action for divorce is pending, the court may in its discretion require the husband to pay as alimony any money necessary to enable the wife to support herself, or her children, or to prosecute or defend the action." The amount which is to be thus allowed is necessarily left to the discretion of the trial court, inasmuch as the circumstances of no two cases are alike. The court cannot know at the commencement of the action the amount of labor that will be required, or the value of the services to be performed, in the prosecution or defense of the action on behalf of the wife, and there is no rule of procedure which requires it to fix the entire amount of counsel fees at the beginning of the action, or to prevent it from making allowances from time to time as the exigencies of the case shall seem to demand. Bohnert v. Bohnert, 91 Cal. 428, 27 Pac. 732. Unless it is made to appear that the court has been guilty of an abuse of its discretion, its order in this respect cannot be disturbed upon appeal therefrom. It was stipulated between the parties at the hearing of this application that the plaintiff had no means of her own, and it does not appear from the record that the defendant is unable to pay the amount directed. As the value of the services and the pecuniary condition of the defendant are elements entering into the determination by the court of the amount which it will direct to be paid, the court would naturally require some evidence upon these points; and unless it is made to appear that the order was made without any evidence, or without any opportunity on the part of the husband to be heard, and that it is of such a character as on its face to be inordinate in amount, it must be assumed that the discretion of the court has been properly exercised. The mere absence from the record of the evidence upon which the order was based does not authorize its reversal. The appellant must show that error has been committed. In taking the evidence for the purpose of fixing the amount of the allowance, the court is not trying an issue in the case, but is seeking for information as the basis of its order, and is not bound by the technical rules of evidence applicable to controversies between contesting litigants.

The court was not precluded from making the order by reason of the averment in the complaint that $350 was a reasonable amount to be allowed as counsel fees for the prosecution of the suit. The value of these services was no part of the plaintiff's cause of action, and need not have been named in her complaint. They were, at most, only the opinion held by her at the time the action was commenced, and which was subject to be changed by the development of subsequent circumstances. See Insurance Co. v. Fisher, 106 Cal. 234, 39 Pac. 758. The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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110 Cal. 122

SMITH et al. v. HAWKINS. (No. 18,362.)

(Supreme Court of California. Nov. 19, 1895.)

APPROPRIATION OF WATER—FORFEITURE BY NONUSER.

Under Civ. Code Cal. § 1411, declaring that an appropriation of water must be for some useful or beneficial purpose, and that, when the appropriator ceases to use it for such a purpose, the right ceases, not only the water rights, but rights of way for ditches, given by Rev. St. U. S. §§ 2339, 2340, over land which at the time of the appropriation belonged to the public, are lost by nonuser for five years,—the period for obtaining prescriptive title, or losing a prescriptive right by nonuser.

Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by Mary Ella Smith and others against Patrick Hawkins. Judgment for plaintiffs. Defendant appeals. Reversed.

C. W. Kitts, for appellant. P. F. Simonds, for respondents.

PER CURIAM. Action begun in October, 1892, to quiet the alleged title of plaintiffs to a dam, ditch, and water right for the diversion of the waters of Wolf creek in Nevada county. As early as the year 1862, one John Ross was in possession of the ditch, and sold water from the same. The ditch claimed by plaintiffs is two-thirds of a mile in length. Its original capacity was 457 inches of water, though it seems to be now so filled up as to be capable of carrying about 100 inches only. Plaintiffs claim in virtue of a deed to them executed by Ross in March, 1888, which, for the purposes of the decision, we shall assume was sufficient to convey his title to the property in dispute. Since the year 1875 taxes have been annually assessed against such property, and paid by Ross and his successors, the plaintiffs. In 1890 it was leased by plaintiffs to persons who made no use of it, but who paid two months' rental therefor, at $15 per month. Defendant owns a piece of land lying below the head of the Ross ditch and riparian to said creek. One-fourth of a mile of the length of such ditch is on defendant's said land, and was there constructed before defendant settled on the same. He having acquired title to the land under the federal homestead laws, the patent therefor was issued to him in 1891. In 1879 the defendant constructed a ditch tapping the creek about 50 feet below the Ross dam, and having a capacity of 200 inches of water under 6-inch pressure; and by that means, for 13 years next before the commencement of this action, continuously, uninterruptedly, with a claim of right, peaceably, and with the knowledge of plaintiffs and said Ross, defendant diverted such water to the extent of the capacity of his ditch, and used the same for agricultural purposes on his said land. For the period of 5 years and more next before the commencement of the action, the dam, ditch, and water right claimed by plaintiffs have not been used by Ross, or any one who has succeeded to his interest, for any useful or beneficial purpose. Neither he nor they have ever owned any property below the head of that ditch to which the water could be applied. For any purpose of profit, its use was contingent on its sale or rental to other persons, and this occurred very infrequently. The court found that plaintiffs are the owners of the property claimed by them; that enough water flows in the creek to fill both ditches to their full capacity; that the use of the water by defendant has not been adverse; that his rights to the water are subordinate to those of plaintiffs; and gave judgment in plaintiffs' favor. We think these conclusions are contrary to the evidence in several particulars.

1. The finding that, during the time defendant has diverted the water, an excess has flowed in the creek above the capacity of both ditches, finds support in an observation only of the judge of the court below, who visited the premises just prior to the judgment in the action (rendered April 3, 1893), and then saw water flowing in the

creek as stated in the finding. This single observation, made near the close of the rainy season, is wholly insufficient to sustain the finding, in view of other uncontradicted evidence that during one season all of the water of the creek was taken in one of the ditches.

2. Plaintiffs' predecessor in interest appropriated water by means of his ditch, and conveyed it over and across the land of the defendant, which at the time of appropriation was a part of the public domain. While the rights of rival claimants and appropriators, as between themselves, had for a long time been recognized and adjusted, both by mining custom and adjudications in the state courts, it was not until 1866 that they met with federal cognizance and sanction. In that year the United States conferred upon those who had or who might thereafter appropriate water, and conduct the same over the public land, a license so to do; and further provided that all patents granted, or pre-emptions or homesteads allowed, should be subject to any such vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as might have been acquired under or recognized by the act. Rev. St. U. S. §§ 2339, 2340. An appropriator of water under these circumstances, and while the land which he subjects to his necessary uses continues to be part of the public domain, is a licensee of the general government; but, when such part of the public domain passes into private ownership, it is burdened by the easement granted by the United States to the appropriator, who holds his rights against this land under an express grant. In this essential respect,—that is to say, in the origin of the title under which the servient tenement is subjected to the use,—one holding water rights by such appropriation differs from one who holds water rights by prescription. The differences are twofold: A prescriptive right could not be acquired against the United States, and can be acquired only by one claimant against another private individual. Again, such an appropriation, to perfect the rights of the appropriator, does not necessitate use for any given length of time; while time and adverse use are essential elements to the perfection of a prescriptive right. One who claims a right by prescription must use the water continuously, uninterruptedly, and adversely for a period of at least five years, after which time the law will conclusively presume an antecedent grant to him of his asserted right.

Section 811 of the Civil Code, discussing the extinguishment of servitudes, declares (subdivision 4): "When the servitude is acquired by enjoyment, disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment extinguishes the servitude." That this section cannot in strictness be applied to rights under such an appropriation as we have been discussing becomes obvious when, as above pointed out, it is considered that there is no period prescribed for acquiring title to such rights. Section 811, therefore, deals with the extinguishment of servitudes resting upon prescriptive right,—a right vesting by reason of continued adverse enjoyment. Section 1411 of the Civil Code declares that the appropriation must be for some useful or beneficial purpose, and, when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases. This section deals with the forfeiture of a right by nonuser alone. We say nonuser, as distinguished from abandonment. If an appropriator has, in fact, abandoned his right, it would matter not for how long a time he had ceased to use the water; for, the moment that the abandonment itself was complete, his rights would cease and determine. Upon the other hand, he may have leased his property, and paid taxes thereon, thus negativing the idea of abandonment, as in this case, and yet may have failed for many years to make any beneficial use of the water he has appropriated. The question presented, therefore, is not one of abandonment, but one of nonuser merely, and, as such, involves a construction of section 1411, Civ. Code. That section, as has been said, makes a cessation of use by the appropriator work a forfeiture of his right, and the question for determination is, how long must this nonuser continue before the right lapses? Upon this point the legislature has made no specific declaration, but, by analogy, we hold that a continuous nonuser for five years will forfeit the right. The right to use the water ceasing at that time, the rights of way for ditches and the like, which are incidental to the primary right of use, would fall also, and the servient tenement would be thus relieved from the servitude.

In this state five years is the period fixed by law for the ripening of an adverse possession into a prescriptive title. Five years is also the period declared by law after which a prescriptive right depending upon enjoyment is lost for nonuser; and, for analogous reasons, we consider it to be a just and proper measure of time for the forfeiture of an appropriator's rights for a failure to use the water for a beneficial purpose. Considering the necessity of water in the industrial affairs of this state, it would be a most mischievous perpetuity which would allow one who has made an appropriation of a stream to retain indefinitely, as against other appropriators, a right to the water therein, while failing to apply the same to some useful or beneficial purpose. Though, during the suspension of his use, other persons might temporarily utilize the water unapplied by him, yet no one could afford to make disposition for the employment of the same, involving labor or expense of any considerable moment, when liable to be deprived of the element at the pleasure of the appropriator, and after the lapse of any period of time, however great. The failure of plaintiffs to make any beneficial use of the water for a period of more than five years next preceding the commencement of the action, as found by the court, results, from what has been said, in a forfeiture of their rights as appropriators. The judgment and order are reversed.

110 Cal. 89

PETERS v. GRACIA et al. (No. 18,329.)[1]

(Supreme Court of California. Nov. 18, 1895.)

BOUNDARIES—EVIDENCE—ADVERSE POSSESSION.

1. Where the best evidence of the location of a displaced monument in the boundary between two surveys is not introduced, but other evidence thereof is admitted without objection, a finding in accordance therewith is not without support.

2. Actual occupation of land up to a boundary fence will not give title by adverse possession, it being claimed by one of the owners that it was not the true boundary, and understood by both that the true line was to be ascertained by a survey.

Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by George Peters against Annie L. De Rose Gracia and others to quiet title. Judgment for plaintiff. Defendants appeal. Affirmed.

A. L. Hart and A. C. Hinkson, for appellants. Armstrong & Platnauer and McKune & George, for respondent.

PER CURIAM. There are four certain swamp-land surveys in Sacramento county which are numbered, respectively, and extend in a continuous chain along the east bank of the Sacramento river, from south to north, in the following order: 147, 165, 282, and 173. The tracts 147, 165, and 173 were surveyed in the year 1858, and tract 282 in 1859; all under the act of April 21, 1858, providing for the sale, etc., of swamp and overflowed lands. St. 1858, p. 198. By section 11 of that act surveys of lands held by actual settlers were required to conform to the lines and boundaries established by such settlers. This action, begun April 23, 1892, is prosecuted by plaintiff, the present owner of said survey 282, to quiet his alleged title to a strip of land lying along the common boundary of said surveys 282 and 165,—the north line of 165 and the south line of 282. Defendants own said tract 165, and the question involved relates to the true location of said common boundary. At the time said surveys were made, it seems that one Watson was a settler on tract 165, and one Angus Ross on tract 282. Patents from the state for the lands were issued in course. In the year 1861 one Casselli became the owner of the land in survey 165. About 1869 he conveyed the same to the brothers Gracia,—Joseph and Manuel. Upon the death of both of them, a few years before the commencement of this action, their title passed to the defendants. Survey 282 was owned in 1861 by a person designated in the record as Miss Ross. She conveyed it to plaintiff in 1865. Of the four parcels mentioned, No. 147 was first surveyed, then the northwest corner of such tract 147 was adopted as the initial point for the survey of 165, thence the east bank of the river was meandered northerly, as the field notes show, "to a stake on the levee, at the end of a partition fence dividing Watson and Ross' land," and thence the line now in dispute, quitting the river, ran "with said fence south, 84 degrees 30 min. east, 65.39 chains," etc. When tract 282 was surveyed, the starting point adopted was the northwest corner of survey 165, viz. the stake at the end of said partition fence. At present a fence and ditch serve, and for many years have served, to delimit the possession of the two tracts, and these are claimed by defendants to be substantially on the line of the partition fence of 1858. The court found, however, that the old fence was destroyed by the freshet of 1861–62, which devastated that region, and was rebuilt a few paces further north, within the exterior limits of survey 282. From this fact and other evidence the court concluded that the true boundary is a little to the southward of the existing fence and ditch, and overruling, also, the defense of the statute of limitations interposed by defendants, gave judgment awarding the land in dispute to plaintiff. As to whether the fence which divided the two ranches was moved from the line it occupied in 1858, the evidence was sharply conflicting. Said Casselli testified positively that Miss Ross rebuilt it, soon after the flood of 1861–62, four or five paces further north than it stood originally. There was also evidence of parol admissions by Casselli while he owned survey 165, and also by the Gracia brothers while they held the title, that the land of plaintiff extended south of the then existing fence and ditch. True, there was testimony tending to disprove this theory, and some circumstances appear which, on the record as presented to us, do not accord well with that view; but the resolution of such conflict by the trial court cannot be disturbed here. The original monument which marked the boundary between the two parcels being thus displaced, it became necessary to ascertain such boundary by other means. For this purpose a survey made some months before the trial was admitted in evidence, without objection, which took as its starting point a monument in the boundary between tracts 282 and 173, the north line of plaintiff's land. The natural and obvious mode of ascertaining the disputed line was, it would seem, by first determining the location of the northwest corner of survey 147, the initial point of the original survey of No. 165, and thence running the lines of 165 according to the original field notes; for the south line of No. 282 was by the survey of 1859 made coincident with the previously established north line of 165. It was not proved that the northwest corner of 147 cannot be located from existing data. The late survey reversed the course suggested, and pursued a faulty method (Blackburn v. Nelson, 100 Cal. 336, 34 Pac. 775), one which would make good mistakes and imperfections, if any, in the original survey of tract 282 at the expense of the south line of that tract, when in fact that line was, relatively to the others, fixed and controlling; but, being received, it was evidence, though apparently not the best, of the location of the line in the place claimed by plaintiff, and the finding of the court in accordance therewith is not without support. It is countenanced also by the evidence of removal of the old fence.

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[1] Rehearing denied.

We do not think that the court erred in overruling the objection to the testimony of Casselli, that in 1861, when he owned survey 165, Miss Ross, who then was owner and in possession of survey 282, told him that the fence was all on her premises. This, together with the whole conversation stated by the witness, was admissible as tending to show that the owners of survey 165 held in subordination to the claim of the owners of survey 282 that the latter extended beyond the fence, and with the understanding that the true line was to be afterwards ascertained. The evidence showed actual occupation of the premises in controversy by defendants and their predecessors in interest for a period of more than 30 years. But the court found that, up to a time within five years before the commencement of this action, it was well understood by defendants and their predecessors that the true division line between the two tracts was to be ascertained by a survey, and that until recently their possession was not adverse to the plaintiff. It was in evidence that an agreement existed, first, between Casselli and Miss Ross, then between Casselli and plaintiff, afterwards between plaintiff and the Gracia brothers, that the plaintiff's land extended somewhat further south than the fence and ditch, and that a joint survey would be made to fix the line. In such a case the statute of limitations does not run. Irvine v. Adler, 44 Cal. 559, Quinn v. Windmiller, 67 Cal. 461, 8 Pac. 14.

A good deal of evidence of statements made by deceased persons many years ago appears in the record,—for example, those of the Gracia brothers, to the effect that they did not claim the existing fence and ditch to mark the true line of their land; and appellants strongly urge the danger of relying upon this species of evidence when it becomes impossible of contradiction. The caution is just, but it addresses itself mainly to the trial court. In this instance the learned judge of that court saw and heard the witnesses, and their credibility was for his consideration. Moreover, he made a personal inspection of the disputed boundary, and we cannot say that his conclusions from the matters before him should have been different. The judgment and order are affirmed.

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110 Cal. 41

PEOPLE v. THOMAS. (Cr. 35.)

(Supreme Court of California. Nov. 13, 1895.)

CRIMINAL LAW—PRIOR CONVICTION—EVIDENCE.

Pen. Code, § 1093, provides that, in cases where the indictment charges a previous conviction, and defendant has confessed the same, the clerk, in reading it, shall omit therefrom all that relates to such previous conviction. *Held*, that it was error to admit testimony tending to show a previous conviction, defendant having confessed the same.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; John Ellsworth, Judge.

S. J. Thomas was convicted of burglary, and appeals. Reversed.

I. F. Chapman and W. F. Sullivan, for appellant. Atty. Gen. Fitzgerald, for the People.

HAYNES, C. The defendant was convicted of burglary in the first degree, and sentenced to imprisonment at San Quentin for 25 years, and this appeal is from an order denying his motion for a new trial. The information charged a burglary committed at the county of Alameda in October, 1894, and also charged a prior conviction of the crime of burglary in the superior court of said county on October 15, 1890. Upon arraignment the defendant confessed the prior conviction, and as to the offense charged in the information pleaded not guilty. Upon the trial a witness called on the part of the prosecution was permitted, over the objection of defendant, to testify to the following conversation which he had with the defendant after his arrest, and while the witness had him in custody, namely: "I says to the defendant: 'Ain't it a fact that you served two years in San Quentin from Alameda county, for burglary?' He said: 'No; I served two years in Folsom for burglary.'" The ruling of the court was duly excepted to, and is the only error relied upon.

Section 1158, Pen. Code, provides that the jury, if they find a verdict of guilty of the offense with which the defendant is charged, "must also, unless the answer of the defendant admits the charge, find whether or not he has suffered such previous conviction." Subdivision 1, § 1093, Pen. Code, is as follows: "If the indictment or information be for felony, the clerk must read it, and state the plea of the defendant to the jury; and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction." From these provisions it is clear that if, upon arraignment, the defendant denies the prior conviction alleged in the indictment or information, that issue, as well as the issue raised by his plea of not guilty of the principal charge, must be submitted to the jury; but if, upon the arraignment, the defendant admits the previous conviction, all information touching a prior conviction must be withheld from the jury. The object had in view in charging a previous conviction is not for the purpose of evidence as to the commission of the offense upon which the defendant is to be tried, but for the information of the court, in determining the punishment to be imposed in case of conviction, as is clearly shown by sections 666 and 667 of the Penal Code. The record here does not disclose upon its face whether the clerk, in reading the information to the jury, read that part relating to the prior conviction. It must be assumed, therefore, that he complied with the provision in section 1093, which requires him, in reading the indictment to the jury, to omit therefrom all that relates to such previous conviction, and that, therefore, the jury were not informed of the prior conviction, otherwise than from the testimony of said witness. If the clerk had read that portion of the information to the jury, it would have been error requiring a reversal of the judgment (People v. Sansome, 84 Cal. 449, 24 Pac. 143), and no such error will be presumed. In People v. Sansome, supra, the defendant objected to the reading of that part of the indictment which charged a prior conviction, and to the statement of his plea thereto. The court overruled the objection, and the clerk stated: "That to the said charge of prior conviction, that the defendant confessed the same, and he was guilty." This court there held that the ruling of the court was clearly erroneous, and said, among other things, that "the evident purpose of the provision of the Code above quoted was to keep from the jurors all knowledge that the person on trial before them had been previously convicted of a criminal offense; and this is based upon the well-settled and familiar principles of law and right." In People v. Wheatley, 88 Cal. 117, 26 Pac. 95, it was said: "He may plead simply not guilty, and thus put in issue every material allegation of the indictment or information; or he may plead not guilty of the principal offense charged, and confess the previous conviction. If he confesses the previous conviction, then the clerk, in reading the indictment or information to the jury, must omit therefrom all that relates to such previous convictions, and no testimony in regard to them can be offered, or reference to them be made, during the trial."

In the case at bar, the defendant having, upon arraignment, confessed the prior conviction, or pleaded guilty thereto, there was no issue as to the prior conviction to which the testimony was applicable. It was not an admission that he had committed the offense upon which he was being tried, and was wholly inadmissible as evidence tending to prove the commission of that offense, while it thwarted the very purpose of the Code provision which requires the clerk to omit all that relates to the prior conviction when he reads the information to the jury. The admission of the evidence objected to was not only erroneous, but highly prejudicial to the defendant.

The judgment and order should be reversed and a new trial granted.

We concur: SEARLES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and a new trial granted.

HAWLEY v. GRAY BROS. ARTIFICIAL STONE & PAVING CO. (No. 15,909.)[1]

(Supreme Court of California. Nov. 13, 1895.)

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Laura L. Hawley against the Gray Bros. Artificial Stone & Paving Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Fisher Ames, for appellant. Warren Olney, for respondent.

PER CURIAM. This is an action to recover a certain sum of money, alleged to be due as rent, under a written lease. Judgment went for plaintiff, and defendant appeals. Upon a careful examination of the record we are clear that the case, in all material respects, is identical with the case bearing the same title found in 106 Cal. 337, 39 Pac. 609, and upon the authority of that case the judgment and order are affirmed.

110 Cal. 37

HENIGAN v. ERVIN. (No. 18,444.)

(Supreme Court of California. Nov. 13, 1895.)

APPEAL—JURISDICTIONAL AMOUNT—APPEALABLE ORDER.

1. To determine the appellate jurisdiction of the supreme court, the cost allowed a party cannot be considered.

2. Code Civ. Proc. § 963, provides for appeals to the supreme court from a "special order made after final judgment." Section 964 provides that section 963 shall not apply in cases appealed from justice courts, except cases of forcible entry and detainer, and cases involving the possession or title of land, legality of a tax, etc., or in which the demand amounts to $300. *Held*, that an order denying a motion to strike out a bill of costs, on appeal from a justice court, in which the demand did not amount to $300, was not appealable.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by George T. Henigan against H. Ervin. From a judgment for plaintiff on appeal to the superior court, and from an order denying defendant's motion to strike out plaintiff's cost bill, defendant appeals. Dismissed.

F. E. Baker and E. R. Bush, for appellant. R. Clark and C. W. Thomas, for respondent.

VANCLIEF, C. This action was commenced in the court of a justice of the peace to recover the sum of $222.20 for cord wood alleged to have been sold and delivered by plaintiff to defendant. The judgment of the justice of the peace was in favor of the plaintiff for the sum of $169.95, and for costs amounting to $180.70. The defendant appealed from the judgment to the superior court, "on questions of both law and fact." A jury trial de novo was had in the superior court, which resulted in a verdict in favor of plaintiff for the sum of $22.20. Within the time limited by law, and before judgment was entered on the verdict, the plaintiff filed an itemized cost bill, amounting to $358.70, including the costs taxed in the justice's court. On the day of the filing of this cost bill the defendant gave notice that on a stated future day he would move the court "to strike out the costs claimed to have accrued in the justice's court, on the ground that plaintiff is not entitled to recover his alleged costs in said justice's court for the reasons that no verified memorandum" of such costs "was served on defendant or filed in said justice's court; and also to strike out the items of costs alleged to have accrued in the superior court, on the grounds that the plaintiff is not entitled to costs therein." And further gave notice that, in case the court determined that plaintiff was entitled to costs, he would move the court to tax the costs, "on the grounds that the costs claimed by plaintiff are erroneous, and that the disbursements claimed had not been made by plaintiff, and that plaintiff's memorandum contained items of disbursements which are not legal charges as costs in this action." But no objection to any item of the cost bill is specified, except as above stated. In the meantime, and before the questions as to costs were determined, judgment was entered on and in accordance with the verdict of the jury, reserving the matter of costs until after defendant's motion relating to that matter should be disposed of. Afterwards defendant's motions relating to costs were heard and denied by the court, and the full amount of plaintiff's cost bill ($358.70) was allowed, and inserted in the judgment, to which defendant excepted.

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[1] Rehearing denied.

The defendant appeals from the judgment as at first entered before his motions relating to costs were heard or denied, and also "from an order and judgment of said superior court * * * allowing and adjudging that plaintiff recover of and from said defendant costs in said action, amounting to the sum of $350.70." The appeals are on the judgment roll, containing a bill of exceptions showing, substantially, the facts above stated.

The respondent moves to dismiss the appeals on the ground that this court has no appellate jurisdiction of the subject-matter of the cause, and I think the motion should be granted. The appellate jurisdiction of this court is defined by section 4, art. 6, of the constitution of this state, and it has no appellate jurisdiction, except such as is given by that instrument. Where the demand in suit is merely for money, as in this case, the supreme court has no appellate jurisdiction, unless such demand, exclusive of interest, amounts to $300. In this case the demand sued for is simply for money, and amounts to only $222.20. For the purpose of testing either the original jurisdiction of the justice of the peace, or the appellate jurisdiction of the supreme court, the incidental costs of the plaintiff can no more be deemed a part of the demand than can the interest on the sum of money or value of the property sued for. Dumphy v. Guindon, 13 Cal. 30; Maxfield v. Johnson, 30 Cal. 545. As generally applicable to the question of the appellate jurisdiction of the supreme court, see Maxfield v. Johnson, 30 Cal. 545; Gorton v. Ferdinando, 64 Cal. 11, 27 Pac. 941; Williams v. Mecartney, 69 Cal. 556, 11 Pac. 186. It has often been held by this court that, where jurisdiction depends on the amount in controversy, the ad damnum clause or the sum demanded in the complaint is the sole test. Dashiell v. Slingerland, 60 Cal. 653; Lord v. Goldberg, 81 Cal. 599, 22 Pac. 1126; Bailey v. Sloan, 65 Cal. 387, 4 Pac. 349; Solomon v. Reese, 34 Cal. 28.

It is claimed by appellant that the order denying his motion to strike out plaintiff's cost bill was a "special order, made after final judgment," in the sense of subdivision 2, § 963, Code Civ. Proc., and therefore is an appealable order. But the next following section (964) provides that "the foregoing section (963) does not apply in cases appealed from justices' * * * courts, except cases of forcible entry and detainer, and cases involving the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, or in which the demand, exclusive of interest or value of the property in controversy, amounts to three hundred dollars." The cases cited to this point are cases of which the superior courts, or late district courts, had unquestionable original jurisdiction, and consequently cases of which the supreme court had appellate jurisdiction, and therefore are not applicable to this case.

I think the appeals from the judgment and order should be dismissed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons stated in the foregoing opinion, the appeals from the judgment and order of the superior court are dismissed.

110 Cal. 33

In re PATTON. (No. 18,456.)

(Supreme Court of California. Nov. 13, 1895.)

INSOLVENCY—PETITION BY CREDITORS—SUFFICIENCY.

1. Insolvency Act 1880, § 8, provides that a petition by creditors to have their debtor adjudged insolvent must set forth that he has made an assignment or transfer of his property with intent to defraud his creditors, or, in contemplation of insolvency, has made any payment, or transfer of his property. *Held*, that a petition is sufficient which states that a debtor has made a transfer of his property to a certain person with intent to defraud his creditors, and that in contemplation of insolvency he has made a transfer of his property to such person, with the circumstances of time, place, and general description of the property sold.

2. That a debtor has transferred his property with intent to defraud his creditors, and that he made such transfer in contemplation of insolvency, are facts, and not conclusions of law.

Commissioners' decision. Department 2. Appeal from superior court, Glenn county; Seth Millington, Judge.

Petition by creditors of J. A. Patton that he be adjudged insolvent, and required to surrender his estate for the benefit of his creditors. From the judgment sustaining a demurrer to and dismissing the petition, the petitioners appeal. Reversed.

Jos. Kirk and J. H. Ball, for appellants. Charles L. Donohoe, for respondent.

VANCLIEF, C. The requisite number of the creditors of J. A. Patton petitioned the superior court of Glenn county that he be adjudged insolvent, and required to surrender his estate for the benefit of his creditors; and he was ordered to show cause why the petition should not be granted. In response to the order he demurred to the petition on the grounds that it "does not state facts sufficient to constitute an act of insolvency on the part of said respondent, and does not state facts sufficient to constitute a cause of action against respondent." The court sustained the demurrer, and, the petitioners declining to amend their petition, judgment passed for defendant, dismissing the petition, and for costs. The petitioners bring this appeal upon the judgment roll.

The petition states two grounds, or acts of the respondent, upon which the petitioners pray that he may be adjudged insolvent, as follows: First. "That said J. A. Patton did heretofore, to wit, on or about the 20th day of July, 1894, at the town of Willows, county of Glenn, state of California, make a transfer of his property with intent to hinder, delay, and defraud his creditors; that is to say, being then and there possessed of a stock of merchandise, consisting of dry goods, fancy goods, and furnishing goods, boots and shoes, clothing, hats and caps, groceries and tobacco, and similar goods, contained in his store conducted by him at said town of Willows, being indebted to the petitioners herein, the said respondent, J. A. Patton, did transfer said stock of merchandise and property unto one R. D. Fry, with the intent aforesaid. That said J. A. Patton was, and at all the time herein mentioned and now is, insolvent, and has not sufficient property with which to satisfy the claims and demands of petitioners." Second. "That said respondent, on or about the 20th day of July, 1894, at the town of Willows, county of Glenn, state aforesaid, being insolvent and in contemplation of insolvency, did make a grant, sale, conveyance, and transfer of a certain stock of merchandise, consisting of dry goods, fancy goods, and furnishing goods, boots and shoes, clothing, hats and caps, groceries and tobacco, and similar goods, then and there belonging to and used in the business conducted by him at said Willows, unto one R. D. Fry. That said respondent, J. A. Patton, was at all the time herein mentioned, and now is, insolvent, and has not sufficient property with which to satisfy the claims and demands of petitioners." The only deficiency attributed to the petition by respondent is "that the allegations of fraud as set out in the creditors' petition merely state conclusions of law, and are not sufficiently specific as to the facts and circumstances constituting the fraud." Section 8 of the insolvent act of 1880 provides what the creditors' petition must set forth as acts for which a person may be adjudged insolvent. Among them are the following: That he "has made any assignment, gift, sale, conveyance or transfer of his estate, property, rights or credits with intent to delay, defraud or hinder his creditors; or, in contemplation of insolvency, has made any payment, gift, grant, sale, conveyance or transfer of his estate, property, rights or credits." That the respondent did make a transfer of his property to one R. D. Fry with intent to hinder, delay, and defraud his creditors, and that, in contemplation of insolvency, he did make a grant, sale, conveyance, and transfer of his property to said Fry, are specifically stated in the petition, with the circumstances of time, place, and general description of the property sold. This was in full compliance with section 8 of the insolvent act, which prescribes what the petition must set forth. It is also entirely in accord with the practice in bankruptcy cases in the federal courts under the United States bankrupt law, substantially the same as section 8 of the insolvent act of this state. See form No. 54; Bump, Bankr. p. 933. No authority applicable to insolvency or bankruptcy cases has been cited by counsel for respondent which would sustain the demurrer in this case; the cases cited being only the ordinary actions in which relief is sought on the ground of fraud actually committed, and in which the pleading is governed by the general law of pleading, and not by a statute enacted for a special class of cases, which prescribes what facts the pleading shall set forth, as does the eighth section of the insolvent act. Besides, no fraud is necessary to constitute a majority of the acts enumerated in section 8 of the insolvent act, for which a person may be adjudged an insolvent; and at least one of such acts is charged in the petition under consideration, viz. that, "in contemplation of insolvency," the respondent sold and conveyed his property, etc. Each of the acts enumerated in said section, as well as the intention with which it was done, is a fact, and not a conclusion of law, as contended by counsel of respondent. Surely, the selling of one's property with the intent to delay creditors is a fact, upon proof of which the seller may be adjudged an insolvent; and the petition sufficiently states this fact. I think the judgment should be reversed, and the court below instructed to overrule the demurrer.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below is instructed to overrule the demurrer.

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110 Cal. 45

COSBY v. SUPERIOR COURT OF LOS ANGELES COUNTY. (S. F. 135.)

(Supreme Court of California. Nov. 13, 1895.)

CONTEMPT — WHAT CONSTITUTES — VIOLATION OF NUNC PRO TUNC ORDER—VOID JUDGMENT—REMEDY.

1. In an action to establish a trust in land, the decree directed that on payment of a specified sum by plaintiffs on or before July 31, 1893, defendant should convey to plaintiffs the land, but that, "unless plaintiffs shall pay or tender said sum to" defendant on or before such day, all the "interest of plaintiffs, or either of them, in and to the said contract and premises hereinbefore mentioned, shall cease and be at an end," etc. Prior to such date, plaintiffs made an absolute assignment of their interest; but on August 1, 1893, it was reassigned to them, and on the next day they tendered such sum to defendant, who refused to convey because the tender came too late. January 25, 1895, they made another tender, which was refused. April 2, 1895, the court directed an order nunc pro tunc as of August 1, 1893, extending the time three days in which plaintiffs might tender such sum, on the ground that it had orally announced on August 1, 1893, that the time would be so extended. *Held*, that defendant was not guilty of contempt, because his refusal to accept such tender and convey the land was disobedience of the decree as amended by such nunc pro tunc order.

2. Where a court, without jurisdiction, adjudges a person guilty of contempt for refusing to comply with its decree, but temporarily suspends the execution of the judgment, prohibition is the proper remedy to test the validity thereof.

In bank.

Petition by James F. Cosby for a writ of prohibition to prevent the superior court of Los Angeles county, department 6, J. W. McKinley, judge, from proceeding to enforce against petitioner a judgment convicting him of contempt. Writ granted.

John D. Pope, for petitioner. Geo. R. Du Bois, Bicknell & Trask, and T. M. Stewart, for respondent.

VAN FLEET, J. Application for prohibition to prevent respondent from proceeding to enforce against petitioner a judgment convicting him of contempt for refusal to comply with a decree of said court. The material facts appearing from the very voluminous petition and answer may be briefly stated thus: John C. Kofoed and Lillie H. Kofoed brought an action in said superior court against the petitioner, Cosby, and one Samuel B. Gordon, alleging that said Gordon, while employed and acting as their attorney for the purpose, among others, of procuring the settlement and satisfaction of a certain judgment held by said Cosby against the Kofoeds, entered into a contract with Cosby, without the knowledge of the Kofoeds, whereby it was agreed that for a consideration of $200, to be paid Cosby by Gordon, Cosby should assign said judgment to Gordon for the latter's own benefit; that under this agreement Cosby retained the title to the judgment in his own name, and, at the direction of Gordon, procured an execution to be issued thereunder, and levied upon certain real estate of the Kofoeds, which was sold thereunder, and the title bought in by Cosby, to be held by him for Gordon until the latter should pay the said consideration of $200; and they prayed that Gordon be held their trustee as to all rights acquired by him under said agreement.

As a result of the trial of said action, a decree was entered in said court, by which it was adjudged that Gordon held whatever rights he had acquired under his contract with Cosby for the benefit of the Kofoeds, and that the latter should be held subrogated to all the rights of Gordon thereunder, provided they should pay or tender to Gordon on or before the 31st day of July, 1893, the sum of $79.50, paid out by Gordon in the transaction; and further directed that upon the payment or tender by the Kofoeds to Cosby of said consideration of $200, agreed to be paid him by Gordon, Cosby should receive the same in full satisfaction of said judgment so assigned by him to Gordon, and should convey to the Kofoeds the real property bought in by him at said execution sale. The decree expressly provided "that unless the plaintiff shall pay or tender said sum to the said James F. Cosby, and shall also pay to the said Gordon the sums hereinbefore mentioned as payable to him, all on or before the 31st day of July, 1893, all the right, title, and interest of plaintiffs, or either of them, in and to the said contract and premises hereinbefore mentioned, shall cease and be at an end, and thereupon and thereafter neither the said Gordon nor the said Cosby shall be held as trustee for plaintiffs, or either of them, with respect to any of the matters mentioned in this decree."

Intermediate the entry of said decree, which was on July 17, 1893, and the 31st day of July, 1893, the Kofoeds made an absolute transfer and assignment of their rights and interest under said decree to one Bradshaw. On the last-named date, Bradshaw tendered to and offered to pay Gordon and Cosby the amounts respectively required by the decree, but coupled with such tender the condition that Cosby and Gordon execute a conveyance which in its terms was not in accord with the directions and requirements of said decree, and, by reason of this condition, said tender was refused. Thereupon, on the same date, Bradshaw procured from said court a citation against Gordon and Cosby to show cause on the next day, August 1st, why they should not be held guilty of contempt for disobedience of said decree. A hearing on said citation was accordingly had, but Gordon and Cosby were held not guilty of contempt in the premises, and the rule was discharged. Thereafter, on August 2, 1893, the Kofoeds, who had on August 1st received a reassignment from Bradshaw of their rights under the decree, themselves made a tender, which it seems to be conceded was, except as to the matter of time, in conformity with the decree. This tender was, however, refused, upon the ground that it came too late, and that the rights of the Kofoeds under the terms of the decree were forfeited and lost. About this time Cosby and Gordon took an appeal from said decree to this court, but it does not appear that such appeal was so perfected as to stay proceedings under the decree, and subsequently the appeal was voluntarily dismissed. No further steps appear to have been taken by the Kofoeds in the matter until on or about the 25th day of January, 1895, when they caused a notice in writing to be served upon Cosby and Gordon of their readiness, and renewing their offer to pay the amounts required by the decree, with interests, etc., upon the execution of the required instruments of conveyance. This offer being likewise refused, upon the ground that it came too late, the Kofoeds sued out a second citation against Cosby and Gordon; requiring them to show cause before said superior court on the 2d day of April, 1895, why they should not be punished for contempt in refusing to comply with said decree. Up to this time the decree had remained of record as originally entered, requiring the payment or tender of the amounts specified therein to be made on or before July 31, 1893, in default of which the rights of the Kofoeds thereunder should be held forfeited, and there was nothing of any character appearing upon the records of said court to indicate or publish the fact that any change or modification in its terms had ever been had or attempted therein. Upon the hearing of said last-mentioned citation, however, there was evidence offered and received by the court, on behalf of the Kofoeds, tending to show that at the hearing of the first citation for contempt, above noted, had on August 1, 1893, the judge of said court had announced orally from the bench that he would grant the Kofoeds three days' further time from said 31st day of July, named in the decree, within which to make a further tender, but that the clerk had failed to make any note of such suggestion or order. This evidence was controverted by evidence on behalf of Cosby and Gordon tending to show that no such order or suggestion had been made, and that, if made, the latter never had or received any knowledge thereof; but the court, on said April 2, 1895, directed its clerk to enter an order nunc pro tunc as of August 1, 1893, granting to said Kofoeds such extension of three days. Thereupon the court proceeded with the hearing of said citation, and found the petitioner guilty of contempt in failing to comply with said decree, as thus modified by said nunc pro tunc order, and adjudged that petitioner pay a fine, and, in addition, be incarcerated in the county jail until he should comply with the requirements of said decree. The execution of the judgment having been temporarily suspended by the court, petitioner has sued out this writ to prohibit further proceedings thereunder, claiming that the action of the court in the premises was beyond its jurisdiction and void.

We are of opinion that the position of the petitioner must be sustained. It is contended with much force that the superior court had no authority to change or amend its decree at the time and in the manner attempted by the order made from the bench on August 1, 1893, extending the time of the Kofoeds for making tender thereunder. There is no question as to the power of the court at all times, in a proper case, to direct any amendment or correction in a judgment, to the end that the judgment as entered may express that which was rendered, and the record thus made to speak the fact. Mere clerical misprisions or omissions are subject to the correction of the court at any time by an order entered for that purpose. But the act of the court in this instance does not fall within that category. There was here no question but that the judgment, as entered, was exactly that rendered by the court in the first instance. The attempt made was to work a material modification and change in the terms of the decree affecting the rights of the parties thereunder, without formal motion therefor, and more than 10 days after its entry, and that at a time when, by the strict terms of the decree, the parties in whose favor the modification was made had forfeited their rights thereunder. In fact, at the date when the allotted time within which a tender was to be made elapsed, the rights of those parties in the premises were vested in a third party, and they had at that time no interest therein. Furthermore, time would appear to have been made of the essence of the right given under the decree. By the decree, if the payment or tender was not made on or before the 31st day of July, 1893, "all the right, title, and interest of plaintiffs, or either of them, in and to the said contract and premises, * * * shall cease and be at an end," etc. That such limitation may be put by the court upon the exercise of such right, and the parties concluded thereby, there is no doubt. Seventy-Six Land & Water Co. v. Superior Court, 93 Cal. 139, 142, 28 Pac. 813.

These considerations render it extremely doubtful as to the power of the court to make said modification at the time and in the manner attempted; but, in the view we take, it is unnecessary to determine that question. Assuming that, as contended by respondent, its general power over its judgment is such that the order in question, although possibly erroneous, is not void, there is yet an obvious reason why the action of the court in convicting petitioner of contempt cannot be sustained. While the recitals of the contempt judgment are somewhat vague and general, and such as to leave it in doubt upon which particular act petitioner's contempt is based, it must of necessity rest upon one of the offers or tenders made subsequent to the order extending the time. While the attempted tender of Bradshaw is like the others recited in the judgment, it is perfectly obvious that no contempt could be predicated of that tender, since it was clearly insufficient, and petitioner was not in fault in rejecting it. In fact, the order of the court in discharging him from the charge of contempt based upon that refusal manifestly proceeded upon that theory. The contempt, therefore, must consist in petitioner's refusal to accept either the offer of August 2, 1893, or that of January 25, 1895. As we have seen, at the date of these tenders there was no record evidence of any extension of the time for making such tender, but the decree stood unchanged as originally entered. It cannot be that one can be held guilty of a constructive contempt for refusing to comply with a direction or provision having no tangible existence of record, but consisting of a mere verbal announcement. Contempt of court is a specific criminal offense (Ex parte Gould, 99 Cal. 360, 33 Pac. 1112, and cases there cited); and it would be departing widely from the rule which so sacredly guards the personal liberty of the citizen to hold that a person may be convicted and punished criminally for a violation of a rule or direction having, if anything, but a mere potential existence. Decrees of court are required to be in writing, and remain of record, and those affected thereby have a right to stand by such record. It was necessary, if the court had power under the circumstances to change the decree in the particular in question, to have such change made of record, and knowledge thereof brought home to the petitioner on making the subsequent tender. Until that was done, the petitioner had a right to regard the decree as entered as the final direction of the court in the premises.

Some question seems to be made as to prohibition being the proper remedy, but, under the circumstances of this case, we have no doubt that it is. It is conceded that there is no appeal, and the judgment of contempt, although entered, has not yet been carried out or executed. In Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, the office of this writ is exhaustively discussed; and it is there held that, while the operation of the writ is primarily and principally preventive rather than remedial, and is excluded where the action of the inferior tribunal is fully completed, and nothing remains to be done under its void order, yet, if its action is only partially and not fully completed, further proceedings may be stayed by prohibition.

In the view we have taken of the question discussed, the various other objections to the validity of the judgment in question need not be here considered. It results that a peremptory writ should issue as prayed; and it is so ordered.

We concur: BEATTY, C. J.; HENSHAW, J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.

110 Cal. 18

HAINES et al. v. SNEDIGAR. (Sac. No. 27.)

(Supreme Court of California. Nov. 13, 1895.)

ACTION ON NOTE—DEFENSE—CROSS-EXAMINATION —BURDEN OF PROOF.

1. In an action on a note for the price of a harvester, a subsequent contract pleaded by defendant in avoidance, whereby the payees were to extend the time of payment until the next harvest, and put the machine in working order, cannot be shown on plaintiff's cross-examination.

2. If such agreement were properly in evidence, it was error to direct a nonsuit, as defendant was bound to prove either that the next harvest had not arrived, or that, if it had passed, plaintiff had failed to put the machine in working order.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by George W. Haines and another against R. R. Snedigar on a note. From a judgment of nonsuit, plaintiffs appeal. Reversed.

P. J. Hazen and Jas. A. Louttit, for appellants. Minor & Ashley, for respondent.

SEARLS, C. This is an action upon a promissory note dated June 10, 1892, made by the defendant, who is respondent here, payable to Houser, Haines & Knight, or order, October 1, 1892, and by them indorsed to plaintiffs. At the trial, the court, on motion of defendant, entered a judgment of nonsuit against the plaintiffs, who appeal from the judgment.

The complaint was in the ordinary form upon a promissory note. The answer admitted the making of the note by defendant, and its assignment to plaintiffs, and, by way of avoidance, pleaded that the note was given in part payment of a harvester purchased by defendant from the payees of the note, which harvester was warranted by the vendors to do good work, etc.; that thereafter, and on August 6, 1892, a contract in writing was entered into between the parties, by the terms of which it was agreed that the assignors of plaintiffs would let the note stand until the next harvest (harvest of 1893), and, if the vendors put the harvester in order to do good work, defendant would then pay the note, otherwise the note was to be returned to defendant with $200, for an old machine received from said defendant; that the vendors did not put the harvester in order to do good work; that defendant demanded his note and the $200, which demand was not complied with, etc.; and that the plaintiffs had notice of all the facts, etc. The foregoing is only the substance of the answer, which was pleaded in three separate counts, setting out the written contract, etc.

At the trial, plaintiffs' counsel called as a witness G. W. Haines, one of the plaintiffs, who presented the promissory note, and said it belonged to plaintiffs, and was signed by defendant; whereupon it was admitted in evidence, and the witness added, "No part of that note has been paid." On cross-examination the witness testified that the consideration of the note was a harvester. "This note and an old 'Young' machine, given to us by Mr. Snedigar as part pay, made up the price. I don't remember what the old machine was rated at; probably $300." Defendant's counsel was then permitted, against the objection of plaintiffs, to prove that, after the execution of the note, a new agreement was entered into between the parties, which agreement was produced, its execution proven, and thereupon it was, against the objection of plaintiffs, admitted in evidence.

The written agreement is as follows:

"Stockton, Cal., Aug. 6, 1892. Messrs. Houser, Haines & Knight—Dear Sirs: I hereby make you this proposition, as a settlement for the harvester that I now have on my ranch: That, if you will let my note stand until next harvest, I will then give you an opportunity to put the machine in order; and, if you can then make the machine do good and satisfactory work, I will then pay you the note; otherwise, you return the note to me, and two hundred dollars for my old machine. R. R. Snedigar."

"August 8, 1892. Mr. R. R. Snedigar: We accept your proposition of August 6, of which the above is a copy. Yours respectfully, Houser, Haines & Knight."

Plaintiffs thereupon rested their case, and defendant moved the court to grant a nonsuit, upon the ground that under the new agreement it was provided that "the plaintiffs must make the machine do good and satisfactory work, and there has been no evidence introduced going to show that the machine did do good and satisfactory work, or that any effort was made to make it do good, satisfactory work." The motion was granted and judgment of nonsuit entered.

The action of the court in admitting the evidence objected to, and in granting the nonsuit, was excepted to, and the rulings thereon are assigned as error. We think the court erred in its rulings. The defense set up by defendant involved the plea of an entirely new and distinct contract, made subsequent to the contract upon which the action was based. It was a plea by way of confession and avoidance, involving new matter to be proven by the defendant. Its allegations are, under our Code, to be treated as though denied. The entire answer is made up of affirmative matter. Whatever was necessary to be alleged therein devolved upon the defendant to prove. But he could not, by any recognized rule of procedure, offer such proofs until plaintiffs had made their case, and submitted it to the court. Plaintiffs called one of their number as a witness. He tesified to no single thing that was not admitted by the pleadings, but he was a witness, and as such defendant was entitled to cross-examine him. The limit placed upon cross-examination is so largely within the discretion of the trial court that its action in allowing a wide range to questions upon cross-examination will only be reversed in extreme cases. The court might in its discretion, as is often done, permit the defendant to prove by plaintiffs' witness, when on the stand, the due execution of an agreement important to his defense. This course, treated as a mere matter of convenience, was not open to serious objection. To permit this agreement to be then admitted in evidence was, however, quite a different matter. It was in effect to inject into the case of the plaintiffs a portion of the defense, and was subversive of known and fixed rules of procedure, and violative of the whole theory upon which those rules are founded. The proof of the execution of the written agreement of August 6, 1892, was not proper in cross-examination, and its admission in evidence was error. Greenleaf, in his work on Evidence (volume 1, § 447), after discussing the difficulty of laying down a precise rule in reference to the limit to be placed upon cross-examination, adds: "A party, however, who has not opened his own case, will not be allowed to introduce it to the jury by cross-examining the witnesses of the adverse party, though, after opening it, he may recall them for that purpose."

2. If we treat the agreement as properly in evidence, defendant was not entitled to a nonsuit. The note in suit was overdue, and upon its face constituted a cause of action. To defeat plaintiffs' apparent right to recover, defendant avers that the parties have agreed to two things: (1) To postpone payment until the next harvest; (2) that defendant should give the plaintiffs an opportunity to put the machine in order, and that they should do so before the note was payable. To sustain these propositions, defendant was bound to prove one of two things: (1) That the next harvest had not arrived; or (2) that,

if it had arrived and passed, he had given plaintiffs an opportunity to put the machine in order, and that they had failed to do so. There was no proof whatever upon either of these propositions. It is admitted, inferentially at least, that the next harvest had passed. This action was commenced July 11, 1893, and this court will take judicial notice that in San Joaquin county the time for harvesting of small grain has arrived on the 11th of July. Mahoney v. Aurrecochea, 51 Cal. 429. Without some proof sustaining one or the other of these propositions, defendant was not entitled to a judgment.

The judgment appealed from should be reversed, and cause remanded for a new trial.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and cause remanded for a new trial.

110 Cal. 85

TERRY v. SUPERIOR COURT OF SAN DIEGO COUNTY. (L. A. 127.)

(Supreme Court of California. Nov. 14, 1895.)

APPEAL FROM JUSTICE'S COURT—ADVERSE PARTIES—WHO ARE.

1. On appeal from a judgment of a justice of the peace by defendants against whom the judgment was rendered, other defendants jointly liable, but not served, are not adverse parties, on whom the notice of appeal must be served.

2. In an action in a justice's court against married women on an express contract alleged to have been made by them, their husbands were properly joined, under Code Civ. Proc. § 370, but judgment was rendered against the wives only. *Held* that, on appeal by the wives, the husbands were not adverse parties, on whom the notice of appeal must be served.

In bank.

Application by George W. Terry for a writ of prohibition to restrain the superior court of San Diego county from hearing an appeal from a justice's court of San Diego township. Writ denied.

Aitken & Smith, for petitioner. A. C. Mouser, for respondent.

PER CURIAM. This is an application for a writ of prohibition to restrain the superior court of San Diego county from hearing an appeal from the justice's court of San Diego township. An action was brought in the justice's court of San Diego township by George W. Terry, petitioner herein, as plaintiff, against W. H. Dinwiddie and Harriet M. Dinwiddie, his wife, Robert Daly and Rebecca A. Daly, his wife, Visa J. Cline, Charles Morris and Josephine Morris, his wife. No service of summons was had upon the defendants Morris and Cline, nor did they appear. The Dinwiddies and Dalys were served with summons, and answered. The action was upon a claim of Johnson & Co., undertakers, assigned to plaintiff, and was for services rendered by said undertakers in the burial of C. Breedlove, father of the women defendants and of C. W. Breedlove, their brother, at their instance and request. Their husbands were joined as parties defendant under the provisions of the Code. The judgment given in the justice's court was in favor of plaintiff, against defendants Harriet M. Dinwiddie and Rebecca A. Daly. No judgment in terms was asked or given against their husbands, or either of them. From this judgment the defendants Harriet M. Dinwiddie and Rebecca A. Daly gave notice of appeal to the superior court. The cause being transferred to that forum, a motion was there made by plaintiff (petitioner herein) to dismiss the appeal upon the ground that the superior court had no jurisdiction to entertain the same, for that the notice of appeal had not been served upon defendants W. H. Dinwiddie, Robert Daly, Charles and Josephine Morris, and Visa J. Cline. The motion was decided adversely to plaintiff, and the court retaining said appeal, this writ is sought to restrain it from proceeding further in the matter.

The superior court, in passing upon the motion, was not called upon to decide any controverted question of fact. The undisputed facts were that plaintiff was served with notice of appeal, and that the defendants Morris, Cline, W. H. Dinwiddie, and Robert Daly were not. The duty devolving upon the court was to determine from the record upon appeal whether the defendants not served, or any of them, were adverse parties to the appellants. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103. The decision of the court upon the motion, by which ruling it retained the appeal, was not erroneous. Adverse parties are those who by the record appear to be interested in the judgment so that they will be affected by its reversal or modification. So far as concerns the defendants Morris and Cline, not having been served with summons and not having appeared, they are not parties litigant to the judgment, and are neither friendly nor adverse upon appeal. It was not incumbent that they should be served. Hinkel v. Donohue, 88 Cal. 598, 26 Pac. 374; Bank v. Rosenthal, 99 Cal. 42, 31 Pac. 849, and 33 Pac. 732.

As to the husbands of appellants, their status in the controversy is to be determined, as has been said, by reference to the record. By this it appears that the action was upon an express contract alleged to have been made, not by them, but by their wives, a judgment upon which would bind only the wives and their separate property. If, as was claimed upon argument, the action was prosecuted to enforce, not a voluntary agreement, but a statutory obligation against the wives, under section 292 of the Penal Code, a judgment for which could be enforced against the community property, it need only be said that, however liberal the rules of pleading may be in a justice's court, nevertheless a cause of action must there be stated, and it must be the cause of action relied on, for in that as in every court the allegata and probata must correspond, and the judgment must be upon the demand, and within the pleadings. Plaintiff charged upon no statutory obligation. There is an entire absence of averment necessary to such charge. But he did sue in assumpsit, averring the performance of services at the special instance and request of the defendant wives. Under such a complaint the husbands in the original action became proper and necessary parties defendant. Not, however, to the end that they or their property should be bound by the judgment, but solely that they might be able to aid their wives in their defense. The present utility of the statute in this progressive day may be open to question, but, however this may be, it was passed at a time when the lawmakers, perhaps with mistaken chivalry, believed that a wife brought into litigation might be the better for the comfort, protection and support of her husband's authorized presence, and in any event determined to secure it to her. Nor was the judgment of the justice's court, in terms, against the husbands' or the community property. In contemplation of the pleadings it was a judgment whose satisfaction could be had from the separate property of the wives alone. Under such a condition of the record it is impossible to regard the husbands as parties adverse to their wives upon this appeal. Their interest in the judgment and in its reversal or modification is identical in kind and character with the wives' interest. They are in court, in contemplation of law as well as in fact, to assist their wives, and not to oppose them, and in this appeal they occupy no position adverse or hostile to them. It was therefore not necessary that the husbands should have been served with notice of appeal, as "adverse parties," and this is all the superior court was called upon to decide in passing upon the motion to dismiss. By the appeal of the wives, as taken, that court obtained jurisdiction of the action. If, upon trial, it should believe it proper that the husbands should again be called in, under section 370 of the Code of Civil Procedure, it would, on proper showing, make an appropriate order to that effect. But the necessity for such action is not here under consideration. The application for a writ of prohibition is denied.

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110 Cal. 145

SMITH v. HAZARD. (No. 19,587.)[1]

(Supreme Court of California. Nov. 23, 1895.)

STREET IMPROVEMENTS — PROTEST — NOTICE — ACCEPTANCE BY SUPERINTENDENT OF STREETS — HARMLESS ERROR.

1. Act 1885, as amended by Acts 1891, p. 196, known as the "Street Improvement Act," by section 2 authorizes the city council to order the improvement of "the whole or any portion, either in length or width of streets." Section 3 provides that, where the improvement is for one block or more, the written objection, duly filed, of the owners of a majority of the frontage of property abutting on the proposed improvement, shall be a bar for six months to any work, unless the owners of one-half of the frontage subsequently petition that it be done, except where the proposed improvement is of not more than two blocks located between or at the end of improved portions of streets. *Held*, that two adjoining blocks of unimproved street located between improved portions may be improved under separate proceedings and contracts, notwithstanding a protest.

2. Error in the exclusion of evidence is harmless where a different construction of a statute adopted on appeal renders the evidence immaterial.

3. The remedy for the acceptance of work by the superintendent of streets of a city before it is completed is by appeal to the city council.

4. Where notice of a street improvement is required to be published "by two insertions in one or more daily" newspapers, a notice published in a daily paper on Saturday and Sunday consecutively is sufficient.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county; Cope, Judge.

Action by Barclay Hazard against Charles L. Smith to recover a street assessment. From a judgment for plaintiff, defendant appeals. Reversed.

W. S. Day and Joseph J. Perkins, for appellant. Richard & Carrier, for respondent.

VANCLIEF, C. This is an action to recover a street assessment of $218.46 for work done by plaintiff on Micheltorena street, in the city of Santa Barbara, under contract with the superintendent of streets. On June 13, 1893, the city council, by resolution, declared its intention "to grade, curb, and gutter" said street "from the northeasterly line of Chapala street to the northeasterly line of De La Vina street," a distance of one block, and duly posted and published said resolution. Thereafter, on July 1, 1893, the owners of a majority of the frontage on the proposed improvement in due form protested against said improvement; but the city council disregarded their protest, and without delay proceeded in the matter as if no objection or protest had been made. The court below ruled that the protest was a bar to further proceedings for six months, and that all subsequent proceedings, including the assessment, were therefore void. Whether or not this ruling was correct is the principal question discussed by counsel on this appeal. The appellant contends that it was error.

The block improved was one of two adjoining ungraded blocks intervening between and bounded at each end by graded blocks; and it is not denied that the council had power to improve the two ungraded blocks thus situated, notwithstanding the protest, but respondent contends that the whole intervening unimproved space of two blocks must have been improved under one resolution of intention and one contract, and that the council was not authorized to improve each of the two intervening blocks under a distinct resolution of intention or a distinct contract, in disregard of a protest by the owners of a majority of the frontage, even though each of the intervening blocks was being so improved at the same time. I think, however, that this is a misconstruction of the street law. Section 2 of the street improvement act of 1885, as amended in 1891 (page 196), confers upon the city council general authority "to order the whole or any portion, either in length or width of streets," to be improved, etc. But section 3 of the same act limits this general authority as follows: "The owners of a majority of the frontage of property fronting on said proposed work or improvement, where the same is for one block or more, may make a written objection to the same within ten days after the expiration of the time of the publication and posting of said notice, which objection shall be delivered to the clerk of the city council, * * * and such objections so delivered and indorsed shall be a bar for six months to any further proceedings in relation to the doing of said work, or making said improvement, unless the owners of one-half or more of the frontage, as aforesaid, shall meanwhile petition for the same to be done." Further on in the same section an exception to the above limitation is expressed as follows: "And when not more than two blocks, including street crossings, remain ungraded to the official grade, or otherwise unimproved, in whole or in part, and a block or more on each side upon said street has been so graded or otherwise improved, or when not more than two blocks at the end of a street remain so ungraded or otherwise unimproved, said city council may order any of the work mentioned in this act to be done upon said intervening ungraded or unimproved part of said street, or at the end of a street; and said work upon said intervening part or end of a street shall not be stayed or prevented by any written or other objection, unless such council shall deem proper." The facts of the case at bar bring it clearly within this exception, and exclude it from the above limitation upon the power of the council; and therefore the authority of the city council to improve the street through said two intervening blocks must be that conferred by section 2 of the act, namely, "to order the whole or any portion" thereof to be graded or otherwise improved, regardless of objections by owners of lots fronting on the improvement. The plaintiff pleaded and offered to prove that both intervening blocks were being improved at the same time, though under distinct proceedings and contracts, and that the improvement of both had been completed; but the court rejected all proffered evidence of this character, to which plaintiff excepted, and contends here that the exclusion of such evidence was error. But, if the views above expressed are correct, the proffered evidence was immaterial, and its rejection harmless.

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[1] Rehearing denied.

Counsel for respondent contends that the superintendent accepted the work before it was completed, according to contract, claiming that there was a narrow strip, of an average width of six inches, on which stood a fence in front of one of the lots, ungraded at the time work was accepted, though it was afterwards graded by the owner of the lot. The only remedy for this attenuated defect was to be had by an appeal to the city council. Jennings v. Le Breton, 80 Cal. 8, 21 Pac. 1127.

Section 3 of the act requires the resolution of intention to make the improvement to be "published by two insertions in one or more daily, semi-weekly or weekly newspapers published and circulated in said city," etc. The resolution in this case was inserted on two consecutive days—Saturday and Sunday—in a daily newspaper published and circulated in said city of Santa Barbara. It is contended by respondent that the publication was insufficient, because the last insertion was on Sunday. The publication was a literal compliance with the statute,—"two insertions in a daily newspaper," Sundays not excepted,—a series of acts, and not a publication for a specified period. I think the publication was sufficient (Society v. Thompson, 32 Cal. 347-354), and that the judgment should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded for a new trial.

110 Cal. 79

McGRATH v. CARROLL et al. (No. 15,697.)

(Supreme Court of California. Nov. 14, 1895.)

CLAIMS AGAINST ESTATES OF DECEDENTS—PRESENTATION FOR ALLOWANCE—STATUTE OF LIMITATIONS—TRUSTS—TRACING SPECIFIC FUND.

1. Plaintiff presented a demand against the estate of decedent, which, on its face, was a claim for money lent, the items thereof being barred by limitations. On the rejection of such claim, plaintiff sued the executors, alleging that the moneys were received and held by deceased in trust for plaintiff; but the terms of the alleged trust were not disclosed, and defendants pleaded the statute of limitations. *Held*, that such plea was good.

2. One who claims to be a beneficiary of funds received by a decedent as trustee must present his demand against the estate for allowance, like other claims, unless the identical trust property, or its product in a new form, can be traced into the possession of the personal representatives.

3. Such claim, though presented as a simple money demand, is still based on the trust, and depends for its validity on the legality and sufficiency of the trust.

4. Where the beneficiary of a fund received by a decedent as trustee is obliged to present his claim for allowance, because unable to trace the

specific trust property into the possession of the representatives, the statute of limitations, in the absence of a repudiation of the trust by deceased in his lifetime, begins to run from the time of the first publication of the notice to creditors.

5. Under Code Civ. Proc. §§ 1493, 1500, providing that no action can be brought on a claim against a decedent's estate unless first presented for allowance, one cannot present a simple money demand, and then maintain an action as the beneficiary of an express trust.

In bank. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by James O. McGrath against George L. Carroll and others, executors of the estate of R. T. Carroll, deceased. From a judgment for defendants, plaintiff appeals. Affirmed.

Young & Powers, for appellant. Maxwell & McEnerney, for respondents.

HENSHAW, J. Appeal from the judgment, taken within 60 days from its rendition. The evidence is brought up for review by bill of exceptions. Plaintiff presented his claim to the executors of the estate of R. T. Carroll, deceased, which claim was in form as follows:

The undersigned, creditor of the estate of R. T. Carroll, deceased, presents his claim against the estate of said deceased, with the necessary vouchers, for approval, as follows, to wit:

Estate of R. T. Carroll, Deceased, to James O. McGrath, Dr.

The following are the particulars of said creditor's claim:

San Francisco, March 20, 1891.

Estate of R. T. Carroll, Deceased, to James O. McGrath.

1879.			
Dec. 18.	By check		$1,000 00
	Interest from date at 7 per cent. per annum, 11 years and 90 days............		787 26
1881.			
May 17.	By cash		600 00
	Interest from date at 7 per cent. per annum, 9 years and 304 days..........		412 98
1882.			
Sept. 19.	To amount of judgment received in suit, McGrath vs. St. Lawrence Mining Co.		600 00
	Interest from date at 7 per cent. per annum, 8 years and 181 days...........		356 83
			$3,757 07
1889.	Cr.		
July 13.	Fees to attorney etc.	$ 30 60	
1890.			
Jan. 11.	Judgment in Cowper vs. McGrath..	800 00	
	Interest from date at 7 per cent. per annum from date to March 11, 1891	66 00	
1890.			
Dec. 23.	Fees to attorney, etc.	30 00	926 60
			$2,830 47

The claim was rejected, and in due time thereafter the claimant commenced this action. By his complaint he set up that the moneys were received and held by deceased "in trust for the use and benefit of plaintiff." The nature and terms of the trust are not, however, disclosed. The defendants, by demurrer, and by answer, pleaded the statute of limitations. When the evidence had been received, the court instructed the jury to render a verdict for defendants, which it did, and judgment was entered accordingly. In so doing the court said: "Of course, if the property was received in trust, then the statute never runs as long as the trust exists and the relation continues; and it would not run until some repudiation of the trust made by the trustee was brought home to the knowledge of the trustor. Treated as a simple money demand, it would clearly be barred on its face, inasmuch as the party did not commence a suit while Carroll was alive, but until after he died. In the case of Lathrop v. Bampton—treating this as an action in trust, and assuming that a trust was created, and if the jury believe the evidence of that witness that a trust was created, nevertheless, the testimony of Mrs. Carroll that this property has not come to her or been received by her is a failure to follow it up and identify it under the rule laid down in Lathrop v. Bampton, 31 Cal. 24, which says: 'The identity of a trust fund consisting of money may be preserved so long as it can be followed and distinguished from all other funds.' If there was any trust fund here, it consisted of money. The decision further says: 'Not by identifying the individual pieces or coins, but by showing a separate and independent fund or value, readily distinguishable from all other funds.' That has not been done. You sued to enforce a trust. You have presented a demand and claim against the estate, and that makes your cause of action. You have sued to enforce a trust in relation to money, and you have not followed the trust fund into the hands of the defendants, nor its proceeds, and place it solely upon that ground." The judgment of a trial court does not depend for its sufficiency upon the reasoning by which it is reached. The opinion of the judge may be erroneous, while the conclusion arrived at and given expression in the judgment may be just and sound. So here the ground upon which the court rested its decision is immaterial if the conclusion reached was the only one justifiable. Moreover, the language of the judge indicates an appreciation of the situation of the parties, and we are inclined to believe that it fails to give a full exposition of the principles involved, not from oversight, but because of the lack of opportunity for careful preparation and presentation which must always embarrass a judge in the swift progress of a trial. Lathrop v. Bampton, 31 Cal. 17, holds that equity will enforce a trust against the personal representatives of a deceased trustee, and without the presentation of a claim against the estate, when the identical trust property, or its product in a new form, can be traced into the estate, and so into the possession of the representatives. But a beneficiary who is unable to do this must rely on the personal liability of the trustee, and so relying has only a claim against the estate which must be duly presented for allowance. But such a claim is still based upon the trust, whatever that may have been. It has its origin in the trust, and depends for its validity upon the legality and sufficiency of the trust. The fact that the beneficiary is obliged to present his claim, and look, like a general creditor, to the assets of the estate for payment, does not change the nature of his demand, which is still one for property due under a trust accounting; it merely has changed his remedy.

In an express trust the statute of limitations is not set in motion against the beneficiary during the term of its existence, unless the trustee has in some unequivocal way, with notice to the beneficiary, repudiated the trust. If, during his lifetime, the trustee has not done this, his death will not be held to be such a repudiation. The rights of the beneficiary remain unaffected by this event. His remedies, however, will depend upon his ability to trace the specific trust property. When, as here, he is obliged to look to the general assets, and to present his claim, in the absence of repudiation the statute of limitations is set in motion from the time of the first publication of the notice to creditors. No action can be brought by the holder of such a claim unless it be first presented (Code Civ. Proc. §§ 1493 and 1500), and every claim must sufficiently indicate the nature and amount of the demand, to enable the executor and judge in probate to act advisedly upon it. Henderson v. Ilsley, 11 Smedes & M. 11. As no holder of a claim may maintain an action upon it unless it has first been presented, it follows as a necessary sequence that the only action the holder may maintain is one founded upon the claim presented. Lichtenberg v. McGlynn, 105 Cal. 45, 38 Pac. 541. In this case the claim presented was a simple demand for money lent, accompanied by a demand for legal interest, with which such moneys are charged. No hint or suggestion is made of a trust, and the debts set out were all long barred by the statute of limitations. Upon such a claim the executors had no discretion. Their plain duty was to reject it as they did. Code Civ. Proc. § 1499.

In the complaint for the first time there is a plea of trust (without disclosure of its terms even then), and the defendant executors are compelled to meet a cause of action unsupported by the claim presented, and a claim founded thereon which had never been presented, and upon which they had never been called to pass. They did this by pleading the statute of limitations, which was a good plea directed against the rejected claim that plaintiff was compelled to set forth in his complaint. They might also have pleaded the variance and nonpresentation in abatement, but under the circumstances we are of the opinion that the point is sufficiently presented by the plea of the statute, and this seems to have been in the mind of the court when it said: "Treated as a simple money demand, it would clearly be barred on its face, inasmuch as the party did not commence a suit while Carroll was alive, but until after his death. * * * You have presented a demand and claim against the estate, and that makes your cause of action." For the foregoing reasons, the judgment appealed from is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN FLEET, J.; HARRISON, J.; GAROUTTE, J.

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110 Cal. 94

SISKIYOU COUNTY v. GAMLICH. (No. 18,337.)

(Supreme Court of California. Nov. 18, 1895.)

Condemnation Proceedings—Decision of Supervisors—Collateral Attack—Admissibility of Evidence—Recitals in Petition—Burden of Proof—Amendment of Pleading—Discretion of Trial Court.

1. In laying out a highway under Pol. Code, §§ 2681–2690, the board of supervisors exercises judicial functions, and its order approving the report of the viewers cannot be collaterally attacked on the ground that it was made on insufficient evidence.

2. In an action to condemn a right of way for a public road over defendant's land, a member of the board of supervisors may identify a petition offered in evidence as the one presented to and acted on by the board.

3. In an action to condemn a right of way for a public road, a petition which had been presented to and acted on by the board of supervisors, in which the petitioners state that "we are, each and all, freeholders" of the road district, "and taxable therein for road purposes," is conclusive as to those facts.

4. In an action to condemn a right of way for a public road, it is only necessary, in order to make out a prima facie case, for plaintiff to prove the presentation to the board of supervisors of a regular petition, with a sufficient bond, the record of the board showing the appointment of viewers, the report of the viewers and its approval, the assessment of damages and the setting apart out of the proper fund of the money awarded defendant, his refusal for 10 days to accept the same, and the order to commence suit for condemnation.

5. In such action the presumption is in favor of the regularity of the board's action, and the burden is on defendant to show affirmatively the contrary.

6. In a proceeding to condemn a right of way for a public road, after a petition to the board of supervisors, a member of such board may testify as to the damages which will be sustained by defendant.

7. An application by defendant during the trial to amend his answer is addressed to the discretion of the trial court, and its action will not be disturbed unless it appears that defendant was prejudiced thereby.

Commissioners' decision. Department 2. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Proceedings by the county of Siskiyou against Charles Gamlich to condemn a right of way for a public road over defendant's land. From a judgment of condemnation, defendant appeals. Affirmed.

Jas. F. Farraher, for appellant. Jas. F. Lodge and R. S. Taylor, for respondent.

BELCHER, C. This is an action for the condemnation of a right of way for a public highway over the lands of defendant. The complaint alleges that the required petition in writing for laying out a new road, signed by at least 10 freeholders of the road district in which defendant's lands are situated, and taxable therein for road purposes, was presented to the board of supervisors; that the necessary accompanying bond was filed, and approved by the board; that three viewers were appointed, one of whom was the county surveyor, and that two of the viewers proceeded to view, survey, and lay out said proposed road; that they filed their report, showing the course, termini, length, width, and probable cost of the road, with the names of the landowners who did not consent and the amount of damages claimed by each, and recommended its construction; that defendant would be damaged by the location and opening of the route so established in the sum of $10, as reported by the viewers, and that the right of way over defendant's lands was necessary for the creation of said highway; that the board approved the report, but defendant refused to accept the damages awarded him; and thereafter an order was regularly made and entered by the board directing the district attorney of the county to institute this action. The answer denies most of the averments of the complaint, and then, as an affirmative defense, alleges that, while the hearing of the petition referred to in plaintiff's complaint was pending, a petition signed by 10 freeholders residing within the road district, and taxable therein for road purposes, was filed with the board of supervisors, asking for the opening up of a road over a different route from the one set out in the complaint; that the petition was accompanied by a good and sufficient bond, which was approved by the board and filed, and that viewers were thereupon appointed to view the proposed route and report thereon; that the viewers thereafter reported favorably upon said route, and recommended that it be declared a public highway; that the board rejected said report and refused to grant the prayer of said petition; that the route so petitioned for forms a more direct and practicable route, and of cheaper construction, than that set out in the complaint, and will serve all the purposes and subserve the interests of the general public much better than the other one. The case was tried by the court without a jury, and judgment of condemnation was entered as prayed for in the complaint, from which and from an order denying a new trial defendant appeals.

1. At the commencement of the trial counsel for plaintiff moved the court to strike out from defendant's answer the alleged affirmative defense set out therein, and the motion was granted. This ruling is assigned as error, but we think it proper. The facts set up in that part of the answer stricken out did not constitute a defense to the action. It was for the board of supervisors to determine whether a new road was necessary or not, and, if necessary, over what route it should be laid out and constructed. Pol. Code, §§ 2681–2690. In laying out a public road the board of supervisors exercises judicial functions, and its order approving the report of the viewers cannot be collaterally attacked on the ground that it was made upon insufficient evidence. Damrell v. San Joaquin Co., 40 Cal. 154; Humboldt Co. v. Dinsmore, 75 Cal. 604, 17 Pac. 710; Los Angeles Co. v. San José Land & Water Co., 96 Cal. 93, 30 Pac. 969.

2. Plaintiff offered in evidence the petition presented to the board of supervisors, and defendant objected to its reception on the ground that the parties who signed it were not shown to be taxpayers and taxable in the road district, and on the further ground that it had not been identified or proved to be the petition presented. The plaintiff then called as a witness Supervisor Jackson, and asked him to state whether or not the board of supervisors took action upon the petition shown him. Defendant objected to this question on the ground that it was incompetent, and that the minutes of the board were the best evidence of the action taken. Both objections were overruled, and these rulings are assigned as errors. The evidence of the witness Jackson was clearly admissible to identify the petition offered in evidence as the one presented to and acted upon by the board. In the petition the petitioners state that "we are, each and all, freeholders" of the road district, "and taxable therein for road purposes." The action of the board shows that this statement must have been found to be true, and for the purposes of this case, under collateral attack, the finding must be held conclusive. There was therefore no error in admitting the petition in evidence.

3. The defendant's motion for nonsuit was properly denied. To make out a prima facie case it was only incumbent upon the plaintiff to prove the presentation of a regular petition to the board of supervisors, with a good and sufficient bond, the record of the board showing the appointment of viewers, the report of the viewers in proper form and its approval, the assessment of damages and the setting apart out of the proper fund of the money awarded defendant, his refusal

for 10 days to accept the same, and the order to commence suit for condemnation. Los Angeles Co. v. San José Land & Water Co., supra. All these facts were sufficiently proved by the plaintiff.

4. Defendant offered to read in evidence, from the records of the board of supervisors, all entries and minutes made therein relating to the petition in question, for the purpose of showing that the board neither approved the bond offered in evidence by the plaintiff, nor found that the signers of the petition were freeholders within the road district. It was objected that the absence of an affirmative showing and finding of the facts referred to could not defeat the action, and the mere absence of such findings was all defendant here offered to show. The court properly sustained the objection, holding that the presumption was in favor of the regularity of the action of the board, and that the burden was on the defendant to show affirmatively the contrary.

5. The defendant offered to prove that there was a shorter and more practicable route than the one sought to be condemned, and, in support of his right to do so, cites City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604. But, as we have already said, the question of the necessity for a new road and of its location was a matter for determination by the board of supervisors, and not by the court. The case cited is not in point. That was a direct proceeding for the condemnation of land, without any intermediate action taken before suit by any board or tribunal acting in a judicial capacity, and passing upon the necessity and practicability of the proposed route.

6. The defendant called as a witness one of the supervisors who acted on the petition, and asked him: "At the time it was presented, or at any time afterwards, did the board of supervisors take or hear any evidence as to the age or ages of any of the parties who signed that petition?" The question was objected to as immaterial and irrelevant, and the court asked: "What is the object of this testimony, Mr. Farraher?" "Mr. Farraher: We want to prove that the board of supervisors heard no evidence on this proposition." The court sustained the objection, and it is earnestly urged that the ruling was erroneous. There was and is no suggestion or claim that any of the signers were minors, and proof of their age or ages before the board was not required.

7. Some of the supervisors who acted on the petition were called as witnesses to testify as to the damages sustained by defendant. It is objected that their testimony was neither competent nor material, and it is said, "It was a part of their judicial duty in the premises to determine this damage, and their records were the best evidence of such determination." The witnesses were certainly competent to testify as to the damages which the defendant would sustain by reason of the laying out of the road; and, while there was some conflict in the evidence upon the question, that introduced by the plaintiff was amply sufficient to justify the finding of the court.

8. While defendant was putting in his evidence, he asked leave to amend his answer by adding thereto a denial that he was present at any meeting of the board of supervisors when the matter of opening said proposed highway was acted upon by them, or that he had any notice of the time and place set for the hearing of said matter. On objection of plaintiff the court refused to allow the amendment, and this ruling is assigned as error. The application was addressed to the sound legal discretion of the trial court, and its action will not be disturbed unless it appears that it abused its discretion and the defendant was prejudiced thereby. We see no such abuse of discretion as would justify a reversal of the judgment on this ground.

The above are all the points requiring special notice, and in our opinion the judgment and order should be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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110 Cal. 23

BOWMAN et al. v. WHITE. (No. 15,959.)

(Supreme Court of California. Nov. 13, 1895.)

INJURY TO EMPLOYE—NEGLIGENCE—EVIDENCE.

Defendant's train having run into a washout, causing the death of an employé, the issue of defendant's negligence with respect to keeping the road in good repair should have been submitted to the jury; the question of contributory negligence not being involved, and the evidence as to whether the train was sent out to repair the track being conflicting.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by William Bowman and others against L. E. White for negligently causing the death of Victor Bowman. From a judgment of nonsuit, and an order denying their motion for a new trial, plaintiffs appeal. Reversed.

A. Morgenthal, for appellants. Oliver P. Evans, for respondent.

GAROUTTE, J. Respondent, in connection with his lumber business, owned and conducted a railroad running from his mill to the timber, about eight miles distant. Upon Monday morning, December 9th, at 6 o'clock, and while it was yet dark, Victor Bowman, an ordinary laborer, in connection with the engineer, fireman, foreman, and other laborers, started upon a working or construction train over the road. They had proceeded but a few hundred yards when the train ran into a washout some 40 feet in length and 14 feet in depth. Bowman and the engineer were killed, and others of the party injured. This action was brought by representatives of Bowman for damages suffered by reason of his death; and, upon the evidence offered by plaintiff, a nonsuit was granted. This appeal is prosecuted from the judgment, and from the order denying a motion for a new trial.

The facts of the case, as disclosed by the evidence, are quite meager; and, in addition to those already stated, it further appeared that heavy storms of rain had been prevalent for some time; that during the previous week these men with this train had been engaged in repairing the roadbed wherever damaged by the elements; that Saturday evening previous to the accident was the last time the road had been used, the washout therefore necessarily having occurred subsequent to that time. There is also evidence found in the record tending in some degree to show the cause of the washout to be traceable to the breaking of a flume of defendant which was used in carrying water to the mill, and which was situated above and near the roadbed.

The defendant was bound to keep his road in good repair after construction, and this was a duty he owed to his employés as fully and completely as to his passengers if he had been engaged as a common carrier of such; and, if the injury to the employé upon the train is caused by reason of a defective roadbed, that employé is entitled to recover for such injury; for, if the defective roadbed was the direct and proximate cause of the injury, no question of the negligence of fellow servants is involved.

There is no question of contributory negligence in the case, and the nonsuit was granted, and must be sustained, if sustained at all, upon the absence of negligence upon the part of defendant; and the true determination of that question forces us to a consideration of the nature of the work carried on by the construction train in connection with its employés, and particularly as to its mission upon this fatal morning. This is not the proper time to pass upon the weight and character of the evidence, but the record discloses beyond a doubt some evidence to the effect that this train left the mill, bound for a point upon the road some 4½ miles distant, known as "Rose Curve." There is also some evidence that the train was bound for that point for the purpose of there repairing the road, and possibly there is some evidence to the effect that it intended to return from that point to the mill with a load of wood. But, whatever its purpose may have been in starting for that point of destination, we think it immaterial. Its object in going there, whether it was for wood, or for the purpose of repairing the track, or for some other cause, in no way affects the question under consideration; for, if it started to that point in the line of its duty, the defendant was bound to furnish it a safe roadbed and track upon which to travel. If not absolutely bound so to do, he was at least required to exercise that degree of care in furnishing a safe roadbed and track demanded by the law. There is some evidence in the record indicating that this construction train, at the time of the accident, was upon the track for the purpose of repairing defects in the road, wherever found, as it passed upon its way; and, if that be the fact, the rule of law applicable to such a case may be found stated in Vaughn v. Railway Co., 83 Cal. 18, 23 Pac. 215. But it is sufficient here to say that the evidence does not all point that way, and a conflict therein is clearly apparent. There being such a conflict, no question of law was raised, but rather a pure question of fact, which should have been solved by the jury alone.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: HARRISON, J.; VAN FLEET, J.

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110 Cal. 54

WHITE v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

(S. F. 94.)

(Supreme Court of California. Nov. 13, 1895.)

CERTIORARI—PROHIBITION—WHEN LIES.

1. Certiorari will not lie to review an appealable order or judgment, though they be void.

2. Since an appeal lies from, and is an adequate remedy to prevent execution of, an order of court appointing a receiver of, and directing a sale by him of, property of a plaintiff in a divorce action, to satisfy a judgment of alimony against him, prohibition will not issue for such purpose, though the order is void as in excess of the jurisdiction of the court.

In bank.

Petition by George E. White against the superior court for certiorari to review, and prohibition to stop the execution of, an order of defendant court appointing a receiver of petitioner's property, and directing a sale to satisfy a judgment for alimony had against him as plaintiff in a divorce action. Writs denied.

Barclay Henly and Edward Lynch, for petitioner. Henry E. Highton, for respondent.

VAN FLEET, J. This is an original proceeding, which, in the matter of remedies sought, is somewhat multifarious, and consequently not susceptible of single definition. Petitioner asks for certiorari to review, and prohibition to stop the execution of, a certain order of the respondent court complained of. From the petition and the return thereto, it appears that in an action for divorce pending in said superior court, in which the petitioner, George E. White, is plaintiff, and one Frankie White defendant, a decree of divorce was entered in May, 1889, and the question of the property rights of the parties referred to a referee for report thereon. Subsequently, in June, 1894, a receiver was appointed in said cause to take charge and possession of the property, real and personal, of the plaintiff therein, the petitioner here, and hold, manage, and control the same, under the supervision of said superior court, until further order in the premises. On February 9, 1895, the report of the referee having been received, said court made and entered its final decree in said action, awarding to the defendant therein, Frankie White, the sum of $100,000, as permanent and final alimony, allowances, etc., and directing that the receiver theretofore appointed be continued as such, and take all necessary and proper measures to enforce and secure the payment and satisfaction of the amount awarded by said decree, and certain unpaid monthly allowances due, and, after such payment, to hold any residue of said property subject to the further order of the court. Thereafter, on the 19th day of April, 1895, said court, on application of the defendant in said cause, and against the objections of the petitioner, made an order therein requiring and directing said receiver to proceed as such, and sell the property of the petitioner, so far as should be necessary, in satisfaction of said judgment. It is this last-mentioned order which is made the subject of attack herein. Petitioner alleges that the making of said order directing a sale by said receiver of petitioner's property, consisting in large part of lands in different counties of the state, for the satisfaction of a mere money judgment, such as it is contended the final decree in said cause in effect is, is beyond the jurisdiction of said superior court, and contrary to the course of the law, for various alleged reasons not necessary to be here recited; that the only competent way in which said property can be sold in satisfaction of said judgment or decree is by execution at the hands of the sheriff; and that a sale by said receiver will operate to deprive petitioner of his property without due process of law.

Without examining into the question of the power of the court to make said order, it is apparent, we think, at the threshold, that, upon the facts stated, petitioner is entitled to neither remedy sought.

1. It is very clear that the facts do not make a case wherein certiorari may be availed of. That writ will lie only where there is no appeal from the judgment or order complained of. Code Civ. Proc. § 1068; Stuttmeister v. Superior Court, 71 Cal. 322, 12 Pac. 270, and cases there cited. The order in question is a special order, made after final judgment, and, as such, is made the subject of appeal by express terms of the statute (Code Civ. Proc. § 939, subd. 3; Id. § 963, subd. 2; Slavonic I. M. B. Ass'n v. Superior Court, 65 Cal. 500, 4 Pac. 500; Livermore v. Campbell, 52 Cal. 75; Calderwood v. Peyser, 42 Cal. 110); and, being so appealable, it cannot be reviewed by certiorari. Nor does it make any difference in this respect if the order be, as contended, in excess of the jurisdiction of the court making it, and consequently void. Void judgments and orders are not the less appealable by reason of that fact (Livermore v. Campbell, supra); and, when that remedy is afforded, it excludes the right to certiorari, notwithstanding the order be void in the extreme sense (People v. Shepard, 28 Cal. 115; Stoddart v. Superior Court [Cal.] 41 Pac. 278). "It may be readily admitted," says Mr. Justice McFarland, in delivering the opinion of the court in the case last cited, "that the court had no jurisdiction to make the order; but, as the order is appealable, certiorari will not lie, because it lies only when 'there is no appeal.'" So far, then, as the remedy by certiorari is concerned, it would be wholly unprofitable to consider the question as to the jurisdiction of the respondent to make the order complained of.

2. And we regard it as equally clear that the case is not one for prohibition. The writ of prohibition lies only where there has been an excess of jurisdiction, and there is "not a plain, speedy and adequate remedy in the ordinary course of law." Code Civ. Proc. §§ 1102, 1103. The petitioner having the right of appeal from the order under consideration, the question arises whether this right affords him "a plain, speedy, and adequate remedy" for the correction of the wrong complained of, since, unlike the provision with reference to certiorari, the mere right of appeal, independently of its affording adequate relief, does not, ipso facto, deprive him of the remedy by prohibition. Havemeyer v. Superior Court, 84 Cal. 327, 397, 24 Pac. 121. It is well established, however, that when an appeal affords a complete and adequate remedy, and the same ends may be accomplished, although perhaps not in so expeditious a manner, the party is not entitled to the extraordinary remedy by prohibition, but must have resort to his remedy by appeal. In Agassiz v. Superior Court, 90 Cal. 101, 27 Pac. 49, it is said: "Petitioners have the right to appeal from the order refusing to dissolve the attachment, and would have an appeal from any final judgment in the case; and such appeal being 'a plain, speedy, and adequate remedy, in the ordinary course of law,' within the meaning of section 1103 of the Code of Civil Procedure, prohibition does not lie. A remedy does not fail to be speedy and adequate because by pursuing it through the ordinary course of law more time would probably be consumed than in the proceeding here sought to be used; and it makes no difference that in this instance a question of jurisdiction incidentally depends upon the validity of an attachment." In Grant v. Superior Court, 106 Cal. 324, 39 Pac. 604, a writ of prohibition was sought to restrain the superior court from making an order fixing the compensation of a receiver, whose appointment in the action was admittedly void, and it was said by this court: "We are of opinion that, whether the pro-

ceeding which the petitioners seek to arrest is or is not without or in excess of the jurisdiction of the superior court, the writ of prohibition ought not to issue, for the reason that the petitioners have a plain, speedy, and adequate remedy by appeal from any order the court may make, by which they would be injuriously affected. * * * If we are right in the conclusion that any party aggrieved by an order of court directing him to pay the receiver's compensation, or directing payment out of a fund in which he is interested, has an appeal from such order, as from a final judgment in an independent proceeding collateral to the main action, and that he may stay all proceedings upon such order, pending his appeal, by filing a proper undertaking, there can be no need of a writ of prohibition in such a case, and it will not lie. See cases referred to in Havemeyer v. Superior Court, 84 Cal. 398, 24 Pac. 121." In this case no reason is urged why the right of appeal which petitioner enjoys will not furnish him complete and full relief in the premises. By such appeal the hand of the superior court, and that of its instrument, the receiver, can be effectually stayed pending its determination, by giving the proper bond; and thus the rights of the petitioner be adequately preserved until finally determined. Under such circumstances, as suggested in Grant v. Superior Court, supra, there can be no necessity for prohibition. In this view it becomes quite as impertinent here as in disposing of petitioner's right to certiorari to inquire into the power of the court to make the order in question.

It follows that the rule must be discharged, and the application denied. It is so ordered.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.; McFARLAND, J.; HENSHAW, J.

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110 Cal. 107

BOYCE v. FISK. (No. 18,443.)

(Supreme Court of California. Nov. 18, 1895.)

EXCESSIVE RATE OF INTEREST—EQUITABLE RELIEF—SATISFACTION OF MORTGAGE—MORTGAGE DEBT BARRED—DECREE.

1. Under Civ. Code, § 1918, providing that parties may contract in writing for the payment of any rate of interest, equity will not relieve one who has contracted to pay interest largely in excess of the current rates, in the absence of accident, mistake, actual fraud, or undue influence.

2. The administrator of a deceased mortgagor is not entitled to have the mortgage satisfied while the mortgage debt, valid in its inception, remains unpaid, even though an action thereon by the mortgagee is barred by limitations.

3. Where an administrator whose intestate owed a valid mortgage debt, which is barred by limitations, brings action against the mortgagee to quiet title, the court may decree that the action be dismissed unless plaintiff pay the mortgage debt within a specified time.

4. In such action a judgment which decrees that, on plaintiff's failure to pay the amount of the mortgage, all his title to the property shall cease and defendant's title shall be good and valid, is erroneous, since its effect would be to grant defendant an affirmative remedy for his outlawed debt.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by William T. Boyce, administrator of the estate of Thomas Boyce, deceased, against Asa Fisk, to quiet title, and for other relief. From a decree for defendant, plaintiff appeals. Modified.

Boone & Schlesinger and Geo. L. Hood, for appellant. Tupper & Welsh, for respondent.

PER CURIAM. This action was brought to obtain a decree to the effect that Thomas Boyce was at the time of his death the owner in fee simple of an undivided half of section 15 in township 14 S., range 14 E., Mt. Diablo B. & M., situate in the county of Fresno, state of California; that an accounting be had to determine the amount due to defendant upon a mortgage, and that defendant has no right, title, or interest in the land, except as a mortgagee thereof; and that upon the payment to defendant of such sum as may be found due him, if any, he be required to satisfy his mortgage. The cause comes up on the appeal of plaintiff from the final decree, and is presented upon the judgment roll, unsupported by any statement or bill of exceptions. The findings show that on the 7th day of August, 1880, Thomas Boyce was the owner of the tract of land hereinbefore mentioned, and that on said last-mentioned day he borrowed from Asa Fisk, the defendant and respondent herein, the sum of $260, and made to the latter his promissory note in writing, in the words and figures following: "San Francisco, Cal., Aug. 7, 1880. $260.00. Thirty days after date (without grace) I promise to pay to Asa Fisk, or order, the sum of two hundred and sixty dollars, to be paid only in gold coin of the government of the United States of America, for value received, with interest thereon, in like gold coin, from maturity, at the rate of four (4) per cent. per month, until paid; interest to be paid monthly in advance, and if not so paid to become a part of the principal, and bear thereafter the same rate of interest, compounded monthly in advance,—for value received. This note to be paid at the office of Asa Fisk. [Signed] Thomas Boyce." To secure the payment of the said promissory note, Boyce executed and delivered to Fisk a deed of conveyance, absolute in form, but intended as a mortgage, of the tract of land hereinbefore mentioned, and at the same time, and as further security, assigned to said Fisk a policy of insurance, fully paid up, upon the life of him, the said Boyce, issued by the Connecticut Mutual Life Insurance Company of Hartford, Conn. No part of the promissory note, principal or interest, was ever paid by Boyce, or by any one, up to the date of his death, which occurred on the 11th day of October, 1892. On the 28th of March, 1893, Fisk collected $1,150 on the said policy of insurance, and applied the same on account, and in part payment of the interest then due on the said promissory note. Fisk paid all the taxes levied upon the land, amounting to $108.31, and never claimed to hold or own the land except as a mortgagee. Plaintiff was duly appointed administrator of the estate of said Thomas Boyce, deceased, April 17, 1893, and duly qualified and is still acting as such administrator. The court further found that, "by the agreed statement of facts herein, that it has been stipulated that the court may grant to either party such proper legal or equitable relief as either party may be entitled to under said stipulation and the pleadings and facts in the case, and in accordance therewith, and as an equitable adjustment and decision." The court then proceeded to allow to defendant, Fisk, interest upon the promissory note, according to its terms, for four years from its date, and 7 per cent. per annum upon the amount thus found due at the expiration of said term of four years; deducted the sum collected on the insurance policy in 1893, leaving a balance due at the date of the decree of $1,606.06; and decreed that upon the payment of said sum of $1,606.06, with legal interest thereon from the date thereof, within one year from said date, viz. May 14, 1894, the defendant should satisfy the mortgage; also, that, should plaintiff fail within one year from said date to pay said sum of money, then and in that event his right to the land should cease and be barred, and defendant's title thereto should be good and valid, and that each party should pay his own costs. A decree was entered accordingly.

The contention of appellant is that the terms imposed by the superior court upon plaintiff, as a condition of the redemption of the property, are unreasonable and exorbitant; that the terms of the promissory note to defendant were so manifestly unjust and oppressive that a court of equity should refuse to uphold them; and that plaintiff should only be called upon to return the money borrowed, with legal interest thereon. We can only look to the amended complaint, answer, findings, and decree, in determining the questions presented. The real question, under these circumstances, is, do the findings respond to the issues, and do they support the decree? Finding 8 is to the effect that the parties have stipulated "that the court may grant to either party such proper legal or equitable relief as either party may be entitled to under said stipulation and the pleadings and facts in the case, and in accordance therewith, and as an equitable adjustment and decision." Turning to the complaint, we find therein no charge or suggestion of mistake or accident in making the note, or that defendant, Fisk, was guilty of any misrepresentation, fraud, or oppression in procuring decedent, Thomas Boyce, to make the note or execute and deliver the securities. If the plaintiff as representative of Thomas Boyce, deceased, is entitled to any relief in a court of equity,—if he is entitled to redeem the mortgaged property without a compliance with the terms and conditions of the agreement made by his decedent,—it must be upon the ground that the terms and conditions of the promissory note were so onerous as to authorize the court to refuse to enforce its provisions. In this state "parties may agree in any contract in writing for the payment of any rate of interest, and it shall be allowed, according to the terms of the agreement, until the entry of judgment." Civ. Code, § 1918. Courts of equity are as much bound by the laws of the land as courts of law, and neither may set aside or annul contracts made in strict compliance therewith, with impunity. The rate of interest provided for in the note to Fisk was, no doubt, largely in excess of the current rates prevailing at the date of the note in question. At an early period in the history of this state, the rate of interest agreed upon in this note would have been much below current rates. When given, it was much greater than such rates. No doubt the excess of interest is a circumstance which, coupled with others tending to show actual fraud, or such circumstances of oppression and overreaching as warrant the inference of undue advantage, is sufficient cause for setting aside a contract. But without some such showing a court of equity may not disregard the contract which the parties have deliberately made, and make a new one for them. If the court, under such circumstances, can decree the rate of interest stipulated in a given written contract as being too large, and establish a lower rate, then, by parity of reasoning, it should be at liberty, in a similar case, but where the rate of interest agreed upon is deemed too small, to fix a larger one; and thus it would in effect become the guardian of business men, and be at liberty to supervise and modify all their contracts. Had Fisk brought an action to foreclose his mortgage within the lifetime of his demand, can there be any doubt but that, in the absence of any showing of fraud or mistake, he would have been entitled to a decree? We think not. The fact that his debt is barred by the statute of limitations does not absolve his mortgagor, who would redeem the mortgaged property, from paying the debt. The moral obligation remains, and rests upon the mortgagor who would redeem, to pay, as a condition thereof, the sum of money which the mortgagee could have recovered but for the bar of the statute. Spect v. Spect, 88 Cal. 437, 26 Pac. 203; Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; Grant v. Burr, 54 Cal. 298; Zellerbach v. Allenberg, 99 Cal. 69, 33 Pac. 786.

We have examined with care the several cases cited by the appellant in support of his contention. Brown v. Hall, 14 R. I. 249, which may be regarded as a leading case, was a bill to redeem from a mortgage, in which the complainant sought to have the interest (5 per cent. per month) reduced to a legal or reasonable rate, on the ground that the stipulated rate was grossly exorbitant. The complainant stated particularly the circumstances under which the note and mortgage were originally given, for the purpose of showing that he did not fully understand the terms of the note when he signed it, and that the defendant took advantage of his necessities and inexperience, and of his confidence, to overreach and impose upon him. The court allowed the conventional interest for six months, under a statute of Rhode Island which permitted borrowers and lenders to make their own terms in regard to interest, and reduced the interest to a reasonable rate after the maturity of the note. It is not plain, from the report, what the evidence showed, but it may fairly be inferred that it went beyond the allegations of the complaint, for the court said: "We hesitate at this decision only because the facts on which we rest it are very imperfectly alleged in the bill. The facts, however, were put in evidence without objection, and, this being a bill to redeem, we do not think we ought to oblige the complainant to submit to unjust terms of redemption by reason of any technical defect, but should rather permit him to amend, if amendment be necessary, on proper terms." It is very apparent that in that case the elements of fraud and oppression on the part of the mortgagee concurred with the rate of interest charged to convince the court that such fraud had been practiced as to warrant a reduction of the conventional rate of interest agreed upon. Hough v. Hunt, 2 Ohio, 495, was a case in which Hough, being pressed for money, applied to Hunt for a loan of $2,600. Hunt agreed to lend him $10,000 on condition that he, the said Hough, should purchase from him 593 acres of land at $20 per acre, being more than double its value. A portion of the money was loaned. In an action by Hough for relief the court rescinded the contract for the land, being of opinion that Hunt had taken an unfair advantage of Hough's necessities. The court said: "When a person is incumbered with debts, and that fact is known to a person with whom he contracts, who avails himself of it to exact an unconscionable bargain, equity will relieve on account of the advantage and hardship. Where the inadequacy of the price is so great that the mind revolts at it, the court will lay hold of the slightest circumstances of oppression or advantage to rescind the contract." In Butler v. Duncan, 47 Mich. 94, 10 N. W. 123, a young man of dissolute and prodigal habits, in want of money, had given his note for $5,000, secured by mortgage, with interest at 10 per cent. per annum, on all his property, and had received only about $2,000 and 160 acres of land, for $3,200, which was worth little over $1,000. In rescinding the contract the court said: "To state the transaction mildly, it was taking advantage of Duncan's weakness and anxiety, and, under the guise of an apparently fair business transaction, exacting a usurious interest, which a court of equity cannot sanction." In this last case, as in the Ohio case supra, it is apparent that an attempt was made to evade the usury law of those states, which in itself, if fully proven, was sufficient to invalidate the contracts, and which, coupled with circumstances of fraud on the part of the parties loaning their funds, served to justify the rulings. In the present case the loan was made, not in evasion of, but pursuant to, the letter and spirit of the law, and no circumstances of fraud are charged. The case of Sime v. Norris, 8 Phila. 84, seems to fully sustain the contention of appellant, yet we do not think it can be upheld as the law of this state. The case was this: In 1864 the defendant, Norris, at San Francisco, Cal., had made his promissory note to Robbins for $4,125, payable 30 days after date, with interest at 2½ per cent. per month, payable monthly in advance, and, if not so paid, to be compounded and become a part of the principal, and bear like interest. The action was by an indorsee against the maker. The claim, when sued, amounted to over $26,000, and Sharswood, J., said, "I think this contract, though lawful, was an oppressive and unconscionable one, which the courts of this state [Pennsylvania] ought to have no hand in enforcing according to its letter," and ordered judgment for the principal and the legal rate of interest then prevailing in California, viz. 10 per cent. per annum. The strongest showing in behalf of appellant which we have found is contained in Story's Equity Jurisprudence, at section 331, where he says: "And here we may apply the remark that the proper jurisdiction of courts of equity is to take every one's act according to conscience, and not to suffer undue advantage to be taken of the strict form of law or of positive rules. Hence it is that, even if there be no proof of fraud or imposition, yet if, upon the whole circumstances, the contract appears to be grossly against conscience, or grossly unreasonable and oppressive, courts of equity will sometimes interfere and grant relief, although they are certainly very cautious of interfering, unless upon very strong circumstances. But the mere fact that the bargain is a very hard or unreasonable one is not generally sufficient per se to induce these courts to interfere. And indeed it will be found that there are very few cases not infected with positive or actual fraud in which they do interfere, except where the parties stand in some very peculiar predicament, and in some sort under the protection of the law,—from age or character or relationship." The cases cited by the learned author tend to show that except in case of fraud or imposition, and except where the parties stand in some peculiar predicament, by reason of age or condition, such as expectant heirs, sailors, and the like, courts of equity only interfere in the most extraordinary cases. The fact that a bargain is a very hard or unreasonable one is not in itself sufficient, and that is all that can be said of the contract in the present case.

But that part of the judgment which decrees that, upon the failure of plaintiff to pay the amount remaining unpaid on the mortgage, all his right and title to the mortgaged premises shall cease and determine, and the title of the defendant thereto shall be good and valid, and plaintiff shall be barred from asserting any claim, interest, or title to said premises, is unwarranted and erroneous. The proper judgment would be that upon the failure of plaintiff to pay the said amount within the time specified by the court the action be dismissed. Cowing v. Rogers, 34 Cal. 655; Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225. Although plaintiff cannot have his title quieted, under the facts here presented, while the money for which the mortgage was given remains unpaid, still the defendant can have no affirmative remedy for his outlawed debt, which the judgment, as it stands, would give him. If plaintiff were suing in his own right, it might, perhaps, be plausibly argued that by his complaint he waived the defense of the statute of limitations against the barred debt of defendant; but an administrator will not be permitted to waive either the general statute of limitations, or the failure of a party to present his claim. The judgment must therefore be modified as above indicated.

The cause is remanded, with directions to the superior court to modify the judgment as above indicated by striking therefrom all of the clause immediately preceding the last clause therein, commencing with the words, in folio 72 of the printed transcript, "It is further ordered," and ending with the words, in folio 73, "said premises or any part thereof," and by inserting instead thereof a provision that, if the plaintiff shall not pay the amount found to be unpaid upon the mortgage within a specified time after the entry of the modification of the judgment,—the time to be fixed by the superior court,—then this action shall be dismissed. In all other respects the judgment appealed from is affirmed. Neither party is to recover costs of this appeal.

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110 Cal. 69

FIRST NAT. BANK OF FRESNO v. DUSY et al. (No. 18,409.)

(Supreme Court of California. Nov. 14, 1895.)

COURTS—POWER TO CORRECT DECREE—ACTION TO FORECLOSE MORTGAGE—EVIDENCE.

1. In an action to foreclose a mortgage and a pledge of stock, the court found that the stock was assigned to plaintiff, and was held as security for the payment of the note; but the judgment failed to make any disposition of the stock, and directed only the sale of the land to satisfy the judgment. *Held*, that the failure to include such stock in the judgment was an error of law, which the court could not correct on motion, after the judgment was entered.

2. In an action to foreclose a mortgage and a pledge of stock, it appeared that the mortgagor gave the mortgage and a certain other note as an additional security for the note secured by the pledge, and that plaintiff claimed only the amount due on the latter note. *Held*, that it was not error to admit in evidence the former note and mortgage.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by the First National Bank of Fresno, a corporation, against Frank Dusy and Samuel Davis, to foreclose a mortgage and a pledge of stock. From a judgment for plaintiff, defendant Dusy appeals. Modified and affirmed.

Wiley J. Tinnin, for appellant. Geo. E. Church, for respondent.

HAYNES, C. Action to foreclose a mortgage and a pledge of water stock. Findings and decree passed in favor of the plaintiff, and Dusy, the debtor and mortgagor, appeals from the judgment, and from an order denying a new trial. The demand sought to be foreclosed was a promissory note for $1,900, made by Dusy to the plaintiff December 28, 1889, payable on demand. Said note also provided that in case of suit a reasonable attorney's fee should be allowed by the court. As security for the payment of this note, Dusy assigned to the bank 16½ shares of the capital stock of the Fowler's Switch Canal Company. The complaint further alleged that on December 20, 1892, defendant Dusy, as further security for the payment of said note, executed and delivered to O. J. Woodward his promissory note of that date, for $4,500, payable on demand, and at the same time executed to said Woodward a mortgage on certain real estate therein described, which note and mortgage Woodward duly assigned and transferred to the plaintiff, and prayed for judgment for the amount of said first-named promissory note, with interest as therein provided, and for the sum of $200 as a reasonable attorney's fee in the action, and that said mortgaged premises and said water stock be sold to satisfy the same. Defendant's demurrer to the complaint was overruled, and defendant Dusy answered, and denied that the mortgage described in plaintiff's complaint is a lien on any of the property described therein, and also denied that the note for $4,500 and the mortgage were executed to Woodward to secure the payment of said $1,900 note, and alleged that said $4,500 note and mortgage were delivered to Woodward in trust to take up and deliver to the defendant three of defendant's promissory notes, one of said notes being the one for the sum of $1,900, mentioned in plaintiff's complaint, and that all three of said notes aggregate the sum of about $4,500; that Woodward violated said trust, in that he failed to take up said notes, or either of them, and that he had placed said mortgage on record as a lien on defendant's property, and that he transferred said $4,500 note to plaintiff without the knowledge and consent of the defendant, and in violation of his said trust and agreement; that the bank took said transfer with full knowledge of the trust and agreement between Woodward and defendant; and that said note and mortgage were without any consideration whatever. Defendant also filed a cross complaint, setting out substantially the same facts, and prayed for judgment against the plaintiff for his costs. Plaintiff answered the cross complaint, denied that Woodward agreed in any way whatever to take up or cancel any of defendant's notes as a condition of the execution of said note and mortgage, and alleged, as was alleged in the complaint, that defendant executed and delivered said note and mortgage as further security for the payment of said note for $1,900. The findings were in favor of the plaintiff upon all the issues, and judgment was entered thereon. It appeared from the evidence that at the time the note for $4,500, and the mortgage to secure the same, were executed, Dusy was indebted to the Bank of Selma upon two promissory notes, one for the sum of about $1,300, and the other for $800, and interest on each of them; that one of these notes was secured by a pledge of stock in the Fowler's Switch Canal Company, and the other by a mortgage upon the same property mortgaged to Woodward; that Woodward was a director in the Bank of Selma, and was president and general manager of the First National Bank of Fresno, the plaintiff in this action, and that his intention was to have this mortgage as additional security for defendant's indebtedness to the Bank of Selma, as well as for the $1,900 note held by plaintiff; but the Bank of Selma was satisfied with the security already held by it, and declined to avail itself of the additional security, and in this action the plaintiff only sought to recover the amount due upon the $1,900 note, together with its costs and a reasonable attorney's fee, as provided for in said $1,900 note, as well as in the collateral note and mortgage.

The court did not err in admitting in evidence the collateral note and mortgage. That, as well as the $1,900 note, was set out in the complaint; and as it was conceded in the complaint that appellant's indebtedness to the plaintiff was only the amount of the original note and interest, and as only that sum was recovered, appellant was not prejudiced by any of the rulings upon the admission of evidence specified by appellant, whether they were technically correct or not. They need not therefore be considered in detail. It does not appear that it would have benefited appellant if plaintiff or Woodward had paid the claims held by the Bank of Selma; and, as the court found upon sufficient evidence that Woodward did not agree to pay those claims, appellant was not prejudiced by the ruling of the court upon the question whether he had paid them. These remarks also dispose of the questions put to Stroud in relation to the same matter.

It is also specified by appellant in his statement on motion for a new trial that the decision of the court is against law, in that the pleadings and evidence in said action show that defendant, to secure the $1,900 note, delivered to plaintiff 16½ shares of the Fowler's Switch Canal Company's stock, and that no finding is made in regard thereto, and that the judgment neither orders said shares of stock to be sold nor to be delivered to defendant, and that said shares of stock are left in the hands of plaintiff without any consideration to defendant. The third finding is to the effect that appellant assigned said stock to the plaintiff, and that plaintiff now holds said stock as security, and that said stock is evidenced by the certificate issued to O. J. Woodward as trustee, and numbered 463. It is true, however, that neither the order for judgment nor the judgment as entered made any disposition of said stock; and this omission presents the principal question in the case.

The findings in said cause were filed and judgment entered on the 28th of April, 1894, and notice of defendant's intention to move for a new trial was given on May 8th. Appellant's statement on motion for a new trial was served on plaintiff's attorney June 6, 1894. On June 18, 1894, the plaintiff served and filed notice that on the 23d of June, 1894, the plaintiff would move the court to amend the conclusions of law filed in said action by inserting after the word "mortgage," in a designated place, the words "together with the said sixteen and one-half shares of stock"; and also to amend the judgment herein by inserting in a designated place the words "together with the sixteen and one-half shares of stock also described therein." This motion was based upon an affidavit made by counsel for the plaintiff: "That, by mistake and inadvertence, said court omitted to find, as a conclusion of law, that the said plaintiff is entitled to have said shares of stock sold, and the proceeds applied to satisfy said judgment so made and entered herein; and, by like inadvertence, the judgment so made, given, and entered herein failed to provide that said shares of stock be sold, and the proceeds applied to the payment of said judgment." Defendant's counsel objected to the consideration of the motion: First, "that the judgment therein had been duly given or made, rendered, and entered in said action, and that also the said matter was then pending on motion for a new trial, and was without the jurisdiction of the court"; second, "that the said motion and the said affidavit were each irrelevant, incompetent, and immaterial, in that the findings and conclusions of law and judgment had been rendered and entered." The court overruled these objections, and ordered the clerk to amend the conclusions of law as requested by plaintiff, and also to amend the judgment by inserting the words stated in said notice of motion; and to this ruling of the court, and the order so made, the defendant excepted.

Counsel for respondent, upon this point, says that "the only change made was to make the judgment entered conform with the judgment as pronounced by the court." If that were true, there would be no question as to the power of the court to make the amendment. But the water stock was not included in or affected by the order of the court upon which the judgment as originally entered was based. The conclusions of law were, in substance, simply that the plaintiff was entitled to a judgment for a specified sum of money, with a specified sum as attorney's fees and costs of suit; that the said amounts were a valid lien upon the lands and premises described in the complaint; and that plaintiff is entitled to have said premises sold according to law, and the proceeds applied, etc.; and concludes with the order, "Let judgment be entered accordingly." It is clear that the judgment as originally entered was in precise accordance with the conclusions of law and the order of the court. Whether the water stock should be sold at all to satisfy the plaintiff's claim, or whether it should be sold before resorting to the real estate embraced in the mortgage, or whether the stock should be surrendered to the defendant, were judicial questions, which the court failed to pass upon, and this failure was an error of law which it was not in the power of the court to correct upon motion. It is true the complaint alleged a lien upon the stock, and prayed that it might be sold as well as the real estate, and the court found, as a fact, that the stock was assigned to the plaintiff, and was then held as security for the payment of said $1,900 note, and no reason appears upon the face of the judgment roll why it should not be sold in satisfaction of the plaintiff's judgment. But, as said above, the making of an order that it be sold involves judicial action, and we think the better rule is, as to such omissions or mistakes, that it is not in the power of the court, after the entry of judgment, to make a new order directing the sale of other property than that embraced in the original order and the judgment entered thereon; that such direction would be equivalent to exercising a revisory power over the judgment itself by the same authority that pronounced it. See Freem. Judgm. § 70, and cases cited in note 2. The same author, in the same section, says: "To entitle a party to an order amending a judgment, order, or decree, he must establish that the entry as made does not conform to what the court ordered." And, again: "On the one hand, it is certain that proceedings for the amendment of judgments ought never to be permitted to become revisory or appellate in their nature; ought never to be the means of modifying or enlarging the judgment or the judgment record, so that it shall express something which the court did not pronounce, even though the proposed amendment embraces matters which ought clearly to have been so pronounced."

The decision of the court, referred to in sections 632 and 633 of the Code of Civil Procedure, when filed, amounts in law to a rendition of the judgment. Water Co. v. West, 99 Cal. 347, 33 Pac. 928. "The rendition of a judgment is a judicial act. Its entering upon the record is merely ministerial." Crim v. Kessing, 89 Cal. 478, 26 Pac. 1074. In Sichel v. Carrillo, 42 Cal. 507, the question whether conclusions of law could be changed before the entry of judgment thereon was made, but not decided. In Condee v. Barton, 62 Cal. 1, it was held that the conclusions of law first announced were not final and beyond the reach of the court, so as to preclude the court from changing them at any time before the judgment is entered. In Broder v. Conklin, 98 Cal. 362, 33 Pac. 211, it was said that section 633 of the Code of Civil Procedure "requires the court in giving the decision to state the facts found and the conclusions of law separately, and provides that, after the decision has been given, judgment must be entered accordingly. The judgment which is to be entered upon the decision is the sentence of the court in conformity with the conclusion of law, and must find its basis therein"; and it was further said that "they [the conclusions of law] may be changed by the court any time prior to the entry of judgment"; citing Condee v. Barton and Crim v. Kessing, supra. See, also, In re Cook's Estate, 77 Cal. 229, 17 Pac. 923, and 19 Pac. 431, where Condee v. Barton, supra, is cited.

I do not find any case in this state where the question as to the power of the court to change or add to its conclusions of law after the entry of the judgment has been expressly decided; but the language used in the cases above cited, inferentially at least, limits the power of the court in this regard to a period which expires with the entry of the judgment. In Egan v. Egan, 90 Cal. 21, 27 Pac. 22, it was said: "It clearly appears in the present case that the matter contained in the amendment made by the order appealed from was not omitted from the judgment by reason of any neglect of the clerk in recording the same, but was intentionally excluded therefrom by the court itself at the time it rendered the judgment. If it should be admitted that the court ought to have included the provisions of this stipulation in its decree, its failure to do so was an error, resulting either from a misconception of the law applicable to the facts before it, or from a failure to give sufficient consideration to those facts. In either case it was an error of law committed at the trial, which the defendant should have sought to remedy through her motion for a new trial." The principle there decided, we think, is conclusive of the question under consideration. This conclusion, however, is strongly supported by the case of Forquer v. Forquer, 19 Ill. 71, where it was said: "This was not a clerical mistake of the clerk in entering up the decree which was rendered by the court, but was an error of the court in rendering the decree, which should be reversed on error. There is nothing to show that the court noticed the prayer of the bill that the rights of the widow, in the lease, should be reserved to her in the sale to be made of the premises, and that the judge intended to reserve such right in the decree. The draft of the decree was drawn by the complainants' solicitor, and he swears that he inadvertently omitted to insert the saving clause, according to the prayer of the bill. The presumption is that the court inspected the draft thus drawn, and pronounced it as the decree of the court without critically comparing it with the bill, and hence was inadvertently led into the error which undoubtedly exists in the decree. The clerk correctly copied into the record the draft of the decree as it was rendered. If the judge's minutes showed that there was a saving clause, we might presume that the draft prepared by the solicitor did not express the whole of the decree, and that the clerk had, by mistake, omitted to enter the saving clause in the decree, when the amendment might have been authorized by the statute of jeofails; but there is nothing to show that the court had an intention to insert such saving clause. This, then, was clearly a judicial, and not a clerical, error, which can only be corrected in this court."

We cannot say that the omission of the court to dispose of the water stock by the decree was not prejudicial to appellant, and, as it was clearly erroneous, the motion for a new trial should have been granted. The amendment of the order for judgment, and the amendment of the judgment itself, being unauthorized and beyond the jurisdiction of the court, and therefore void, did not change the situation. If the motion for new trial should have prevailed, the amendment not having been made, it should have been granted notwithstanding the amendment. But, as the pledge of the water stock was admitted by the answer, the stock should have been included in the order for judgment, and in the judgment and order of sale.

The cause should be remanded, with directions to the court below to amend its order for judgment, and the judgment therein, so as to include said water stock in the order of sale, and directing that said water stock shall be first sold, unless the defendant shall otherwise direct; and the judgment, as so amended, should be affirmed, appellant to recover his costs on this appeal.

We concur: BRITT, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that this cause be remanded to the court below, with directions to modify the judgment so as to include said water stock in the order of sale; and, as so modified, the judgment be affirmed, appellant to recover his costs on this appeal.

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108 Cal. 450

In re LEVINSON'S ESTATE. (No. 15,916.)

(Supreme Court of California. Nov. 23, 1895.)

APPEAL — REMITTITUR — MODIFICATION OF JUDGMENT.

A motion on appeal for a modification of a judgment for payment of costs must be made before the remittitur issues.

In bank.

Judicial settlement of the accounts of J. W. Goodwin, administrator with the will annexed of John Levinson, deceased. An order allowing the account with the exception of one item was, on appeal, modified and affirmed. On motion to modify judgment for payment of costs. Denied.

For former opinion, see 41 Pac. 483.

PER CURIAM. Motion to recall the remittitur herein for the purpose of securing a modification of the direction made therein for the payment of the costs of the appeal. Without reference to the merits of the motion, it comes too late. The remittitur was regularly issued on September 6, 1895, and this motion was not noticed until October 18th following. If respondent desired a modification of the judgment in any respect, the proper application should have been made before the going down of the remittitur. Gray v. Palmer, 11 Cal. 341. When the remittitur has been duly and regularly issued, without inadvertence, we have no power to recall it. This court thereupon loses jurisdiction of the cause, except in a case of mistake, or of fraud or imposition practiced upon the court, neither of which elements appear in this case. People v. Sprague, 57 Cal. 147; Rowland v. Kreyenhagen, 24 Cal. 52. Motion denied.

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110 Cal. 155

PEOPLE v. JAMES et al. (Cr. 41.)

(Supreme Court of California. Nov. 25, 1895.)

FORGERY—INDICTMENT—VARIANCE—IDEM SONANS.

1. Though furnishing intoxicating liquors to Indians is prohibited by law, Indians may be convicted of forging an order to furnish liquor to "bearer."

2. The names "Crusius," as alleged in an indictment, and "Crushes," as shown by the proof, are idem sonans.

Department 1. Appeal from superior court, Del Norte county; James E. Murphy, Judge.

Henry James and W. H. Miller were convicted of forgery, and appeal. Affirmed.

R. W. Miller and Eugene McNamara, for appellants. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. Defendants were convicted of forgery, the charge being that, with intent to defraud Frank Crusius and Gottlob Hess, they forged a false and fraudulent order for the delivery of chattels, in these words: "March 26, '95. Please give to bearer 5 gal. beer, and oblige, Frank Crushes," —and passed said order upon Gottlob Hess.

1. The evidence discloses that the defendants are Indians, and it is urged in their behalf that inasmuch as the sale or furnishing of intoxicating liquor to Indians is positively prohibited by law, and made a felony, the order in question was without legal efficacy and void, and therefore not the subject of forgery; that, even if genuine, it was not an instrument which the defendants were capable in law of making use of, because the person upon whom it was drawn was not permitted to honor it; and, consequently, that the false making of it could not operate to the injury or defrauding of any one, and for that reason the act did not constitute forgery. This argument assumes that the supposed infirmity of the forged paper appears upon its face, and consequently was bound to be taken notice of by the person upon whom it was drawn. But such is not the fact. The paper is drawn to bearer, and, assuming defendants' position to be true in the instance of a paper disclosing its invalidity upon its face, this paper, in the hands of other than an Indian, was susceptible of being made the engine of fraud and injury. In this view, the fact that it was presented and passed by the defendants is wholly immaterial, and may be laid out of consideration as a false factor. If, upon its face, the paper is capable of being used to defraud those who may act upon it as genuine, it is within the statute. People v. Monroe, 100 Cal. 664, 35 Pac. 326, and cases there cited. In that case substantially the same objection was made as here, and it is there said by Mr. Justice Garoutte, speaking for the court: "There is no question but that a writing which is a nudum pactum is not the subject of forgery; but a contract which a court will not enforce, or even recognize, because it is against the policy of the law, cannot be termed a 'nudum pactum.' A forged contract, even though it covers a subject-matter which makes it void as against public policy, upon its face may present such an appearance that, if genuine, it might injure another, and such a one satisfies the test which we have laid down." In People v. Krummer, 4 Parker, Cr. R. 219, replying to a like objection, it is said: "We are never called upon to determine whether in legal construction the false instrument or writing is an instrument of a particular name or character. It is a matter of perfect indifference whether it possesses or not the legal requisites of a bill of exchange, or an order for the payment of money, or the delivery of property. The question is whether upon its face it will have the effect to defraud those who may act upon it as genuine, or the person in whose name it is forged. It is not essential that the person in whose name it purports to be made should have the legal capacity to make it, or that the person to whom it is directed should be bound to act upon it if genuine, or have a remedy over." Tested by these principles, the contention of defendants cannot be sustained.

2. The objection that the demurrer to the information should have been sustained because it is alleged that the intent was to defraud one "Frank Crusius," and the forged instrument alleged is signed "Frank Crushes," is without merit. Within the doctrine of idem sonans, there is no material variance or difference in the names.

The judgment and order denying a new trial are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

110 Cal. 60

WHITE v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

(S. F. 118.)

(Supreme Court of California. Nov. 13, 1895.)

CERTIORARI—WHEN LIES—FINAL ORDER IN CONTEMPT.

1. On a petition for writ of certiorari to review an order of court, facts affecting the validity of the order can only be considered as they affect the question of jurisdiction.

2. Certiorari will not issue to review an order of court adjudging the petitioner guilty of contempt in disposing of his property in violation of a decree of divorce enjoining him from so doing, on the ground that the restraint is perpetual, since it is an error which can be corrected by appeal.

3. Certiorari will not issue to review a final order of guilty in contempt proceedings because of an erroneous ruling on a plea of former jeopardy, since the plea does not go to the jurisdiction.

4. After a cause has been assigned to one department of the superior court, a transfer to another department, though irregular, will not render proceedings in the latter for contempt of an order made by the former, while the cause was under its control, void for want of jurisdiction, and subject, therefore, to review by certiorari, since the jurisdiction of causes is by the constitution (article 6, § 6) vested in the court, and not in departments.

In bank.

Petition by George E. White against the superior court of the city and county of San Francisco for a writ of certiorari. Writ denied.

Barclay Henly and Edward Lynch, for petitioner. Henry E. Highton, for respondent.

VAN FLEET, J. Application for certiorari to review an order of said court (department 4 thereof) adjudging petitioner guilty of contempt.

In the case of George E. White vs. Frankie White, pending in said superior court, wherein petitioner is the plaintiff, the superior court entered a decree divorcing the parties; and by said decree, after reserving the property rights of the parties for future consideration, it is provided: "That until the further, supplemental, and final decree aforesaid is duly entered, recorded, and carried into effect, the plaintiff, his agents, attorneys, trustees, employés, and servants, and each of them, be, and they hereby are, enjoined and restrained from selling, conveying, alienating, assigning, transferring, mortgaging, hypothecating, incumbering, or in any manner disposing of, embarrassing, complicating, or affecting the community property of the plaintiff and the defendant, real and personal, or any part or portions thereof, and his own separate property, real and personal, including all moneys and securities the plaintiff has on hand, and the income derived from said property, or any part or portions thereof, except that plaintiff may be permitted to pursue and carry on his usual and ordinary business; and, with respect to the whole of said property, from doing or permitting or suffering to be done any act or acts in violation of the rights, or any of them, of the defendant respecting the subject of this action, or tending to render the judgment or decree in favor of the defendant, or any part thereof, ineffectual." Subsequent to the entry of said decree, the superior court appointed a receiver in said action, and directed him to take possession and control of all the property of petitioner, and hold it subject to the direction and control of the court. The proceeding for contempt against petitioner was commenced since the making of the decree and order aforesaid, and the acts charged as constituting such contempt were in making two certain leases of his lands, in violation of the injunction contained in said decree, and in interfering with and obstructing the receiver in the efforts of the latter to take possession of said property. Petitioner, having been duly cited and tried, was found guilty of the acts charged, and it was adjudged that they constituted a willful contempt of said court; and petitioner was sentenced to suffer five days' imprisonment in jail, and to pay a fine of $500. He seeks by this proceeding to have the judgment of contempt annulled.

Numerous grounds are urged against the validity of said judgment, but we regard most of them as possessing little, if any, merit. Many of the allegations contained in the very voluminous petition, and a considerable part of petitioner's argument, relate to matters of fact and propositions of law which can by no possibility arise or be considered upon certiorari, for the simple reason that they in no manner involve the question of jurisdiction, but go only to that of mere error in the rulings of the superior court in the matter complained of. Nothing is better understood than that on this proceeding the single question involved is whether the lower court has exceeded its jurisdiction. If it has not, no matter how grievously it may have erred to the prejudice of the petitioner, either in matters of fact or matters of law, this writ will not afford an avenue of relief. Central Pac. R. Co. v. Placer Co., 43 Cal. 365; Whitney v. Board, 14 Cal. 479; Buckley v. Superior Court, 96 Cal. 119, 31 Pac. 8; Loaiza v. Superior Court, 85 Cal. 11, 35, 24 Pac. 707. The question being purely one of power, the mere manner in which the contempt proceeding was tried, the rulings of the court upon the admissibility of evidence, and kindred matters, are things wholly without the range of our investigation. Nor can we look into the evidence to inquire as to its sufficiency to sustain the finding and conclusion of the superior court. If the court had jurisdiction, and the recitals of the judgment or order are sufficient to sustain it, those recitals are conclusive upon us in this proceeding. We are confined to the record. "If the order is one which the court had power to make, it is not for us to inquire whether this power was properly exercised or not. The writ of review is not a writ of error." Von Roun v. Superior Court, 58 Cal. 358. "The mere grounds upon which the determination was reached may or may not be correct in themselves. These may be supported by evidence inadmissible when tested by the rules governing the introduction of evidence. The reasons given for the conclusion arrived at may or may not be such as address themselves to the judgment of others; but erroneous views entertained, or incorrect reasons assigned, or evidence erroneously admitted in deciding the controversy, do not make a case of want of jurisdiction." Central Pac. R. Co. v. Placer Co., supra. In Ex parte Ah Men, 77 Cal. 198, 19 Pac. 380, it is said: "Nearly all of the objections urged against the validity of the judgment convicting petitioner of a contempt are answered by the recitals in the judgment itself. If the record were silent as to the jurisdictional facts, jurisdiction would be presumed; but the judgment itself recites all the facts necessary to the exercise of jurisdiction by the court. * * * The matters adjudicated are conclusive, and no evidence dehors the record can be received to impeach them." See, also, Ex parte Sternes, 77 Cal. 156, 19 Pac. 275; Farmers' & Merchants' Bank v. Board of Equalization, 97 Cal. 318, 32 Pac. 312; Buckley v. Superior Court, 96 Cal. 119, 31 Pac. 8.

These considerations strip the case of much of its bulk, and render it unnecessary to notice in detail many questions raised, which it will readily be perceived are swept aside by the principles above announced.

Within those principles falls the objection that the superior court had no power to put the restraint upon petitioner's right to dispose of his property which it does by the injunction contained in its decree, and, consequently, that petitioner was guilty of no contempt for violating it. It is not questioned that the court had jurisdiction of the action for divorce, and power to put a proper restraint upon the disposition of the property, pending the final determination of the rights of the parties therein; but it is claimed that the restraint here is practically perpetual, and that this it was beyond the power of the court to make. It is perfectly obvious that this, if true, would not amount to an excess of jurisdiction, but an error, merely, which could be corrected upon appeal; and, until so corrected, the decree would be obligatory upon the parties, and they would violate its terms under pain of contempt. In re Cohen, 5 Cal. 494.

Within the same general principles is the further objection that the facts alleged in the petition show that the petitioner has been twice in jeopardy for the acts for which he was convicted of contempt. In Muir v. Superior Court, 58 Cal. 361, in passing upon the same objection, the court say: "The defense of a former adjudication does not go to the jurisdiction of the court. In this case, when the question of whether the contempt charge has been before adjudicated was raised, the court had the same power to pass upon it as it had to pass upon any other question in the case; and, if it erred in holding that there was not such former adjudication, as claimed, the error cannot be reviewed upon certiorari. That writ lies only in cases where the inferior tribunal has exceeded its jurisdiction."

This leaves substantially but one objection to be disposed of. It is claimed that neither the department of said court in which the contempt proceeding was tried, nor the judge thereof, ever acquired jurisdiction of said cause or of the parties, for the reason, as it is alleged, that said divorce action was never lawfully transferred thereto. This contention is based upon the fact, set forth in the petition, that the action was originally assigned for trial to department 1 of said court, and after being there partially disposed of, and said decree of divorce entered therein, was by the presiding judge of said court transferred for further disposition to said department 4, wherein the judgment of contempt was entered. The rule of said court providing for the method of transferring a cause from one department to another is set out, and facts are alleged showing that the order transferring the action of White vs. White was not made in accord with the requirements of that rule, but in disregard and violation thereof; and it is urged that, by reason of this fact, department 4 and the judge presiding therein never became vested with power to hear or determine said contempt, and that its judgment in the premises is void. But, taking the facts to be true,—and they are not denied,—they in no way involve the question of jurisdiction. The jurisdiction of causes is vested by the constitution in the court, not in any particular judge or department thereof. The constitution, in fact, says nothing about departments. It provides that there may be as many sessions of the court at the same time as there are judges (section 6, art. 6); but, whether sitting separately or together, the judges hold but one and the same court, and the jurisdiction they exercise in any cause is that of the court, and not the individual. The division into departments is purely imaginary, and for the conveniences of business and of designation. Transferring a cause for trial or disposition from one of those departments to another does not effect a change or transfer of the jurisdiction of that cause; that remains at all times in the court as a single entity. The same section of the constitution provides that the judges of the superior court of the city and county of San Francisco shall choose a presiding judge from their number, who "shall distribute the business of the court among the judges thereof, and prescribe the order of business"; and it seems that the judges of that court have adopted rules for the guidance of the presiding judge in the performance of that duty, which it was competent for them to do, so long as those rules violate no express or implied provision of law. But it is perfectly obvious that, however proper those rules may be, or however desirable or essential to the impartial and orderly conduct of the business of the court that they should be adhered to, their violation in any instance cannot affect the jurisdiction of the court over a cause. The power to distribute and regulate the business of the court resting with the presiding judge, though it be exercised in a grossly unfair and arbitrary manner, is not an excess of power, but an abuse of it. The remedy for such abuse rests in the hands of the judges of that court, since they have the power to remove that functionary at their pleasure, and substitute another in his stead. And possibly, in an instance where the violation of the rules of the court by the judge, without notice to a party litigant, worked the latter an injury, by depriving him of some substantial right, the act would amount to an irregularity which could be corrected on appeal. Callahan v. Hickey, 63 Cal. 438. But we do not understand that, after a cause has been once assigned, it may not be reassigned or transferred, even irregularly, without jeopardizing the jurisdiction of the court therein. The power of the presiding judge in the premises is not exhausted by the original assignment of an action or proceeding. Such construction would tend to impede, rather than facilitate, the administration of the business of the court, and defeat in large part the very purpose of the provision in question.

We have considered the other points made, but, as they are all in our judgment covered by what has been already said, they require no special notice. We are satisfied that the record does not disclose an excess of jurisdiction, and consequently no case is made for our interposition by the remedy of certiorari. It follows that the writ should be dismissed, and it is so ordered.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.; McFARLAND, J.; HENSHAW, J.

109 Cal. 437

SCHULTZ et al. v. McLEAN et al. (No. 19,457.)

(Supreme Court of California. Oct. 9, 1895.)

CONTINUANCE—PLEADING—AMENDMENT — DEMURRER—TRIAL—OBJECTIONS WAIVED—EVIDENCE—REVIEW.

1. On the third trial of a cause wherein plaintiff has had a continuance by stipulation, a motion for the further continuance, to amend his complaint and obtain evidence, is properly denied where the affidavit neither shows the amendments desired nor alleges want of evidence to support the amended complaint.

2. Error in refusing to grant a continuance to amend a pleading is waived by the subsequent filing of an amended pleading.

3. On the third trial of a cause, an allowance of 24 hours after denial of a continuance, within which to amend the complaint, will be deemed sufficient, where it is not claimed that the amended pleading filed within that time did not contain all the desired averments, or that the brief time allowed rendered their presentation defective, and it appears that plaintiff, some time previous to the motion, knew in what particulars he desired to amend.

4. Time within which to demur to an answer to an amended complaint is properly denied where plaintiff does not show that the answer is subject to demurrer, and that some advantage will be gained by the demurrer.

5. After a third trial of a cause, an order to proceed to trial after the filing of an answer

to the amended complaint, without allowing plaintiff time for preparing for trial, will be deemed proper where plaintiff does not claim want of evidence to rebut affirmative matter in the answer, the cause was set for trial by stipulation, and his affidavit for a new trial does not show that he had any other evidence.

6. Code Civ. Proc. § 443, fixing the time within which to demur to an answer, applies only to an answer to the original and not an amended complaint, the allowance of a demurrer in the latter case being within the discretion of the court.

7. An appearance by plaintiff before a judge, and obtaining rulings from him on motions presented, with knowledge that he has acted as counsel for defendant, is a waiver of his right to urge the disqualification of the judge on that ground.

8. Under Code Civ. Proc. § 592, the submission of special issues to the jury is within the discretion of the court.

9. Where the evidence is not in the bill of exceptions, it will be assumed that it was sufficient to support the findings of the court.

In bank. Appeal from superior court, San Luis Obispo county; B. T. Williams, Judge.

Action by George Schultz and others against George D. McLean and another to have a deed absolute in form declared a mortgage, and for a transfer of the legal title to them on payment of the money due under the mortgage. From a judgment for defendants and an order denying a new trial, plaintiffs appeal. Affirmed.

Pierson & Mitchell and D. H. Whittemore, for appellants. T. M. Osmont and E. P. Cole, for respondents.

HARRISON, J. 1. When this action was called for trial in the superior court the plaintiffs moved for a continuance, and its denial is assigned by them as one of the errors of law committed at the trial. In connection with their motion for a continuance, the plaintiffs filed affidavits setting forth the history of the case, and stating that it would be required to file an amended complaint, and that until such amended complaint was filed and issue joined thereon, and a reasonable time allowed for the purpose of procuring the necessary evidence, the cause could not be tried. The cause had been tried twice before, and the judgments rendered in favor of the plaintiffs reversed by this court. The complaint upon which the last trial had been had was filed July 30, 1889, and the answer of the defendant McLean was filed August 3, 1889. Robinson made no answer, and his default had been entered. The cause was tried upon these issues, and judgment rendered in favor of the plaintiffs, April 30, 1890. From this judgment, McLean appealed, and the judgment against him was reversed February 9, 1892, and the cause remanded for a new trial. 93 Cal. 329, 28 Pac. 1053. Robinson took a separate appeal from the judgment, and October 4, 1892, upon the stipulation of the plaintiffs, confessing error, the judgment against him was reversed, and the remittitur filed in the court below October 9, 1892. In reply to this motion of the plaintiffs, it was shown on the part of the defendants that in August the cause had been set for trial on the 12th of September, and that prior to that date, at the request of counsel for the plaintiffs, the defendants' counsel had consented to a continuance of the trial to some time in October, and that on the 3d of September a stipulation was made by the attorneys for the respective parties, consenting that the cause might be set for trial "at any time between the 5th and the 15th days of October, 1892, that may suit the convenience of the judge called to try the same," and that pursuant to this stipulation the cause was, by order of the court, set for trial on the 11th day of October. The court thereupon denied the motion. The plaintiffs did not claim that they were unable to proceed to trial upon the issues as they then stood upon the record, or that they were unable to present all the evidence necessary to establish the averments of their complaint, nor did they designate to the court any particulars in which they desired to amend their complaint, or that they desired to present any different issues from those upon which the cause had been previously tried; and, in view of the fact that before they went to trial they filed an amended complaint, it must be held that, so far as the motion was made upon this ground, it was removed by the filing of such complaint. At the time the motion was made, the court was not informed of the nature of the amendments that the plaintiffs desired to make to the complaint, or that they were unable to establish the averments that they might include in such amended complaint; and in the absence of some showing of this nature, and in view of the fact that the cause had been twice tried, the court was justified—at least until they had asked leave to amend their complaint, and pointed out the particulars in which they desired to amend it—in assuming that they were prepared to establish their cause of action.

2. After the denial of this motion, the plaintiffs asked leave to file an amended complaint, and that a reasonable time might be granted them therefor. The court gave them the leave, but directed that it should be filed within twenty-four hours. The plaintiffs insisted that this was too short a time, and excepted to the order upon the ground that the time allowed therefor was insufficient. We cannot perceive any error in this action of the court. It is not claimed on behalf of the appellants that the amended complaint which they filed does not contain all the averments which they desired to incorporate therein, or that, by reason of the brief time which was given for its preparation, it does not properly present their cause of action. In view of the previous trials of the cause, and the rulings of this court upon the previous appeals, the court was justified in assuming that the facts, as well as the mode of presenting them, were familiar to the plaintiffs. The reversal of the judgment against Robinson was

upon their own confession of error, and was granted by the court at their request, and not by reason of any consideration of the court itself, and the plaintiffs did not by such reversal first learn of the necessity for an amendment to their complaint. Their stipulation, after becoming aware of the error upon which they consented to a reversal of the judgment, that the cause might be set down for trial for some time between the 5th and 15th days of October, shows that they must have known at that time the particulars, if any, in which they desired to amend their complaint.

3. Upon the filing of the amended complaint, Robinson demurred thereto, and after argument thereon the demurrer was overruled, and, Robinson declining to answer, his default was entered. McLean filed his answer the next day after the amended complaint was filed, and the court thereupon ordered the parties to proceed to trial. The plaintiffs objected thereto upon the grounds that they were entitled to a reasonable time after issue joined within which to prepare the cause for trial, and that they had not had sufficient time within which to examine the issues involved in the action, and that they also had the statutory right to at least 10 days after service of McLean's answer within which to demur thereto, and to raise an issue of law thereon, before being compelled to try the issues of fact. Their objection was overruled, and they excepted thereto. The answer of McLean consists chiefly of denials of the averments in the amended complaint, and of a plea of the statute of limitations, and an averment of good faith in making the purchase of the lands involved in the action. The plaintiffs did not claim that witnesses by whom to establish the facts alleged by them were not at hand, or that any evidence was wanting with which to rebut the affirmative matters shown by the answer; and inasmuch as the cause had been set for trial on the 11th of October, with their consent, and with the presumption that they knew the points in which they intended to amend their complaint, it would have shown a want of diligence on their part not to have had the witnesses present with which to proceed to trial. Upon their motion for a new trial they did not present any affidavits showing that they had any other evidence, or that any facts could be presented by them in addition to those which they did present at the trial which then took place. Their claim of the right to time within which to demur to the answer is untenable. They did not then suggest any ground of demurrer, nor did they afterwards upon the motion for a new trial, nor have they upon this appeal specified any grounds upon which they could have demurred to the answer, or that there was any issue of law which they desired to have determined before the issues of fact were tried. Unless it is made to appear that an answer is subject to demurrer, and that the plaintiff could have derived some advantage by demurring to it, he cannot claim to have been deprived of any right because he is not granted time to determine whether he will demur. The provisions of section 443, Code Civ. Proc., are applicable to the original pleadings in a cause, and not to pleadings which are amended at the trial, or during its progress. The court has the same right to exercise its discretion in determining the time within which an answer or demurrer shall be filed to the amended pleading which it allows as it has in determining whether it will allow such amended pleading; and, unless it shall appear that it has abused this discretion, its action will not be reviewed.

4. After this motion for a continuance had been denied, the plaintiffs then objected to further proceeding with the cause upon the ground that the superior court of that county had no jurisdiction to try the same, by reason of an order having been made transferring the cause to the county of Santa Barbara for trial. It appeared that on the 4th of June, 1892, an order was made, upon the application of McLean, for a transfer of the cause to the county of Santa Barbara, upon the ground that the judge of the county of San Luis Obispo was disqualified by reason of having been counsel for McLean. When this order of transfer was made, the cause had been removed from the superior court of that county, and was pending in the supreme court upon the appeal of Robinson from the judgment therein, and no notice of the motion had been given to Robinson; and, upon these matters being brought to the attention of the court, it made an order on the 18th of June vacating its previous order of transfer. The papers in the cause had not been transferred to Santa Barbara county, but remained with the county clerk of the county of San Luis Obispo. Whether the plaintiffs would have had the right, upon a proper motion therefor, to have the cause transferred to another county for trial, need not be decided. After having stipulated on September 3d that the cause might be set for trial at any time "that may suit the convenience of the judge called to try the same," and, in pursuance thereof, Judge Williams having been called to preside in that court, and the plaintiffs having appeared before him, without objection to his trying the cause, and obtained leave to file an amended complaint, and argued the demurrer thereto, they must be deemed to have waived any right to move for a transfer by reason of the disqualification of Judge Gregg.

5. Whether the court would submit special issues to a jury was a matter within its own discretion. Code Civ. Proc. § 592.

6. In their notice of intention to move for a new trial, the plaintiffs stated, as one of their grounds of said motion, the insufficiency of evidence to support the findings; but

they have not incorporated into the bill of exceptions any of the evidence that was given at the trial, or specified any particular in which it was insufficient. It is stated in the bill of exceptions that at the trial they produced before the court their evidence tending to prove the allegations of their amended complaint, and also evidence in rebuttal of that introduced by the defendant. It must therefore be assumed that the evidence fully sustained the findings of the court. The judgment and order are affirmed.

We concur: GAROUTTE, J.; McFARLAND, J.; VAN FLEET, J.; HENSHAW, J.

110 Cal. 219

MORONEY v. HELLINGS et al. (No. 15,874.)

(Supreme Court of California. Nov. 29, 1895.)

FORCIBLE DETAINER—FAILURE OF LANDLORD TO REPAIR.

Under Civ. Code, § 1942, authorizing the tenant, on refusal of the landlord to repair, to make the necessary repairs, not to exceed one month's rent, or to vacate the premises, the tenant, after remaining in possession on refusal of the landlord to repair, without making the repairs, cannot defend in an action for forcible detainer, on refusal to pay rent, because of such failure to repair.

Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge. Unlawful detainer by Kate Moroney against W. B. Hellings and others. From a judgment for plaintiff, defendants appeal. Affirmed.

T. M. Osmont and T. J. Crowley, for appellants. Clement, Cannon, Kline & Stradley, for respondent.

HENSHAW, J. Appeal from the judgment. The action is one in unlawful detainer, for the forfeiture of a lease, the recovery of the possession of the demised premises, and for treble rents. Hellings and his wife were the lessees. Walk was a subtenant, and entered under the Hellings after the three-days notice to pay or vacate had been served upon them. The complaint, which is in the usual form, sufficiently pleads plaintiff's cause of action. The answer denied that any sum of money was due as rent, and, by way of cross complaint, pleaded that by the indenture of lease it was expressly agreed that all necessary repairs during the term of the letting should be made, and the expense therefor borne, by plaintiff; that during the time mentioned in the complaint, when it was claimed that rent was due and unpaid, the water pipes of said premises "became impaired and leaky, and greatly increased the monthly water rate," and caused the tenants occupying the premises to vacate; and that the plaintiff, after frequent demands, still refused to repair the water pipes, or to permit defendants Hellings to do so. All to the damage of the defendants in the sum of $260.

Complaint is made by appellants that the court failed to find upon their allegations as to defective water pipes, their demand that plaintiff make necessary repairs, and plaintiff's refusal to make them, or to permit appellants to do so. But these averments rest upon the claim that it was plaintiff's duty to make these repairs, under the lease. The lease was admitted in evidence, and the court properly found that it contained no such covenant, and that plaintiff's obligations as landlord were those only imposed upon her by law. The bill of exceptions contains all of the evidence admitted in the case, and the evidence offered and rejected. By this it appears that no leak was proved to exist. It was merely suspected that one existed, because of the size of the monthly water bills. Examination of the pipes had been made by a plumber, at the expense of plaintiff, and no leak discovered. The premises were in habitable and tenantable condition. The tenants thought a leak existed, and that it was situated under the sidewalk, between the water meter and the house. They wished to tear up the sidewalk to investigate, and plaintiff would not permit them to do so. There was upon this matter no other rights and duties between the parties than such as arose in law. In the absence of an agreement to the contrary, it was the landlord's duty to repair dilapidations which rendered the premises untenantable; and, if he did not, then the tenants had the option of making the necessary repairs, not to exceed in cost one month's rent, or to vacate, and be discharged from further liability for rent. Even if the landlord refused to allow the lessee to make such repairs, the refusal would be meaningless, and would not and could not modify or destroy the tenant's right under the Code. Civ. Code, § 1942. The failure to find becomes, therefore, immaterial, since the finding itself, even if in appellants' favor, could not have benefited them. They neither repaired nor vacated, but remained in possession, and claimed damages for the alleged condition of the premises as an offset to the rent. The averments of the cross complaint become immaterial, either in defense or as a cross complaint, and no findings were necessary upon them (Diefendorff v. Hopkins, 95 Cal. 343, 28 Pac. 265, and 30 Pac. 549), for the rights of the lessees were only those defined by the Code (Van Every v. Ogg, 59 Cal. 563; Sieber v. Blanc, 76 Cal. 173, 18 Pac. 260; Green v. Redding, 92 Cal. 548, 28 Pac. 599). For like reason the evidence rejected by the court was properly rejected, since its admission could not have aided appellants in their defense or cross complaint. It was therefore rightly excluded as immaterial. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

110 Cal. 129

FISCHER et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 121.)

(Supreme Court of California. Nov. 22, 1895.)

RECEIVER OF CORPORATION—AUTHORITY TO APPOINT—IMPROPER APPOINTMENT—REMEDY—PROHIBITION—INJUNCTION—VALIDITY.

1. A court has no power, pending an action against a corporation, to displace the corporate management, and put in its place a receiver and the court, in the absence of a statute giving it such power. Fischer v. Superior Court, 32 Pac. 875, 98 Cal. 67, distinguished.

2. There is no statute in California giving a court the power, pending an action against a corporation, to displace the corporate management by a receiver and the court.

3. Where a court undertakes, pending an action against a corporation, to displace the corporate management by a receiver and the court, without statutory authority, prohibition is the proper remedy.

4. An injunction against a stockholder of a mining corporation and others, restraining them from withdrawing certain moneys then deposited in banks or elsewhere in the name of such corporation, or in the name of a certain person appointed receiver, and from selling any of the mines of the corporation or any interest therein, cannot be said "to suspend the general and ordinary business of a corporation," within Code Civ. Proc. § 531, requiring notice to defendant of the application for the writ in such cases.

In bank. Original petition by Jacob A. Fischer and others for a writ of prohibition to the superior court of the city and county of San Francisco and others to restrain further proceedings under certain orders of such court. Granted.

Wheaton, Kalloch & Kierce, for petitioners. Crittenden & Van Wyck, for respondents.

McFARLAND, J. This is an original petition here by Jacob A. Fischer, M. A. Wheaton, and the Consolidated Golden Gate & Sulphuret Mining & Development Company, a corporation, for a writ of prohibition to the superior court of the city and county of San Francisco, and the Honorable James M. Troutt and Honorable James M. Seawell, judges of said court, and also to John F. Pinkham, a receiver appointed by said Troutt, as judge of said court, in a certain action therein pending, in which Charles J. Behlow is plaintiff and the said Jacob A. Fischer et al. defendants, commanding said court and judges and said Pinkham to desist from taking any further proceedings, etc., under the order appointing said Pinkham receiver, or under a certain injunction issued in said action, or under an order and citation by which it is proposed to punish said petitioners Fischer and Wheaton for contempt in refusing to deliver certain real property to said receiver. The proceeding in prohibition here was submitted upon a demurrer to the petition, and also an answer filed by said judges and a separate answer by said receiver Pinkham. The complaint in the action in which Pinkham was appointed receiver was filed April 19, 1895. The theory and averments of this complaint are, briefly, that in the year 1889 the plaintiff, Behlow, together with the defendant Fischer and F. C. Loftus and William C. Long, constituted a copartnership, and that as copartners they owned the mining claims and properties involved in this proceeding, and situated in Tuolumne county; that on or about September 1st of said year 1889 the said copartners, for the purpose of carrying on the business of said copartnership by said copartnership under a corporate name, agreed to organize a corporation to be called "the Consolidated Golden Gate & Sulphuret Mining & Development Company"; that the said partners should convey and transfer to said corporation their mines and mining property; that the capital stock of said corporation should consist of 60,000 shares; that 48,000 shares should be divided between said copartners, and issued to them individually, in certain proportions agreed upon, and that the remaining shares should be afterwards disposed of as they might determine, but that said corporation, when organized, should not be an independent corporation, and should be "but the name and mere medium of the copartnership in carrying on its business, and that the copartnership should be the real and beneficial owner of the property transferred into the name of said corporation." It is averred that such corporation, with the name before stated, was duly organized on or about the 20th day of August, 1889, and that on September 4, 1889, the said copartners by deed conveyed, assigned, and transferred to said corporation "all the said mining claims, real property, water rights, water ditches, water privileges, stamp mill, hoisting works, furnace, amalgamating plant, engine, boilers, water wheel, tools, implements, and other property," except a certain mining and placer claim, described, "and all other property, of whatever kind or nature, situate on, or in the course of erection, or about said mining claims and real property," and also "the moneys of said corporation then on hand." It is then averred that plaintiff, Behlow, did not get all the shares of the stock of the corporation to which he was entitled; that Fischer wrongfully procured certain shares to be issued to Behlow for his (Fischer's) benefit; that he afterwards, by false representations of the value of the mining property, induced Behlow to sell him 22,000 shares of said stock for less than their real value; that said Fischer, as president of said corporation and general manager, together with the majority of the board of directors, whom he controls, and who have conspired with him, have misappropriated dividends, and caused wrongful certificates of stock to be issued, and will so conduct the business that it will become valueless, etc., to the irreparable injury of plaintiff. There are many other averments, which need not be here mentioned, some of which, however, will be noticed hereafter. The prayer is that Fischer be required to account for moneys and personal property "of the copartnership or corporation" unlawfully appropriated by him or his agents; that certain stock held by the defendant Rozalia Fischer be adjudged to be the property of the said copartnership; that the defendants be enjoined from doing certain things with respect to the said mining properties; and that a receiver be appointed to take possession and charge of all said mining properties, "and to work, operate, and develop said mines, during the pendency of this action, and to take possession of and hold all the net profits thereof, subject to the further order of this court." The court on April 20, 1895, in accordance with said prayer, appointed said Pinkham receiver, who went to Tuolumne county to take charge of said property, and demanded the same of said petitioner, Fischer, who was in possession for said corporation under a decree and order of the superior court of Tuolumne county. The orders granting the injunction and appointing the receiver were made without any notice to petitioners or any bond from plaintiff on the appointment of the receiver. Fischer, on the advice of Wheaton, who was counsel for Fischer and for said corporation, refused to deliver possession, whereupon a citation was issued to them both to show cause why they should not be punished for contempt.

In addition to the facts set out in said complaint, the petition for this writ contains averments of these other facts: In January, 1892, the said Behlow and others commenced a certain other action in the superior court of Tuolumne county against the said Fischer, said corporation, and others. For convenience, we will call the action last above named the "Tuolumne Case," and the second action, in which Pinkham was appointed receiver, the "San Francisco Case." The Tuolumne case was substantially the same as the San Francisco case. In the former case the court, after a trial, rendered a judgment in favor of the plaintiffs therein, but upon an appeal to this court the judgment was reversed. See 102 Cal. 208, 36 Pac. 509, where the facts are very fully stated in the opinion of Mr. Justice Harrison. After the remittitur went down the pleadings were several times amended, and it was finally tried the second time upon the fourth amended complaint, in which Ed. C. Loftus and his wife, Mariam, were the sole plaintiffs, and the said Behlow was a defendant, and made answer. In that case one Lane had been appointed receiver, and continued to act as such, having possession and control of said property, until after the appointment of Pinkham in the San Francisco case. The said Tuolumne case was tried in the superior court of that county during the months of January and February, 1895; and on April 16, 1895, the said court made and entered its findings and decree, wherein it was found and adjudged, among other things, that said corporation never agreed to act, and never did act, as the agent of said copartnership, nor was any copartnership business carried on through said corporation; that it has been the owner of said mining properties since September, 1889, and since then was in full possession thereof, working it, as a corporation, exclusively in its own right, until possession was taken by said Lane as receiver; that the title of said corporation to said mining properties be quieted as against all of the defendants therein, including said Behlow; that all of said defendants be adjudged to have no right, title, or interest in or to said properties; and that said defendants, including said Behlow, be, and they were, enjoined from claiming or asserting any right, title, or interest in or to said mining properties, or any part thereof, adversely to said corporation. After entering this decree the court, on April 20, 1895, made an order that the receiver, Lane, deliver possession of said property to the said corporation, and to Fischer as its agent and manager, and such possession was given about 5 or 6 o'clock on April 23d. Immediately afterwards Pinkham, receiver in the San Francisco case, demanded possession. These averments of the petition are substantially admitted by the respondents herein, except that they assert that cerain rulings of the court in the Tuolumne case, with respect to the pleadings of said Behlow in said case, and evidence offered, prevented him from having his rights properly adjudicated therein. He was a party to that action, however, and any wrong rulings of the court touching his pleadings or evidence were mere errors, to be corrected upon appeal.

Petitioners contend that the said admitted averments of their petition, together with the fact that no previous notice had been given the corporation, show a want of jurisdiction either to grant the injunction or appoint the receiver. The general rule, no doubt, is that so harsh a measure as the appointment of a receiver to take property out of one's possession without trial will not be indulged in by a court without previous notice to the defendant. It would be unjustifiable, except where it clearly appeared that irreparable injury would be done during the few days necessary for a hearing on notice, and even in such an extreme case a temporary injunction would usually be sufficient. "A motion to appoint a receiver will not be entertained unless notice has been given to the defendant, if practicable, and the appointment will not be made without notice, save in case of irreparable pending injury." Beach, Rec. § 141, and notes. In the case at bar, if the superior court of San Francisco had known what the petitioners could have shown it on notice, it would probably not have so far disregarded the decree of the superior court of Tuolumne as to have granted an injunction and appointed a receiver in favor of one whom a court of co-ordinate jurisdiction had just enjoined from asserting any right to the property involved, especially when such property was then in the possession of the other court and its receiver. With such knowledge, it probably would not have peremptorily taken the property away from the corporation a second time until it had itself heard the merits of the controversy. Indeed, there are authorities to the point that a court has no power to appoint a receiver where one had already been appointed by another court of equal co-ordinate jurisdiction, and was in possession. In Beach, Rec. § 15, it is said: "As between courts of the same state, when a receiver has been appointed by one court, and has obtained possession of the property or fund over which he was appointed, he cannot be in any manner interfered with by a receiver subsequently appointed, or by any proceeding whatever in any other action brought in any court." See, also, Merrill v. Lake, 16 Ohio, 405; Stearns v. Stearns, 16 Mass. 167; Pugh v. Brown, 19 Ohio, 211. In Young v. Railroad Co., 2 Wood, 606, Fed. Cas. No. 18,166, the court says: "If there are any adjudicated cases which would authorize this court to interfere with the possession of a receiver appointed by another court having jurisdiction, and who is in the actual possession of the property, they have never fallen under my observation. The authorities all sustain the opposite doctrine;" citing a number of cases. Respondents contend that the rule does not apply here, because the second receiver did not attempt to take possession until after the first receiver had delivered possession to the corporation. However, as the first receiver was in possession when the order of the San Francisco court appointing Pinkham was made, it is doubtful if the validity of said order can be determined, except upon the facts existing when it was made. But whether these matters—suggested by said averments in the petition—involve considerations of mere error and abuse of discretion, or raise issues of jurisdiction, is a question which we do not deem it necessary to be here decided, because, in our opinion, the averments of the complaint show a want of power to appoint the receiver. We may remark, however, that the appointment of a receiver to take property and business out of the hands of persons in possession and claiming ownership thereof, without requiring a bond from the plaintiff in the action, would in most cases be a gross abuse of discretion.

It is to be observed that the order complained of makes Pinkham receiver of the corporation. He is to take possession of the mining properties of the corporation, and to "develop, work, operate, and run said mining claim and mill, and to employ such persons and laborers as may be necessary to continue the development and business of said mines and mining claims, and to pay out and disburse such moneys as may be necessary to work, operate, develop, and carry on the business of said mines," etc. This is to displace the corporate management, and to put into its place the receiver and the court; and it seems to be well settled that a court has no power to do this, except in cases where it has been given by statute, and that prohibition is a proper remedy for its attempted exercise. Neall v. Hill, 16 Cal. 145; French Bank Case, 53 Cal. 495; Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121; People's Home Sav. Bank v. Superior Court of City and County of San Francisco, 103 Cal. 34, 36 Pac. 1015; Harrison v. Hebbard, 101 Cal. 152, 35 Pac. 555. In Neall v. Hill, supra, where a receiver had been appointed to take possession of the property of a corporation, the court said: "It is well settled that a court of equity, as such, has no jurisdiction over corporate bodies for the purpose of restraining their operations or winding up their concerns. We do not find that any such power has ever been exercised in the absence of a statute conferring the jurisdiction." In the French Bank Case the court say: "Irrespective of the effect of the fifth subdivision of section 564 of the Code of Civil Procedure, which will be presently considered, there is no jurisdiction vested in courts of equity to appoint a receiver of the property of a corporation in a suit prosecuted by a private person. This is only to say that there is no jurisdiction vested in these courts in such a case to dissolve a corporation; for the power of a receiver, when put in motion, of necessity supersedes the corporate power." Holding directors accountable for abuse of their trust is, of course, a different thing. The general authorities on the subject are to the same effect. Beach, Rec. § 403, speaking of receivers of corporations, says, "It is, in the first place, to be remarked that the jurisdiction to appoint a receiver in these cases is wholly statutory." The question to be determined, therefore, is whether or not there is any statutory provision under which power is given a court to appoint a receiver, in a case like the one at bar, during the pendency of the suit. The question last stated was exhaustively considered in the French Bank Case. In that case a receiver had been appointed by the trial court in a suit brought by creditors of a corporation alleged to be insolvent, and upon certiorari it was held that the court had no jurisdiction to make the appointment. In that case it was held that such jurisdiction was not conferred by any subdivision of section 564 of the Code of Civil Procedure, or by any other provision of said Code, or any legislative enactment. There it was sought to maintain the appointment upon the ground, among others, that the corporation was insolvent. In the case at bar the respondents do not base their right upon the insolvency of the corporation; but, if they did, the court declared in the French Bank Case that "there is no statute of this state —none to which we have been pointed—which undertakes to confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation upon the ground that it is insolvent, or to obtain relief by seizing its property out of the hands of the constituted management, and placing it in the hands of a receiver." And this being so, what other provision of the Codes or of the statutes is there which confers the power to appoint a receiver under the facts presented in the case at bar? We cannot see any, and have not been referred to any, which confers such power. How is plaintiff's position any better than that of a creditor or stockholder? Indeed, plaintiff bases his right very largely upon the fact that he is a stockholder of the said corporation.

It is difficult to understand upon what ground the right to a receivership is based in the case at bar, or what that position is, which, it is contended, lifts the plaintiff in the case above the principles hereinbefore stated, and enables him, through the agency of a receiver, to take from a corporation the management of its affairs during the pendency of an action. Respondents seem to contend that the whole doctrine is swept aside by the mere averment that the said Consolidated Golden Gate & Sulphuret Mining & Development Company is a mere medium of a partnership, and not an independent corporation. But the complaint in the San Francisco case admits and declares that said company was duly organized as a corporation in 1889; that in said year all the mining properties involved were conveyed to said corporation, and that it has ever since been the owner in fee of said properties; that its capital stock was issued to the members of the partnership, except the shares reserved; that said capital stock is of great value, 19,200 shares thereof being alleged to be worth "not less than one hundred thousand dollars ($100,000)"; that ever since its organization, in 1889, said corporation has carried on the business of operating said mining properties, except when said receiver, Lane, appointed in the Tuolumne case, was in possession thereof; and that said corporation "asserts and claims that it is the owner and entitled to the possession of said mines, mining claims, moneys, and other property, and that it is an independent corporation, and that said partnership and the members thereof have no right, title, or interest, beneficial or otherwise, in or to said mines, mining claims, moneys, or other property." Here, then, upon the face of the complaint, we have the case of a corporation de jure and de facto, having the legal title to certain mining properties, carrying on the business of operating the same as mines, and asserting full ownership and right of possession thereof; and this is the very case in which, under the authorities, a court has no power, during the pendency of a suit by a private person, to take the control of the property and business of the corporation out of the corporate management, and give it to a receiver. And, these facts being admitted and declared, the rule is not changed, nor is any new power given the court, by the other averments of the complaint. Otherwise the rule would be worthless, and any corporation in the state, acknowledged to be in the legal ownership and possession of certain property and business, could be dispossessed of that property and business through the appointment of a receiver whenever a party saw fit to make some averment similar to those contained in the complaint in Behlow v. Fischer. The position of the plaintiff in that case is no better than that of a creditor or stockholder, neither of whom could rightfully procure the appointment of a receiver during the pendency of an action against a corporation.

The authority relied upon by respondents is the case of Fischer v. Superior Court, 98 Cal. 67, 32 Pac. 875. That was a petition for a writ of prohibition commanding the superior court of Tuolumne county to desist from acting under an order appointing said Lane receiver in the action hereinbefore designated as the "Tuolumne Case," and the writ was denied. But that decision was made upon the basis that there had been a trial and adjudication of the rights of the parties, and that the appointment of Lane was part of the final judgment and decree. He had been appointed before judgment, but judgment had been rendered in favor of plaintiffs (erroneously, as it afterwards appeared), and by the judgment he had been reappointed. This court, in its opinion in Fischer v. Superior Court, say: "The application for the writ and the order to show cause was made prior to the rendition of the aforesaid judgment, but that judgment includes the authority under which the receiver is now acting, and for that reason we shall address ourselves to the legal sufficiency of that authority." The additional words, "although the jurisdictional question presented is probably the same under either order," in no way change the decision, or make it authority upon the question of the power to appoint a receiver before judgment. The court further says, "It will not be necessary to enter into a discussion of the principles and authorities relied upon to sustain the proposition that a court of equity cannot appoint a receiver to take possession of the property of a corporation pending litigation, for petitioner's case fails before it reaches that position." Now, the power of a court to appoint a receiver, under subdivision 3, § 564, Code Civ. Proc., "after judgment, to carry the judgment into effect," is a very different thing from the power sought to be exercised in the case at bar. Whether that subdivision applies to a judgment obtained against a corporation in a suit brought by a private person is not a question arising here, but Fischer v. Superior Court is not authority to the point that in such a suit a receiver can be appointed pending the action. The judgment upon which that decision was based was afterwards reversed, and a subsequent judgment rendered in the Tuolumne case adjudging that said company was an independent corporation, owning said mining properties, and operating them for itself and on its own account.

Our conclusion is that there was no jurisdiction in the court to make the order appointing the said Pinkham receiver in the said case of Behlow v. Fischer et al., and that under the views above expressed a writ should issue, commanding the respondents herein to desist from taking any further proceedings under said order, or under the order citing petitioners to answer for contempt. This makes it unnecessary to consider other points made by petitioners,—as, for instance, that petitioners violated no order or process of the court, because there was no order or process commanding them to deliver property to the receiver, and that they did not interfere with the possession of the receiver, because he had no possession.

The injunction complained of restrains the petitioners and all of the defendants in the San Francisco case from withdrawing certain moneys then deposited in certain banks or elsewhere, in the name of said corporation, or in the name of said Lane, and from selling any of the mines of the corporation, or any interest therein. Although this injunction was granted without notice, we cannot say that its effect is "to suspend the general and ordinary business of a corporation," and that, therefore, it is invalid, under section 531, Code Civ. Proc. The remedy would be a motion in the superior court to dissolve the injunction, and an appeal from an order denying said motion. As to said injunction, the prayer of the petition is denied. It is ordered that a peremptory writ of prohibition issue, commanding the respondents to desist from taking any proceedings under the order appointing John F. Pinkham receiver, and under the order citing petitioners for contempt, as prayed for in the petition.

We concur: VAN FLEET, J.; TEMPLE, J.; HENSHAW, J.; HARRISON, J.

BEATTY, C. J. I concur in the judgment.

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5 Cal. Unrep. 194

FOGEL v. SAN FRANCISCO & S. M. RY. CO. (No. 16,011.)

(Supreme Court of California. Nov. 25, 1895.)

Railroad Companies—Personal Injuries—Contributory Negligence—Evidence—Physician as Expert Witness—Remarks by Counsel—Verdict—Reversal.

1. In an action for injury from being thrown from a car by its coming to a sudden stop, by reason of a defective switch, while being run at a high rate of speed, evidence that other persons than plaintiff were thrown from the car and injured is admissible to overcome the claim of defendant that plaintiff's injuries were caused by his negligence in jumping from the car when in motion.

2. In an action for injuries received in an accident due to a defective switch, evidence by a skilled switch tender as to whether anything was not done that could have been done to have avoided the accident is inadmissible, as invading the province of the jury.

3. Where a witness shown to be a physician has been "examined at length" as to plaintiff's injuries, it will be assumed that a proper foundation has been laid to enable him to testify as a medical expert.

4. The fact that plaintiff's counsel, in an action against a railroad company passing through a city, for personal injuries, said that "there is no road in the city * * * that has caused so many accidents as this road, as is well known," is not ground for reversal, where it was casual, and did not evidently influence the jury.

5. A verdict on conflicting evidence will not be disturbed on appeal.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Jacob Fogel against the San Francisco & San Mateo Railway Company for personal injuries. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Morrison, Stratton & Foerster, for appellant. H. I. Kowalsky and A. Everett Ball, for respondent.

BELCHER, C. The plaintiff brought this action to recover damages for injuries to his person alleged to have been caused by the negligence of defendant's servants and employés, in consequence of which he was thrown from one of its moving cars. The answer denied any liability on the part of defendant, and alleged that the injuries sustained by plaintiff "were occasioned by the negligence of said plaintiff in jumping from said car while the same was in motion, and that the said negligence of said plaintiff proximately contributed to the injuries alleged to have been received by him." The case was tried before a jury, and by the verdict plaintiff was awarded damages in the sum of $1,000, for which judgment was entered. From this judgment, and an order denying its motion for a new trial, defendant appeals.

It was proved on behalf of the plaintiff that the car on which he was riding was going at a greater speed than usual, and that on coming to a switch the front wheels passed onto the switch and the hind wheels remained on the main track; that the car was thereupon brought to a sudden stop, and the plaintiff was thrown off, and, when picked up, was found to be badly bruised and unconscious. John W. Tracy was a witness for plaintiff, and was asked: "Was anybody else thrown off of the car?" He answered: "Yes, sir; a lady." J. J. Kerr was a witness for defendant, and on cross-examination was asked if he saw the plaintiff lying on the ground, and answered that he did. He was then asked: "Did you see anybody else lying on the ground besides this man?" "A. Yes, sir; I saw a lady." "Q. Was she injured?" "A. Not very much. We picked her up." Similar questions were propounded on cross-examination to defendant's witness Conrad Trieber. All of these questions were objected to by defendant upon the ground that they were irrelevant, immaterial, and incompetent, and the objections were overruled. It is claimed that the questions objected to were not relevant to the issues presented by the pleadings, and that the testimony as to the injury of the lady tended to prejudice the minds of the jury against the defendant. The testimony was evidently offered to meet and overcome the defendant's theory that plaintiff's injuries were caused by his own negligence in jumping from the car when it was in motion, and for that purpose it was clearly competent and admissible.

William Craven was a witness for defendant, and testified that he was an oiler on the electric road of the defendant, his business being to oil the switches and curves; that it was his duty to examine the switches, and see that they were in good order, and that on the day the accident occurred he examined the switch where plaintiff was hurt at about a quarter past 6 in the morning and again about 11 o'clock; and that on both of these occasions it was in good order. He was then asked the following questions: "Mr. Craven, was anything omitted that could have been done, that a man of foresight could have advised, or were you as careful as a man could have been to have avoided an accident, on this day?" "Well, now, in your opinion as a railroad man, used to working on railroads, was everything done that could have been done in the matter to obviate or prevent this accident?" Both questions were objected to by plaintiff upon the ground that they were immaterial, irrelevant, and incompetent, and the objections were sustained. The rulings of the court were correct; both questions call for the opinion of the witness upon a matter of fact, which was the principal question at issue, and which it was the sole province of the jury to decide.

A physician was called as a witness for plaintiff, and stated that he was called to see him on the day he was injured, and then proceeded to testify as to his injuries and condition. He was asked if he had ever examined the patient in consultation with any other physician, and answered that he had, with Dr. F. S. Cook. Dr. Cook was then called as a witness, and "was examined at length by counsel for plaintiff." During the examination, counsel for plaintiff asked: "I want to know, doctor, what is the present condition, physically, of the plaintiff?" Defendant objected to the question upon the ground that it was irrelevant, incompetent, and immaterial, and that the proper foundation had not been laid for a question of that kind. The Court: "Have you examined him lately?" "A. Yes, sir; some five weeks ago." The court then ruled that the witness might tell what he found his condition to be when he examined him physically. It is now claimed that the admission of the testimony of the witness, against the defendant's objection as to his competency, was error, "in view of the fact that his competency to testify as a medical expert had not been shown." But it does not appear that he was not competent to testify. He was shown to be a physician, and was "examined at length," and the presumption must be that the proper foundation had been laid to enable him to testify as a medical expert.

During the closing argument of counsel for plaintiff to the jury, he remarked, "There is no road in the city and county of San Francisco that has caused so many accidents as this road, as is well known." An exception to the remark was taken by counsel for defendant, and the court said, "I would not repeat it." It is claimed that the remark was improper, and tended to prejudice the minds of the jury against defendant. The judgment cannot, in our opinion, be reversed on this ground. The remark, while improper, appears to have been casual, and there is nothing to indicate that the minds of the jurors were or could have been prejudiced by it against the defendant.

Finally, it is claimed that the evidence was insufficient to justify the verdict, but we think it quite sufficient for that purpose. There was some conflict in the evidence, but that was a matter for solution by the jury and the trial court. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

110 Cal. 164

FERNANDEZ et al. v. BURLESON et al.
(No. 18,272.)

(Supreme Court of California. Nov. 25, 1895.)

MINES—LIENS—DESCRIPTION OF PREMISES—SUFFICIENCY.

1. The fact that a particular description by metes and bounds, of a mining claim, in a notice of a lien, is incorrect, will render the notice invalid.

2. Where the same persons own two mining claims in the same mining district, only one of which has on it improvements, and it appears that the mines are known by the names of the parties working them, a notice of lien reciting that it is for work done within a designated period of three months on a mining claim, with improvements, located in a particular mining district of a certain county, owned by the persons (naming them) who had the work done, does not identify the claim with the improvements with sufficient certainty to create a lien thereon.

Commissioners' decision. Department 2. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by John Fernandez and others against I. C. Burleson and others to enforce mechanics' liens on a mining claim. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Reversed.

Warren & Taylor and T. M. Osmont, for appellants. Farraher & Raynes, for respondents.

BRITT, C. Plaintiffs (eight in number) united in this action under the permissive clause of section 1195, Code Civ. Proc., to enforce liens claimed by them, respectively, for balances due from defendants on account of labor performed by plaintiffs, severally, at the request of defendants, on a mining claim in Siskiyou county. Defendants constitute a mining partnership under the name of Burleson & Parsley. They owned a mining claim called the "Bare Bar Claim," and employed plaintiffs to work thereon. Their answer admitted that the balances alleged are due to the plaintiffs, respectively, but denied that the work was done on the premises described in plaintiffs' several claims of lien. There was judgment for the plaintiffs (seven of them), directing the sale of said Bare Bar property, and the application of the proceeds to the payment of the demands of the successful plaintiffs, with costs and attorneys' fees. The correctness of the judgment depends upon the answer to the question whether the property thus directed to be sold is described at all in the claims of lien filed in the office of the county recorder under section 1187, Code Civ. Proc. In this particular the notices were all in the same form. That of Fernandez, taken as an example, stated: "I * * * give notice of my intention to hold and claim a lien * * * upon that certain mining claim situated in the Virginia Bar mining district, county of Siskiyou, state of California, particularly described as follows [giving a specific description, by monuments, metes, and bounds]; containing twelve acres, more or less, * * * with all improvements, including wheels, pumps, and all mining facilities and appurtenances situated thereon. The said lien being claimed and held for * * * work done * * * upon said premises * * * from the 27th day of June, 1892, to the 8th day of September, 1892, * * * at the special instance and request of Burleson & Parsley, the owners and reputed owners thereof." It is conceded that the description by monuments, metes, and bounds, thus stated, does not apply in any part to the Bare Bar property, where plaintiffs did their work, but does apply with entire accuracy to an adjoining mining claim, known as the "Otto Bar," in which defendants had, with other persons, some interest, but which was not worked at all during the year 1892. It was in evidence, however, that there were no wheels, pumps, or mining facilities on the Otto Bar mining claim, while there were such on the Bare Bar claim; that mines in the vicinity were "generally known by the names of the parties running them"; that the Bare Bar claim was commonly called the "Burleson & Parsley Caim"; that mining claims were somewhat numerous in that neighborhood, but defendants worked no other.

The court found that the claims of lien as filed contained a description of the property intended to be charged sufficient for identification, and that any one familiar with the locality can readily identify the Bare Bar mine as the mining claim which plaintiffs intended to charge with their liens. We discover no evidence to justify this finding. The contention of respondents' counsel, as we understand it, is that the boundaries given in the claim of lien may be disregarded, and that the other circumstances stated, viz. that the lien is claimed upon mining ground, in a specified mining district, with all improvements, including wheels, pumps, etc., situated thereon, for work done by the claimants between specified dates, at the request of Burleson & Parsley, the owners and reputed owners thereof, will "enable a party familiar with the locality to identify the premises intended to be described with reasonably certainty, to the exclusion of others," and hence is sufficient. Mills Co. v. Kremer, 94 Cal. 209, 29 Pac. 633. But, in the first place, there is no warrant in the law or in the abstract equity of the case for rejecting the boundaries by which the notice of lien states that the property is "particularly described." One of the most important requirements of the statute governing the creation of such liens is that the notice shall contain a description of the property to be charged sufficient for identification. Code Civ. Proc. § 1187. Without such description the notice would in some instances be of no value to the owner, and could rarely be of any use to creditors, purchasers, or other lien claimants dealing with the land. Phil. Mech. Liens, § 378. If this were a case of mistake as to some incident of the description, the mistaken circumstance, like a false call in a deed, would be rejected (Mills Co. v. Kremer, supra); but, on the contrary, the error is of the essence of the description. To reject the particular description, and rely on the adventitious circumstances which accompany it, would be to invert the maxim that the incident follows the principal, and not the principal the incident. Civ. Code, § 3540. The notice of lien is not an instrument susceptible of reformation. Goss v. Strelitz, 54 Cal. 640. Therefore the monuments and lines by which the property is said in the notice to be "particularly described" cannot be expunged from the notice, but must be read as part of it. So read, it is misleading in a particular where it should be substantially true. Wagner v. Hansen, 103 Cal. 107, 37 Pac. 195. Secondly, were the particular description omitted and the other circumstances stated in the notice alone consulted, we do not think that a person familiar with the locality merely could thereby identify the premises with reasonable certainty to the exclusion of others. He would also need to know that the claimant worked on the premises, and when he worked there, knowledge of which matters cannot be implied from mere knowledge of the locality. Besides, the statute requires that the notice itself must describe the property on which the work was done. Code Civ. Proc. §§ 1183, 1187. A notice that the property to be charged is the property where claimant worked does not take the first step towards compliance with the statute. Nothing, then, remains except the reference to pumps, wheels, and mining facilities, and to the names of the owners. It is shown affirmatively that the defendants claimed and were reputed to own an interest in the Otto Bar mine; and the reference to the wheels, pumps, etc., is (on our present assumption) to them as situate upon unascertained land. On these facts, at the very most, one might suspect that the Bare Bar mine was intended; but that he could identify it with reasonable certainty to the exclusion of other premises is incredible. The judgment and order should be reversed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

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110 Cal. 169

DAGGETT v. GRAY et al. (No. 19,410.)

(Supreme Court of California. Nov. 25, 1895.)

CONVERSION—DEMAND—PLEADING OVER.

1. A complaint alleging that defendants, being in possession of property, converted the same to their own use, need not allege demand and refusal.

2. Failure to allege demand and refusal in an action for conversion is cured by an answer setting up ownership to the property in controversy.

In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Daggett against Gray and others for conversion. Plaintiff had judgment, and defendants appeal. Affirmed.

For opinion in department, see 40 Pac. 959.

Parrish & Mossholder and Walter Rose, for appellants. Johnston Jones and D. L. Withington, for respondent.

HARRISON, J. This action was brought to recover damages from the defendants for the conversion by them of a stock of drugs in the Hotel Brewster Building, in San Diego. The defendants demurred to the complaint upon the ground that it did not state a cause of action, and, upon the overruling of their demurrer, answered the complaint. The cause was tried by the court, and judgment rendered in favor of the plaintiff, from which and an order denying a new trial the defendants have appealed.

1. The demurrer was properly overruled. The complaint alleges that the plaintiff had been appointed receiver in an action then pending in the superior court of the county of San Diego, in which one Brickey was the defendant, and that as such receiver he was on the 17th day of March, 1893, "the owner and lawfully entitled to the immediate possession of a stock of goods in the drug-store in the Hotel Brewster Building, in San Diego, in said county," and that on said 17th day of March, 1893, "the defendants, then being in possession of said goods, unlawfully converted and disposed of the same to their own use," whereby he had sustained damage. The defendants urge that this complaint is defective by reason of a failure to allege that the plaintiff had made a demand upon them for the property, and a refusal on their part to comply with such demand. As demand and refusal does not of itself constitute conversion (Steele v. Marsicano, 102 Cal. 666, 36 Pac. 920), but only evidence from which conversion in certain cases may be found, so conversion may be established by proof of other acts on the part of a defendant concerning the property. If the relation of the defendant to the property is such that a previous demand is essential in order to establish conversion on his part, proof of such demand must be made at the trial, but the demand need not be alleged. The allegation that the defendants "converted and disposed of the property to their own use" is the allegation of a fact sufficient, in the absence of a special demurrer, to sustain a judgment. Upon the trial of an issue on this averment, the plaintiff would be at liberty to introduce evidence of a demand and refusal, if such evidence were sufficient or necessary to establish the conversion; and he would also, under this averment, be authorized to offer evidence that the defendants had sold or otherwise dealt with the property in repudiation of the claim of the plaintiff. "Where conversion is alleged as a fact, in general terms, that is sufficient to admit of any evidence on the trial of issue joined that tends to establish such conversion, and the plaintiff is not bound to allege the particular acts or acts which constitute conversion, in an action of this character. Averments which sufficiently point out the nature of the pleader's claim are sufficient, if under them, upon a trial of the issues, he would be entitled to give all the necessary evidence to establish the claim." Berney v. Drexel, 33 Hun, 34. See, also, Johnson v. Lumber Co., 45 Wis. 119; Railroad Co. v.

Robinson, 133 N. Y. 246, 30 N. E. 1008. The other objections to the complaint urged in the brief on behalf of the appellants would be relevant if there had been a demurrer on the ground of uncertainty or ambiguity; but as these grounds were not specified in the demurrer they were waived, and cannot now be considered.

2. Whatever defect there may have been in the complaint in this particular was removed by the answer of the defendants, wherein they alleged their ownership of the goods, and denied that the plaintiff had had "at any time since the 12th day of March, 1893, any interest in, or been entitled to the possession of," the property sued for. The rule is well settled that a complaint which lacks the averment of a fact essential to a cause of action may be so aided by the averment of that fact in the answer as to uphold a judgment thereon (Pom. Rem. & Rem. Rights, § 579; Schenck v. Insurance Co., 71 Cal. 28, 11 Pac. 807), even though a demurrer to the complaint for the want of this fact had been erroneously overruled (Cohen v. Knox, 90 Cal. 266, 27 Pac. 215. The rule in those cases which holds that when the defendant came lawfully into the possession of the property, a demand and refusal must be established in order to charge him with conversion, and must be alleged in the complaint, in order to permit of such proof, ceases when the defendant admits in his answer that he has converted the goods to his own use, or alleges facts showing that a previous demand would have been futile. The denial in the answer of a tenant of his tenancy, and of the title of his landlord, obviates the necessity of proving or alleging a notice to quit. Smith v. Shaw, 16 Cal. 88; Simpson v. Applegate, 75 Cal. 342, 17 Pac. 237. Upon the same principle, the claim by a bailee, in his answer, of the ownership of goods intrusted to his keeping, and a denial of any title in his bailor, obviate the necessity of proving a demand for the goods before bringing suit, and waive the omission of an allegation of such demand. The judgment and order are affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

110 Cal. 159

WISE v. ROSE. (Sac. 16.)

(Supreme Court of California. Nov. 25, 1895.)

ANSWER—DENIAL—SUFFICIENCY—WAGER—CONSTRUCTION.

Where plaintiff, in an action against the stakeholder to recover back money wagered on a horse race, alleged that, before the race was run, he repudiated the wager, and served written notice thereof on defendant and on the other party, defendant's answer, admitting all the material facts except that he denied on information and belief that plaintiff repudiated said wager, and served written notice upon defendant and upon the other party, before the race, and alleging that he could not "positively say" whether the notice was received prior to the race, was insufficient as a denial.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by K. D. Wise against L. J. Rose, Jr., to recover a certain sum of money. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Woods & Levinsky, for appellant. Jas. A. Louttit, for respondent.

VANCLIEF, C. It is alleged in the complaint that plaintiff and A. B. Spreckels laid a wager of $500 on the result of a horse race to be run on the Stockton course between September 17 and 22, 1894, each depositing with the defendant his stake of $500, under an agreement that defendant should pay the stakes ($1,000) to the winner; that before the race was run, and before it was or could have been known or determined whether plaintiff had won or lost the stakes, he repudiated the wager, and served written notice of such repudiation upon Spreckels and upon defendant, and, two days thereafter, demanded of defendant his said stake of $500; but that defendant has failed and refused to return to him said sum of $500, or any part thereof. In his answer, defendant admits the wager, and that plaintiff and Spreckels each deposited with him a stake of $500, pursuant to a written agreement between them, which was also deposited with him, of which the following is a copy: "San Francisco, Cal., Aug. 15, 1894. In the match race between the mare She and Jennie June the conditions are as follows, to wit: L. J. Rose (Jr.) is stakeholder. The race to be trotted at Stockton, California, during the fall meeting. Each principal to select one judge; they to select a third judge. The principals to agree upon a starter. The race to be three best heats in five, and trotted to rule. Positions to be decided by tossing up. The race to be for five hundred dollars a side. Play or pay. K. D. Wise. A. B. Spreckels." That thereafter the following further written agreement was executed between plaintiff and Spreckels: "Sacramento, Cal., Sept. 10, 1894. The undersigned agree to trot the match race between She and Jennie June on the 18th day of the present month, over the Stockton course. A. B. Spreckels. K. D. Wise." That, at the time and place thus appointed, the said Jennie June failed to appear, although requested by the judges of the race so to do, but that the mare She did appear in accordance with the terms of said agreement, and did trot over said course at said time, and did win said race; and thereupon the judges of said race did so decide and declare in writing, as follows: "Stockton, September 18, 1894. In the match race between She and Jennie June the latter did not appear when called; and She came up, and was given the word, and, after trotting over the course in 2:22, was declared the winner of the race. Chris. Green, C. E. Needham, B. F. Langford, Judges." Defendant qualifiedly denied, as hereinafter stated, the alleged repudiation of the wager, and notice thereof to him and Spreckels, on the ground that he "has no information or belief sufficient to enable him to answer the allegation"; but "admits that on the 18th day of September, 1894, he received an alleged telegraphic repudiation from said plaintiff, but whether the same was received by him prior to the time when said event occurred, or was to have occurred, or prior to the time when said wager was decided, this defendant cannot positively say." Further answering, the defendant "admits that he has not paid to the said plaintiff the sum of five hundred dollars, or any part thereof, but denies that he still has or holds said sum, or any part thereof, and in this behalf alleges that after the happening of the said event, to wit, the winning of the said race by the said mare She, that he delivered to and paid to said A. B. Spreckels, in accordance with the terms of said written contract or agreement hereinbefore set forth, the full sum of $1,000." The plaintiff demurred to the answer on the ground that it does not state facts constituting a defense, and, at the same time and upon the same ground, moved the court for judgment in favor of plaintiff on the pleadings. The court sustained the demurrer, and also rendered judgment for plaintiff on the pleadings. Defendant brings this appeal from the judgment on the judgment roll, with a bill of exceptions, showing merely the action of the court on the demurrer and motion for judgment. It does not appear that defendant offered to amend his answer, nor that he expressly declined to amend; but he does not complain that he did not have leave to amend, nor pretend that he desired to amend, his answer, but simply contends that his answer stated a defense to the action, and that the court erred in sustaining the demurrer, and in rendering judgment in favor of plaintiff.

Unquestionably, the plaintiff was entitled to judgment on the facts stated in his complaint (Johnston v. Russell, 37 Cal. 670; Hill v. Kidd, 43 Cal. 615; Gridley v. Dorn, 57 Cal. 78); and there is no pretense that the answer denied any material fact alleged in the complaint, except the averment that plaintiff notified the defendant of his repudiation of the wager before the race was won, and before it was known, or could have been known, whether plaintiff had won or lost the wager. The answer shows that the race was trotted by the mare She alone, as the second event in the afternoon of September 18, 1894, and expressly admits that defendant received telegraphic notice of plaintiff's repudiation of the wager on that day, and does not deny that he received such notice before the race was trotted by the mare She, but merely avers that "defendant cannot positively say" whether or not the telegram was received by him before the event occurred or before the wager was decided. This is not a denial of the allegation in the complaint that he had notice of the repudiation before the race was run, and before it was known, or could have been known, whether plaintiff won or lost the wager; nor is it an averment that defendant did not know that he received the telegram before the race was trotted, and before it was known which party won; and surely it could not have been intended as an averment that he did not believe the telegram was received by him before the race was trotted. Nor in this construction of the express admission in defendant's answer affected or qualified by the previous denial (on the ground of want of sufficient knowledge or belief) "that on the 18th day of September, 1894, and prior to the time when the event occurred, or was to have occurred, or prior to the time when said wager was decided, plaintiff repudiated said wager, and served written notice of said repudiation upon said defendant and his representative, one Walter Maben, also upon said A. B. Spreckels and his representative, one Ben Harris." This copulative denial of four distinct matters, two of which, at least, are immaterial, is not a denial of any one of them. While the repudiation of the wager on September 18th is expressly admitted, the answer is plainly evasive of the material allegation in the complaint that such repudiation and due notice thereof were prior to the occurrence of the event by which alone it could be determined whether plaintiff won or lost the wager.

Appellant offered to prove that the words "Play or pay," in the agreement, mean that, after the stakes were placed, neither party could repudiate without consent of the other, even though one of the horses should die before the day set for the race. The court properly refused to hear this evidence, since the regulations and usages of the turf are subject to the laws of the state.

I think the judgment should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

110 Cal. 173

BROOKS v. SAN FRANCISCO & N. P. RY. CO. (No. 15,871.)

(Supreme Court of California. Nov. 26, 1895.)

APPEAL—TIME OF TAKING—NEW TRIAL—IMPOSING CONDITIONS—DISCRETION.

1. In order to secure a review of the sufficiency of the evidence, an appeal from a final judgment must be taken within 60 days (Code Civ. Proc. § 939), though a motion for a new trial is undecided.

2. The court, in granting a motion for a new trial, may, in its discretion, require the moving party to pay the other party's counsel fees and expenses necessarily incurred in such motion.

3. An order of the court granting a new trial, on the ground that the verdict is not supported by the evidence, will not be disturbed except for an abuse of discretion.

Commissioners' decision. Department 2. Cross appeals from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Eugenia Beatrice Brooks against the San Francisco & North Pacific Railway Company. There was a judgment for plaintiff. Both parties appeal from an order granting a new trial, and defendant appeals from the judgment. Appeal from judgment dismissed, and order affirmed on both appeals.

Clement, Cannon, Kline, & Stradley, for plaintiff. Sidney V. Smith, for defendant.

SEARLS, C. This was an action to recover damages sustained by the infant plaintiff for personal injuries received while a passenger upon the railway train of the corporation defendant. The cause was tried before a jury, and a verdict rendered in favor of plaintiff for $5,000. Judgment was entered thereon February 26, 1894. Defendant in due time moved for a new trial, which was granted, "upon the payment by defendant to plaintiff of the sum of $300 for counsel fees and expenses necessarily incurred in said motion." This order was made June 25, 1894. On July 23, 1894, defendant gave notice of an appeal to this court from the order of the court below granting the new trial upon the condition specified in the order, and on the same day gave notice of an appeal from the final judgment entered in the cause February 26, 1894. On June 25, 1894, plaintiff gave notice of an appeal to this court from the order of the court below granting the new trial. These appeals were all duly perfected, and are all based upon a single transcript.

The foregoing dates as to the entry of judgment and appeal therefrom are given for the purpose of showing that defendant's appeal from the final judgment was not taken within 60 days after the rendition thereof, and hence that, under section 939 of the Code of Civil Procedure, the sufficiency of the evidence to support such judgment cannot be reviewed on such separate appeal; and as, upon the judgment roll, the judgment seems regular, we may dismiss from consideration the separate appeal therefrom and turn our attention to the two appeals from the order granting the new trial. The contention of the plaintiff is that to grant a new trial at all was error and an abuse of the discretion lodged in the court, while the defendant bases its appeal upon the ground that it was clearly entitled upon the record to a new trial, and therefore that the condition imposed by the court below was erroneous.

First, as to the appeal by defendant. That a nisi prius court has the power to impose terms as a condition of making an order for a new trial is too well settled to need argument in its support. In Rice v. Gashirie, 13 Cal. 54, which, in view of the fact that the motion was founded upon errors of law occurring at the trial, and hence at first blush would seem not to have been a case involving turpitude on the part of the losing party, the court below granted a new trial upon condition that the moving party should pay the costs. Upon an appeal by the moving party this court, speaking through Baldwin, J., said: "The terms upon which a court will grant a new trial are peculiarly a matter within its discretion. This must necessarily be so, for so many reasons relating to the conduct, management, and peculiar circumstances of the trial may exist that it would be impossible to prescribe any general rules on the subject. If error at law intervenes, a party may take his exceptions and prosecute his appeal without motion for a new trial; but, if he makes his motion, and relies upon that for redress against an improper verdict, he must subject himself to the equitable power of the court. The verdict may have gone against him, in some degree or wholly, by his own neglect or default, or even the rulings of law be chargeable to his own laches or want of diligence. In such cases it may be proper to grant him a new trial, yet only upon equitable terms. We cannot interfere with this exercise of discretion unless upon a clear showing that it has been abused, or that the terms were grossly unreasonable." In the present case the motion for a new trial was based, among others, upon the ground of the "insufficiency of the evidence to justify the verdict." This is a ground appealing peculiarly to the discretion of the trial court. And wherever the conditions are such that the court below is authorized in its discretion to impose terms as a condition to granting a new trial, this court will interfere only in those cases where it manifestly appears that there has been an abuse of such discretion. The following cases in this court recognize and uphold the right of the trial court in one form and another to impose terms and conditions in granting and refusing motions for new trials: Sherman v. Mitchell, 46 Cal. 578; Gillespie v. Jones, 47 Cal. 264; Chapin v. Bourne, 8 Cal. 294; Harrison v. Peabody, 34 Cal. 178; Dreyfous v. Adams, 48 Cal. 131; Benedict v. Cozzens, 4 Cal. 381; Corbor v. Morse, 57 Cal. 301; Gregg v. Railroad Co., 59 Cal. 312; Davis v. Southern Pac. Co., 98 Cal. 13, 32 Pac. 646. In the case last cited the jury had found a verdict in favor of plaintiff for $15,300. Defendant moved for a new trial. The trial court made an order that, if plaintiff should consent that the judgment be reduced to $9,000, the new trial would be denied, and that otherwise it would be granted. Plaintiff consented to the reduction, and the motion was thereupon denied. Defendant appealed from the order. Counsel for appellant attacked the power of the court to make such an order, and contended that, if the court thought the verdict excessive, its duty was to grant a new trial. This court, speaking through McFarland, J., after admitting that the position of appellant was a strong one, added: "But whatever might be considered the weight of reason and foreign authority on the question above stated, if it were res integra here, the right of a court to do what is complained of in the case at bar is too firmly established in this state by a long line of decisions to be now questioned." The principle involved in that case is the same as that underlying the present one, and goes to the power of the court to impose terms in granting and refusing motions for new trials. A review of the record fails to disclose any basis for concluding that there was an abuse of discretion in imposing terms as a condition to granting the motion for a new trial. It follows that the order appealed from by defendant should be upheld.

Second, as to the appeal of plaintiff from the order granting such new trial. The infant plaintiff, a young girl of the age of 12½ years, a passenger on the 5 p. m. train of the defendant from Tiburon to San Rafael, on Sunday, July 6, 1890, seated in next to the rear car, and designing to stop at San Rafael, remained on board the train when it stopped at the regular station in said last-named city, supposing her car would be detached from the train a couple of blocks beyond said station, and that she could then and there leave the car at a point nearer her temporary home. The train did not stop or detach cars as plaintiff had anticipated, but moved on up a grade of 100 feet per mile at a rate of speed of 8 to 10 miles per hour, when the plaintiff, being alarmed at being carried beyond her home, started for the rear car, as she stated, to find the conductor, and upon reaching the platform fell from the car, as she says, whereby her right foot and ankle were crushed by the wheels of the car, rendering amputation of the leg necessary. The theory of the plaintiff was that defendant was accustomed to drop off cars from the rear of its trains at a point two or three blocks north of the San Rafael station, and switch them to a side track; that passengers residing in the vicinity of such switch and side track were, and for some years had been, accustomed, with the knowledge of the defendant, to remain on such cars until they were detached from the train, and that this custom had been so uniform and general that plaintiff was entitled to rely, and did rely, upon its observance; and that the failure of the defendant to stop its train on the day in question, and at the point indicated, in conformity to such custom, was such negligence as rendered defendant liable for the consequences to the plaintiff. Plaintiff introduced some evidence tending to establish such custom. Defendant took issue with plaintiff as to the existence of the habit or custom indicated above, and introduced evidence tending to prove that, under its summer schedule or arrangement in 1890, it ran trains on week days leaving San Francisco by boat for Tiburon, where connection was made with the cars as follows: At 3:30 p. m., at 5 p. m. and at 6:15 p. m. The 3:30 train ran through to Cloverdale; the 5 p. m. through train ran to Santa Rosa. To accommodate the local travel to San Rafael a local train also ran to that point on the 5 p. m. schedule, pulling out of Tiburon five minutes in advance of the Santa Rosa train, and on reaching San Rafael it discharged its passengers, ran up the track to a point above the switch, near the point where the plaintiff expected to alight, and was backed upon a siding to permit the through train to pass. This through train dropped no cars at San Rafael on week days. The 3:30 train on week days did ordinarily drop off two cars above the switch, and they found their way back by gravity, and were shunted upon the side track. Upon this local train, and upon the 3:30 train, it is apparent, from the testimony, passengers did remain on board, at times, at least, and land at or near the switch, which is north of and beyond the station. On Sunday in 1890 there was no considerable number of passengers for San Rafael at 5 p. m., and the local train was not run; but the Santa Rosa train carried all the passengers, stopped at the station in San Rafael, but did not stop at the switch or drop off any cars, as they were all needed to bring down passengers from above on Monday morning, who were accustomed to go up Saturday evening to spend Sunday in the country. This is but an outline of the testimony. We shall not comment upon it, for the reason that it is not desirable to express any opinion upon the facts of a case which must be again tried beyond what is absolutely necessary. It is sufficient to say that the court below was warranted in granting a new trial. It was said in Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114, by Harrison, J.: "The action of the trial court in granting a new trial, for the reason that the former verdict or decision was not supported by the evidence, is so much a matter of discretion that, unless it appears that there was an abuse of that discretion, this court will not interfere with its action." There is no abuse of discretion apparent in the present case.

The order appealed from by the plaintiff and the order appealed from by the defendant, and each of them, should be affirmed, and as, upon such affirmance, the judgment appealed from will, upon the compliance of defendant with the condition upon which the motion for a new trial was granted, cease to exist, the appeal from the judgment should be dismissed, each party to pay her and its own costs on appeal.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from by the plaintiff and the order appealed from by the defendant, and each of them, is affirmed, and as, upon such affirmance, the judgment appealed from will, upon the compliance of defendant with the condition upon which the motion for a new trial was granted, cease to exist, the appeal from the judgment is dismissed, each party to pay her and its own costs on appeal.

5 Cal. Unrep. 197

WISE et al. v. WILLIAMS et al. (No. 18,317.)

(Supreme Court of California. Nov. 26, 1895.)

ALLOWANCE BY ADMINISTRATRIX—MORTGAGE TO SECURE RUNNING ACCOUNT—PRIOR INDEBTEDNESS.

1. A finding that a claim was not allowed by an administratrix is improper where the only evidence on that issue was the testimony of the attorney of said administratrix, read from a transcript taken on a former trial before another judge, and was to the effect that he signed the allowance at her request and in her presence.

2. A finding that a mortgage was not intended to secure a note executed by the mortgagor prior to the mortgage is not sustained by the evidence where it appears that the mortgage was executed to secure a running account, that the amount of said note was charged to the account, that the note was surrendered and a statement of his indebtedness rendered to the mortgagor without objection, that at the time the mortgage was executed the mortgagees had for sale merchandise of the mortgagor of almost equal value with his then indebtedness, and the only testimony of an opposite tendency was that of the mortgagees' bookkeeper, who stated that the "mortgage was not given to secure any special indebtedness," and that said note "was evidently surrendered and a new note taken."

Commissioners' decision. Department 1. Appeal from superior court, Merced county; Joseph H. Budd, Judge.

Action by John H. Wise and another against J. E. P. Williams and others to foreclose a mortgage. Defendants had judgment, and plaintiffs appeal. Reversed.

Edw. P. Cole and D. H. Whittemore, for appellants. T. C. Law, for respondents.

SEARLS, C. Appeal by plaintiffs from a judgment in favor of defendants, and from an order denying plaintiffs' motion for a new trial. This is the third appeal in this cause. To the first complaint a demurrer was filed, and sustained by the court, and judgment entered for defendants. On appeal the judgment was reversed (72 Cal. 544, 14 Pac. 204), and the cause remanded for trial. On November 17, 1887, the cause was tried, and judgment rendered in favor of the defendants. An appeal was taken from that judgment, and from an order denying a motion for a new trial. The judgment and order were reversed (88 Cal. 30, 25 Pac. 1064), and the cause sent back for a new trial. On the first appeal it was held by this court that as the complaint showed the demand to have been presented to the administratrix in due time, and to have been allowed by her and approved by the judge in due time, it was not barred by the statute of limitations. Upon the second appeal it was held, among other things, that the presentation and allowance of the claim were in due time, upon the ground that due notice to creditors had not been given prior to such presentation. The facts material to the present appeal are as follows: On the 2d day of May, 1877, John Connell made to the plaintiffs, copartners under the firm name of Christy & Wise, his promissory note for $3,000, payable one day after date, with interest at 1½ per cent. per month, payable quarterly, and if not so paid to be added to the principal and bear like interest, etc. Thereafter, and under date of May 12, 1877, said John Connell and Sarah Connell, his wife, to secure the payment of said promissory note, executed to plaintiffs their mortgage upon certain lands situate and being in the counties of Merced and Stanislaus. The mortgage was duly acknowledged by the wife May 14, 1877, and duly recorded May 18, 1877, in Merced county, and on May 22, 1877, in the county of Stanislaus. Thereafter, and on the 24th day of October, 1877, John Connell and Sarah, his wife, recorded their declaration of homestead in the county of Merced, upon the property covered by the mortgage. Thereafter John Connell died intestate, and on the 19th day of July, 1880, Sarah Connell, his widow, was duly appointed administratrix of his estate, and such proceedings were thereafter had that the homestead was by the court set apart to said Sarah Connell, as the surviving widow of John Connell, and released from administration. According to the complaint, which is denied by the answer, the claim of plaintiffs upon said promissory note and mortgage for $2,813.69 was duly presented to the administratrix December 21, 1880, allowed by her, approved by the judge of the superior court, and duly filed on said last-mentioned date. Sarah Connell died intestate February 17, 1882, and defendant John Hallinan was duly appointed administrator of her estate. In April, 1883, defendant J. E. P. Williams was appointed administrator of the estate of John Connell. This action was commenced in August, 1883, and all claim against the estate of John Connell, except upon the mortgaged premises, was expressly waived. Defendant John Hallinan, as administrator of the estate of Sarah Connell, and as guardian of John B. Connell, minor son of John and Sarah Connell, deceased, answered. Williams, the administrator of John Connell, did not, so far as appears, answer the complaint. The cause was tried by the court without a jury, and written findings filed. Several of these findings are attacked as being unsupported by and as contrary to the evidence. Two or three only of these findings need be examined.

The tenth finding is, in substance, that the plaintiffs did not on the 20th day of December, 1880, or at any other time, present their claim to Sarah Connell, administratrix of the estate of John Connell, deceased, or to any administrator thereof, and that no claim of plaintiffs was ever allowed or approved by the administratrix or by any administrator of the estate. It having been held upon the former appeal that the presentation of the claim on December 20, 1888, was in time, the only question now to be considered is whether or not the evidence shows a presentation on that day, and an allowance by the administratrix. The only evidence on this point was the testimony of E. Jackman, who was the attorney for the administratrix, and had his office in Merced. His testimony, as well as all the other testimony in the case, was, by stipulation, read from the transcript of the evidence taken on a former trial before a different judge. He says, in substance, that the claim was sent to him by plaintiffs, and he presented it to the administratrix at his office; that she had just come into town on a wood wagon, and, when requested to sign her name to the allowance, she said she was tired, excited, and sick, and he (the witness) wrote her name at her request, and that she placed her mark thereto, as he thought, though, from the lapse of time, he did not remember especially as to the mark which was placed between the words upon the paper, thus: "Sarah Connell, X, by E. Jackman." The witness added, in answer to the question as to her having placed her mark after the name, that, to the best of his knowledge and belief, she placed it there. The following is the entire indorsement: "The within claim presented to Sarah Connell, administratrix of said deceased, is allowed and approved for $2,813.69, this 20th day of December, 1880. [Signed] Sarah Connell, X, by E. Jackman." This indorsement is preceded by the title of the court and cause, and is followed by the order of allowance and approval of the superior judge. Whether or not Mrs. Connell made the mark to her signature is a matter of no consequence. Jackman is shown by the evidence to have signed her name at her request and in her presence, and that was sufficient. Under such circumstances, the finding of the court referred to cannot be upheld. While the trial court has the right to refuse to believe the testimony of a witness, though not directly contradicted, that right is not to be arbitrarily exercised. If the witness is a credible person, and his testimony is not inherently improbable, nor opposed to other circumstances in proof, nor in any way contradicted, it ought to be accepted. As the judge of the court below did not see the witness on the stand, and had, so far as appears, no better opportunity than we have of estimating his credibility, and as we are unable to discover any inherent improbability in his testimony, we think it not improper to hold that this finding is not justified by the evidence.

The other findings demanding attention are the third and eleventh, the former of which finds that the mortgage was not given to secure the promissory note for $3,000, but that said note and mortgage were given to secure the payment of the account due plaintiffs on their ledger, amounting to $1,249.62 and no more, and for such other amounts as might thereafter be due them from John Connell on ledger account. The eleventh finding is to the effect that plaintiffs have been paid in full long before the commencement of this action, and prior to the death of Sarah Connell, in February, 1882. The propriety of this last finding depends upon the correctness of the third. The allowance of plaintiffs' claim on the 21st day of December, 1880, for $2,813.69, is prima facie evidence that such sum was then due, but was not conclusive against the heirs of John Connell, deceased, who could, under section 1636 of the Code of Civil Procedure, show that the claim was not properly allowed. It was so held on the former appeal in this case. 88 Cal. 35, 25 Pac. 1064. The books of plaintiffs were in evidence, and showed, as found by the court, that on the 2d day of May, 1877, there was a balance due thereon to plaintiffs from John Connell of $1,249.62. Between that date and June 25, 1877, this balance was increased to $2,552.94. A single item going to make up this balance constitutes the only subject upon which there can be, in the light of the evidence, any doubt. It is an entry, of June 25th, of a charge, on account of "bills receivable," of $2,009.46. The evidence tends to show that this amount was due upon an old note held by plaintiffs against John Connell, which was surrendered by the holders. It also tends to show that a statement of account was rendered to Connell on June 25, 1877, with this item charged, and again December 31, 1877, and, so far as appears, no objection was ever offered to the balance as rendered. The only evidence which can be relied upon by the respondents to sustain the contention that this item was not included in the sums to secure which the mortgage was given is to be found in the testimony of W. P. Gerlach, a witness on the part of the plaintiffs, who had been their bookkeeper during the period in which the account with John Connell was made, and who, upon the point in question, was interrogated as follows: "Q. This amount here in Exhibit H1, 'By balance of account rendered, $2,552.94,' to what does that refer? A. To the account sent June 25, 1877. Mr. Connell did not have credit on the ledger for the note or mortgage sued on. That note and mortgage does not affect the ledger account. There was no other indebtedness from John Connell, outside of this running account, and the note and mortgage were given to secure any balance there might be on the books.

The plaintiffs took the note and mortgage to secure any balance due from time to time,—to secure the running account, but not to cover any special indebtedness; to secure the amount due from John Connell at the time, and any amount that might thereafter accrue. In the account of June 25, 1877, the entry of note for $2,009.46 was a note then due from Mr. Connell to Christy & Wise, and was evidently surrendered, and a new note taken." The court below must have concluded from the expression of the witness, "The plaintiffs took the note and the mortgage to secure any balance due from time to time,—to secure the running account, but not to cover any special indebtedness," that the witness intended to convey the idea that the note for $2,009.46 was not so secured. We do not so understand the witness. By the term, "but not to cover any special indebtedness," the witness, judging from the context, simply meant that the note and mortgage in suit were given, not to secure a special or specific sum of money, but the balance then or thereafter to become due, whatever it might be. The witness cannot be understood to have meant to except specialties or a specialty from the indebtedness secured, for the reason that the note for $2,009.46 was not a specialty, in the technical sense, and none are shown to have existed, except it may be the mortgage sought to be foreclosed. And when the witness said this particular note "was evidently surrendered, and a new note taken," he must have referred to the note in suit, as there is no evidence of any other notes in the case. Again, when viewed in the light of the probabilities of the case, we think the conclusion reached must be the same. On May 14, 1877, plaintiffs credited John Connell with $1,235.20, the net proceeds of wool sold by them for him. It is reasonable to suppose that this wool had been in plaintiffs' hands at least as early as the date of the mortgage (May 12, 1877), and before its acknowledgment. If this is correct, then plaintiffs, if the note for $2,009.46 was not included in the indebtedness secured by the mortgage, must have taken such mortgage when there was a balance due them, in excess of the value of the wool on hand, of only some $14.42,—a sum so small as not to warrant the expense of a mortgage. It is true that, in view of future advances to be made, careful business men might exact a mortgage in advance; but the same care would be likely to exhibit itself by securing a present indebtedness,—something tangible and real,—as well as a future and contingent one. The conclusion that the note in question was not included in the balance intended to be covered by the mortgage, founded, as it is, solely upon what at most was but an indefinite expression of the witness, was not, in view of the conduct of all the parties, and in view of the prima facie case in plaintiffs' favor made by the account as allowed, and in the face of the evidence furnished by the books of plaintiffs, sufficient to warrant the finding that the note and mortgage in suit were given to secure the sum of $1,249.62, and no more, of the then present indebtedness. It must follow that if the $2,009.46 was secured by the note and mortgage of May, 1877, there is still something due the plaintiffs over and above all payments made; and hence the judgment and order appealed from should be reversed, and a new trial ordered.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

110 Cal. 197

GRUNSKY v. PARLIN. (Sac. 8.)[1]

(Supreme Court of California. Nov. 26, 1895.)

SALE BY INSOLVENT—BONA FIDE PURCHASER.

1. Though a sale by an insolvent was prima facie fraudulent, a finding that the vendee purchased in good faith will not be disturbed on evidence, though conflicting, that the vendee had no knowledge of the vendor's insolvency, that the price agreed upon was the fair value of the property, and that he afterwards offered to make the deferred payments to the vendor's assignee.

2. An insolvent vendor's fraudulent intent will not affect a bona fide purchaser.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by Otto Grunsky, assignee in insolvency of O. H. Hull, against C. A. Parlin, to set aside a sale. Defendant had judgment, and plaintiff appeals. Affirmed.

James H. Budd, John E. Budd, and Minor & Ashley, for appellant. Nicol & Orr and F. H. Smith, for respondent.

BRITT, C. Hull was a dealer in stationery and musical instruments. His voluntary petition in insolvency was filed June 16, 1893, and in due course plaintiff was chosen his assignee. At sundry times within three days next before said June 16th, Hull sold to defendant certain pianos and organs, and notes and other contracts previously taken by him in the course of business with his customers. The amount of the sales to defendant was $1,385, of which $656 was paid in cash, and by agreement the sum of $729 was to be subsequently paid in installments. Plaintiff brought this action to set aside such sales, alleging that the same were made to prevent the coming of the property to the possession of the assignee, and its ratable distribution among Hull's creditors, and to defeat the objects of the insolvent act of 1880. The trial was by the court, which found that the defendant made his purchases in good faith, without the intent charged and for sufficient consideration. Defendant had

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[1] Rehearing denied.

judgment accordingly. Appellant urges that the findings are unsupported by the evidence.

The transfers in question were not made in the ordinary course of the business of Hull, and hence were prima facie fraudulent. Section 55 of the insolvent act. There was also evidence of other circumstances tending to cast suspicion on them. But, on behalf of defendant, there was evidence which tended to show that he had no information of Hull's insolvent condition, that the prices paid and agreed to be paid were the full and fair value of the property he purchased, that he has offered to make to the assignee the payments deferred under his arrangements with Hull, and that his conduct, speaking generally, was not inspired by any fraudulent motive. The presumption of fraud was subject to rebuttal (Bernheim v. Christal, 76 Cal. 567, 18 Pac. 683), and, though the evidence in some parts was sharply conflicting, yet there was sufficient, if believed, to rebut such presumption. What credence should be allowed to it was a matter for the trial court to determine. These remarks apply as well to the choses in action assigned to defendant as to the pianos and organs, though appellant argues that the facts were so different regarding the former that, as to them, at least, he should have had judgment.

It is also contended that, in failing to find whether Hull entertained the fraudulent intent alleged in the complaint, the court omitted to dispose of a material issue. But, since the findings exonerated the vendee of the charge of fraud, the intent of the vendor ceased to be of any consequence in the case. A transaction of this nature cannot be vacated because of the fraud of the seller, in which the purchaser had no part, and of which he had no notice. Bank v. Northrup, 22 N. J. Eq. 58.

The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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110 Cal. 150

GREGORY v. SPIEKER. (No. 18,404.)

(Supreme Court of California. Nov. 23, 1895.)

STATUTE OF LIMITATIONS — ACTION BASED ON FRAUD—CONTRACTS—VALIDITY—RESTRAINT OF TRADE—BREACH—MEASURE OF DAMAGES.

1. Defendant sold plaintiff a certain medicine compound and the good will of the business, and agreed not to sell any of the same medicine in a certain locality. Subsequently, he secretly engaged with another person in the sale of the same compound, under a different name. *Held*, that plaintiff's action for breach of the contract was one "for relief on the ground of fraud" (Code Civ. Proc. § 338), and the statute of limitations therefore did not begin to run against such action until after discovery of the fraud.

2. Civ. Code, § 1673, provides that every contract to refrain from exercising a lawful business otherwise than is provided by the next two sections is "to that extent" void. Section 1674 provides that one selling the good will of a business may covenant to refrain from carrying on such business within a specified county so long as the buyer or person deriving title under him to the good will carries on a like business. *Held*, that a covenant not to carry on a business in a certain county is not entirely void for failure to limit the covenant to the time during which the covenantee or his assigns might carry on the business, but is only void to the extent that it transcends section 1674.

3. A contract for the sale of the good will of a business of selling in a certain county a certain medical compound is broken by the vendor selling in such locality the same compound under a different name, and representing it as superior to the original compound.

4. In such an action the measure of damages is the loss suffered by the vendee, and not the profits made by the vendor, in the sale of the similar compound.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by Victor J. Gregory against J. J. Spieker. There was a judgment for plaintiff, and defendant appeals. Reversed.

D. E. Alexander and Albert M. Johnson, for appellant. Armstrong & Bruner, for respondent.

BRITT, C. Action begun October 4, 1892, to enjoin the violation of a contract, and to recover damages for the fraudulent breach thereof. The following facts, among others, were alleged by plaintiff and found by the court below: Defendant owned a liquid compound known as "Robert's Kidney and Liver Bitters," and the formula for the manufacture thereof, and the good will of the business of making and vending the same. On January 7, 1884, while engaged in such business at the county of Sacramento, and having then a large sale of such bitters in said county and throughout this state, the defendant made a bill of sale to one Lee, by the terms of which he sold and transferred to Lee all right, title, and good will of the said bitters theretofore manufactured by him; also, the recipe for manufacturing the same, and all labels, printing matter, boxes, etc., pertaining to the manufacture thereof. The instrument concluded as follows: "And I furthermore agree not to manufacture or sell any of said Robert's Kidney and Liver Bitters in this county. J. J. Spieker." Said Lee was the agent of plaintiff in this transaction, and on the following day, January 8, 1884, he assigned to plaintiff the property and rights acquired by him under said instrument of January 7th. Thenceforward the plaintiff manufactured and sold said bitters, and is yet so engaged. About February 5, 1884, defendant, with intent to injure plaintiff's business, combined and conspired with one T. M. Lash to manufacture and sell the same bitters under the name of "Lash's Kidney and Liver Bitters," and thereafter, for several years, such combination, first under the style of "T. M. Lash & Co.," and later under that of "Lash's Bitters Company," manufactured and sold such bitters in said county and throughout the state. Defendant then dissolved his connection with Lash, but under the style of "Lash's Bitters Company" continued, until the time of the commencement of this action, the same business of making and selling Robert's Kidney and Liver Bitters by the name of "Lash's Kidney and Liver Bitters." Defendant fraudulently concealed from plaintiff the fact of his interest in the business of T. M. Lash & Co. and Lash's Bitters Company, and the fact also that said Lash's Bitters were compounded of the same ingredients as the said Robert's Bitters, until he divulged such facts upon the trial of a certain action between him (Spieker) and said Lash in April, 1892, up to which time plaintiff was without knowledge or information thereof. By reason of false representations made by defendant to plaintiff's customers, to the effect that Lash's Bitters differed from and were superior to Robert's Bitters,—he knowing that they were compounded of the same ingredients,—said customers, or some of them, were induced to purchase the former instead of the latter, whereby the profits of plaintiff's business were mostly cut off. Some further history of this same compound, and the dissensions of those concerned in its preparation and sale, may be found in Spieker v. Lash, 102 Cal. 38, 36 Pac. 362.

Defendant pleaded, among other matters, the bar of the statute of limitations (sections 337, 443, and subdivision 4 of section 338, Code of Civil Procedure). The court held that the action was not barred, and rendered judgment perpetually restraining defendant from manufacturing or selling in Sacramento county the said Robert's Kidney and Liver Bitters, or any preparation compounded of its constituents, and from conducting the sale of Lash's Bitters in such manner as to interfere with the good will of Robert's Bitters anywhere in the state, and from endeavoring to draw off plaintiff's customers; also, that plaintiff recover all the net profits made by defendant in the sale of Robert's under the name of "Lash's Bitters" from February 5, 1884, to October 4, 1892, which profits were found, by means of a reference and accounting had under order of the court, to be the sum of $51,872. The appeal is on the judgment roll, no evidence being brought up.

It is argued by appellant that plaintiff's cause of action lies solely in defendant's breach of contract; that the fraud charged and found is merely for the purpose of excusing delay in the commencement of the action, and is not the substantive ground upon which relief is sought; hence that the action is not saved by the provision of section 338, Code Civ. Proc., that, in an action for relief on the ground of fraud the cause of action is not to be deemed to have accrued until the discovery of the facts constituting the fraud. But we are of opinion that the facts, as found by the court, show that fraud was so ingrained with the breach of contract by defendant that the action, as regards the bar of the statute, at least, must be treated as one for relief on the ground of fraud. The breach was accomplished underhandedly, by secret confederacy with another, and the use of his name to cloak the movements of the defendant, and by deceit, inducing third persons to believe that defendant's product differed from, or was superior to, that of plaintiff. Deception practiced on one person to the injury of another may be actionable fraud as to the latter. Blakeslee v. Starring, 34 Wis. 538.

Sections 1673, 1674, Civ. Code, real as follows:

"Sec. 1673. Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void.

"Sec. 1674. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer or any person deriving title to the good will from him carries on a like business therein."

Here Spieker agreed "not to manufacture or sell any of said Robert's Bitters in this county," not limiting his covenant to the time during which the buyer might carry on the business, as provided in the latter section quoted. For this reason, it is contended that his contract with Lee was void in this particular. We think it reasonably clear that no design to impose a limit on the time during which defendant was restrained from carrying on the business in Sacramento county is inferable from the contract, and in that respect it transgressed the statute. But the statute does not render the whole provision void. It avoids it only "to that extent," viz. the extent that it transcends the permissive clause of the statute. Within that limit, it is valid. This must be regarded as the settled construction of the statute. Ragsdale v. Nagle, 106 Cal. 336, 39 Pac. 628, and cases cited. The judgment here proceeds further, however, and in this regard the respondent concedes that it should be modified. It is said that defendant has not used the trade name sold by him; that he did not part with the right to make and vend all bitters; and that, so long as he did not apply to them such trade name, nor represent his product to be the same as plaintiff's, he did not violate his contract. But the contract purports to transfer "all right, title, and good will of the bitters known as 'Robert's Kidney and Liver Bitters.'" This meant the liquid known, when compounded, as "Robert's Bitters"; not merely the name by which it was known. It may be that he retained some right to make and sell the same bitters by whatever designation other than "Robert's" he chose to give them (Spieker v. Lash, 102 Cal. 38, 36 Pac. 362); but by the terms of the contract he incapacitated himself to exercise this right at all in Sacramento county, and to exercise it anywhere to the impairment of the good will he sold to plaintiff (Snow v. Holmes, 71 Cal. 142, 11 Pac. 856; Knoedler v. Glaenzer, 5 C. C. A. 305, 55 Fed. 898); and it seems to us that representing to plaintiff's customers that the same preparation by a different name was superior to Robert's Bitters tended to draw them from plaintiff, and to injure the good will he had bought and paid for.

The court adopted a false rule as to the measure of damages. It proceeded upon the theory that, as in trade-mark and patent cases, the defendant was compellable to render to plaintiff the net profits of the business of selling Lash's Bitters. Trade-mark cases only are cited to support this branch of the judgment. Graham v. Plate, 40 Cal. 493; Manufacturing Co. v. Gato (Fla.) 7 South. 23; Avery v. Mieker (Ky.) 3 S. W. 609. But here, though plaintiff alleged an infringement of his trade-mark by defendant, the court expressly found against that averment. In cases like the present the damages are rarely susceptible of accurate proof, but the measure, expressed generally, is the value of the business lost to plaintiff, not the gain of defendant, which may be more or less than plaintiff's loss, though such gain may be considered in evidence. It should be shown to correspond, in whole or in part, with the loss of plaintiff. Peltz v. Eichele, 62 Mo. 171, 180; Lashus v. Chamberlain, 5 Utah, 140, 13 Pac. 361; Howard v. Taylor, 90 Ala. 241, 8 South. 36; Warfield v. Booth, 33 Md. 63; 2 Sedg. Dam. § 632. Nothing here appearing of the amount of plaintiff's loss, the allowance of damages beyond a nominal sum was error.

The judgment of the superior court should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of the superior court is reversed, and the cause is remanded for a new trial.

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110 Cal. 191

BIDDICK v. KOBLER. (No. 18,441.)

(Supreme Court of California. Nov. 27, 1895.)

TRIAL—EVIDENCE—OBJECTION TO EVIDENCE—PUBLIC LANDS—TOWN SITES—JUDGE'S DEED—CONCLUSIVENESS.

1. Though a mere general offer to prove certain facts is an improper method of presenting offered evidence, and should not be allowed except by consent of counsel, where the objection to such an offer is not on the ground that the offer is an improper method, it will be presumed that the method used was by consent.

2. Rev. St. U. S. § 2387, provides for the granting of public lands settled on as a town site to the judge of the county court, in trust for the occupants thereof, the trust to be executed under regulations prescribed by the legislature of the state in which the lands are situated. Act March 12, 1885, § 24, providing as to the conclusiveness of the judge's deed, relates to the regularity of the preliminary proceeding; section 11 requires an action by a "party out of possession"; and section 10 requires one "for the recovery of the possession of such premises" to be brought within a certain time. *Held* that, in an action by the grantee in such a deed, to quiet title to the land conveyed, defendant, who was in possession, may show that, at the time of the execution of the deed, he was in possession and entitled to the occupancy of the land.

Department 2. Appeal from superior court, Plumas county; G. G. Clough, Judge.

Action by Josiah Biddick against John B. Kobler. There was a judgment for plaintiff, and defendant appeals. Reversed.

C. E. McLaughlin, for appellant. Goodwin & Webb, for respondent.

PER CURIAM. This action is prosecuted to quiet title to a small parcel of land claimed by the plaintiff to a part of lot 3 in block 5 in the town of Crescent Mills, in Plumas county. The complaint is in the usual form. The premises in controversy are within the town site of Crescent Mills (an incorporated town), which was surveyed and platted in 1882 upon public lands of the United States, under the provisions of section 2387 of the United States Revised Statutes, authorizing the judge of the county court to enter lands settled upon and occupied as a town site, and for which a patent was issued by the United States October 26, 1888, to the superior judge of said county, "in trust for the several use and benefit of the occupants thereof according to their respective interests, the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated." The statute under which said trust was administered was the act of our legislature approved March 30, 1868, and the amendments thereof. For the original act, see St. 1867–68, p. 692; and, as amended, see St. 1885, p. 115, or Pol. Code, under section 4442, p. 723.

The plaintiff claims under a deed executed by the superior judge January 7, 1890, which purports to convey to him lot 3 in block 5, "as appears from the official plat of the survey of said town-site now on file and of record in the office of the county recorder of said Plumas county." The defendant, in addition to denials, alleged that for more than 22 years before the commencement of the action, and at the time the town site was surveyed and platted, he was, and ever since has been, the sole and exclusive occupant of the disputed premises, and that neither the plaintiff nor his grantor had ever been in the possession or occupation thereof; that in 1871 defendant inclosed his lot, and erected a boundary or division fence between the lands of plaintiff and defendant, and inclosed within defendant's inclosure the land in dispute; that plaintiff and his grantor agreed to and acquiesced in said boundary; that the said parcel in controversy had ever since remained inclosed as part of defendant's lot, and cultivated and improved as such, adversely to the plaintiff, down to the present time; and that he had paid all taxes thereon. Plaintiff introduced in evidence the original plat and field notes of the town site, and described the parcel in litigation (a triangular piece of ground in the southeast corner of lot 3), and also the patent for the town site, and the said deed from the superior judge for said lot 3, and rested. Thereupon counsel for the defendant offered to prove that in 1871 defendant built a line or division fence between his lot and that of the plaintiff, which included within the boundaries and inclosure of the defendant the land here in dispute; that, at the time the survey and application for patent were made, the land in controversy was so within the inclosure of defendant, and was occupied by him; that the land in question was never at any time in the possession or occupancy of the plaintiff; that the boundary line or fence above mentioned was acquiesced in by the grantor of plaintiff and by the plaintiff for more than 22 years; that defendant had been in the adverse possession of the parcel in controversy, occupying and claiming the same, ever since 1872, and had paid all taxes, state, county, and municipal, levied upon the same, though the land, since 1882, has been assessed according to the town plat, which it was always supposed indicated the fence as the boundary between the two lots. Plaintiff objected "to the offer as immaterial, incompetent, and irrelevant, with the exception of that we stated [referring to the statute of limitations]." The court thereupon ruled that "it is incompetent and immaterial as the statute stands," and made findings, and entered judgment for the plaintiff. The defendant appeals from the judgment, the facts being brought into the record by a bill of exceptions; and the question here is whether the facts so offered to be proved would, if proved by competent evidence, constitute a defense to the action.

A mere general "offer" to prove a variety of things, without producing the witnesses or evidence whereby they are to be proved, or segregating the different items, is an improper method of presenting offered evidence, and should not be allowed unless by consent of parties. In the case at bar, however, the objection was not made upon the ground that the offer was an improper method, and therefore we will assume that this method was used by consent; and we think that the court below erred in sustaining the objection to appellant's said offer. The appellant should have been allowed to prove, if he could, that when the deed of the judge was made to respondent, and during all of the time when preliminary steps were being taken to acquire title to the town site, and distribute the same to those entitled to particular parcels of land, the appellant was in the actual possession of the part of the lot here in contest, and that, therefore, respondent was not during said time the occupant thereof, or in any way entitled to the same. Under the grant of congress, particular parcels of land are to go to the "occupants," or those entitled to the occupancy thereof; and the trust is to be executed under such regulations as the legislature of the state may prescribe. It was said by the supreme court of Kansas in Rathbone v. Sterling, 25 Kan. 448: "We do not doubt the power of the legislature to provide for a contest and decision in the first instance, and before the probate judge or commissioners, and to give to such trial all the force and effect of a regular trial before a court." And although, under the "regulations" prescribed by the legislature of California, the superior judge does not act judicially, but merely makes deeds under certain circumstances as a matter of course, still a provision that a deed of the judge should be conclusive against all persons who should not bring actions against the grantees within a specified time would, no doubt, be valid. There are provisions of that kind in our statute as to certain persons; but we find nothing of the kind which is applicable to one in the alleged position of appellant; that is, one in the actual possession and occupancy of a piece of land, and entitled to such occupancy.

There are only three provisions of the statute relating to the conclusiveness of the judge's deed,—sections 24, 11, and 10 of the act of March 12, 1885. Section 24 relates merely to the regularity of the preliminary proceedings; section 11 refers merely to the bringing of an action by a "party out of possession"; and section 10 provides that an action for "the recovery of the possession of such premises" must be brought within a certain time after the recording of the deed. Appellant's rights are not affected by either of these provisions. Whether or not he has any right in the premises which would warrant a court in giving him any affirmative relief is not a question in this case. Respondent brought this action relying upon his paper title, viz. his deed from the judge; and appellant may rely upon his actual possession as a defense to the action, if he can show that at the time of the execution of said deed he was the occupant and entitled to the occupancy of the land in contest, and respondent never was either the occupant or entitled to the occupancy of said land. If respondent was not the occupant, within the meaning of the grant of congress, he was not entitled to the deed from the judge; and, as we have seen, there is no statutory provision making the deed conclusive as against appellant. These views are sustained by the following authorities, which, indeed, go much further in the same direction than we are called upon to go here: Treadway v. Wilder, 8 Nev. 91, 9 Nev. 71; Lechler v. Chapin, 12 Nev. 65; Rathbone v. Sterling, 25 Kan. 444; City of Helena v. Albertose, 8 Mont. 499, 20 Pac. 817; Hall v. Ashby, 2 Mont. 489. The judgment is reversed, and the cause remanded for a new trial.

110 Cal. 183

KNOWLTON v. MACKENZIE et al. (DAVIS, Intervener. No. 15,304.)[1]

(Supreme Court of California. Nov. 27, 1895.)

TRIAL—FINDINGS BY COURT—MODIFICATION OF JUDGMENT—APPEAL—FAILURE OF TRANSCRIPT TO SHOW SERVICE OF NOTICE OF APPEAL.

1. The fact that a finding of fact is placed after the conclusions of law, and is given as a fact resulting from the other findings of fact, does not prevent it from being a finding of fact, to enable the appellate court to review which appellant must have excepted thereto, and incorporated the evidence in a statement or bill of exceptions.

2. Where defendant refuses to sign a stipulation authorizing the court to modify a judgment, an expression by his counsel of willingness to obey any order of the court does not authorize the court to increase the amount of the judgment against defendant.

3. Under Code Civ. Proc. § 1045, providing that, if an original pleading or paper be lost, the court may authorize a copy to be filed, a copy of a notice of appeal with proof of service may be supplied.

4. An appeal will not be dismissed for failure of the transcript to show that notice of appeal was served, where, in answer to such motion, appellant files a certified copy of an order of the court, directing that a copy of the original notice of appeal, which had been lost, with affidavit showing service, be filed nunc pro tunc.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

Action by one Knowlton against one Mackenzie and others, in which George O. Davis intervened. From a judgment for Davis against defendant Kaufman, the latter appeals. Modified.

Garber, Boalt & Bishop, for appellant. James G. Maguire, Frank Shay, and Geo. W. Towle, for respondent.

HARRISON, J. The defendant Mackenzie was engaged as a stockbroker in San Francisco, and on the 3d of December, 1886, made an assignment for the benefit of his creditors to C. H. Kaufman, the appellant herein, under the provisions of title 3, pt. 2, div. 4, of the Civil Code, and on the same day transferred to him certain money and other personal property. Included in the property so transferred were certain mining stocks belonging to M. H. McDonald, which were subsequently sold by Kaufman under directions from one Scott, to whom McDonald had transferred her claim against Mackenzie, and for which Kaufman realized the sum of $5,316.55. The court found that the sum of $1,494.03, which had been received by McDonald from Kaufman, should be considered as a payment upon this claim, and found, as a conclusion of law, "that the intervener, George O. Davis, is entitled to a judgment against the defendant C. H. Kaufman, assignee of John Mackenzie, in the sum of $3,822.52." Davis was the successor in interest, through Scott, to the claim of McDonald, and had filed a complaint in intervention in the action. These findings of the court were filed January 21, 1889, and judgment thereon was signed and filed on the same day, and entered of record January 31, 1889, by which it was adjudged "that the intervener, George O. Davis, do have and recover of and from the defendant C. H. Kaufman the sum of $3,822.52." May 24, 1889, the court made an order, which was entered in its minutes, that the judgment be modified "by striking out therefrom $3,822.52, and substituting in lieu thereof $5,769.52, so that the said George O. Davis shall have and recover of and from the said C. H. Kaufman the sum of $5,769.52, instead of the sum of $3,822.52," and that said modification be made nunc pro tunc of the 31st of January, 1889, and that the clerk of the court make an entry thereof in the original judgment entered in the judgment book. Thereupon the clerk drew a line in red ink, upon the face of the judgment, through the figures $3,822.52, and inserted directly after them, in red ink, the figures $5,769.52, and wrote on the margin, "Modified by the order of court May 24, 1889." From this judgment Kaufman has appealed upon the judgment roll alone, without any bill of exceptions.

1. The finding that Kaufman realized the sum of $5,316.55 from the sale of the stocks belonging to McDonald, the respondent's assignor, is the basis of the judgment against him, and, in the absence of any qualifying finding of fact, would have authorized a judgment against him for that amount. The further finding that of the moneys received by McDonald the sum of $1,494.03 was to be deducted from this amount, and that the remainder of the moneys received by her were to be treated as a dividend upon her general claim against Mackenzie, must be regarded upon this appeal as authorized by the evidence before the trial court. If the appellant would question the conclusion of this finding, it was incumbent upon him to except thereto, and have the evidence thereon presented in a statement or bill of exceptions. This finding is placed after the conclusions of law, and is given as a fact resulting from the other findings of fact, but does not cease to be a finding of fact by reason of its position. Upon the findings, therefore, the court was authorized to render the judgment which was originally given and entered in favor of the intervener.

2. The subsequent modification of the judgment was unauthorized. After the court had rendered judgment in accordance with its findings, such judgment could be changed only through a motion for a new trial or upon appeal. As a judgment must depend upon the conclusions of law drawn from the

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[1] Rehearing denied.

findings of fact (Broder v. Conklin, 98 Cal. 360, 33 Pac. 211), before a judgment drawn from these findings of fact can be changed, the findings of fact must themselves be changed, so as to support a different judgment; and, as the court loses all power to change its findings of fact after the entry of judgment (Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Los Angeles Co. v. Lankershim, 100 Cal. 532, 35 Pac. 153, 556), the only mode in which the findings of fact can be changed is by means of a motion for a new trial (Egan v. Egan, 90 Cal. 15, 27 Pac. 22). This proposition is not controverted by the respondent, but it is claimed that the action of the court in modifying the judgment was authorized by a stipulation of all the parties to the action. This contention, however, is not sustained by the terms of the order or of the stipulation upon which the order is based. The appellant not only did not sign the stipulation, but the order modifying the judgment recites that it was signed "by all the respective parties in this action, except the defendant Kaufman," and also that "said Kaufman, by his attorney, being present, and having refused to sign any stipulation, but expresses the willingness of the assignee to obey any order of the court in the cause." Whatever may have been intended by the statement of his attorney that the assignee was willing "to obey any order of the court in the cause," it did not confer upon the court any authority to modify the judgment that had been entered against him, by increasing the amount for which he was declared liable. The stipulation of the other parties for increasing the amount of the judgment against him could not confer any such authority, and, in the face of the express declaration by the attorney that his client refused to sign any stipulation, the court was not authorized to accept the attorney's statement of the "willingness" of his client as the equivalent of a stipulation. The attorney is only the agent of the client for the management and conduct of the cause while it is pending before the court for determination, and as such agent he has authority to bind his client in all matters pertaining to the conduct and management of the suit. The ground upon which it is held that a client is bound by the stipulations of his attorney in those matters that are not directly connected with the conduct of the trial, or the procedure of the court in which the cause is pending, rests upon the presumption that the client has given authority to his attorney to make such stipulation; but, whenever it appears that the attorney has entered into an agreement in direct opposition to the instruction of his client, there is no ground for such presumption. As a general rule, a stipulation of the attorney will be presumed to have been authorized by the client, as well in order to uphold the action of the court as for the protection of the other party to the stipulation; but when the adverse party, as well as the court, is aware that the attorney is acting in direct opposition to his client's instructions or wishes, the reason of the rule ceases, and the court ought not to act upon the stipulation, nor can the adverse party claim the right to enforce a judgment rendered by reason thereof. For the purpose of prosecuting or defending an action the authority of an attorney ordinarily terminates with the entry of judgment (Kellogg v. Gilbert, 10 Johns. 220; Weeks, Attys. at Law, § 239), except for the purpose of enforcing the judgment or seeking to have it set aside or reversed. When a judgment in the cause has once been entered under the direction of the court, the rights of the client have been finally determined, and the attorney ceases to have any authority to consent to its modification to the prejudice of the client without his consent. In the present case the court had adjudged that the liability of the appellant to Davis was only $3,822.52, and, before his attorney could consent that this liability might be increased by nearly $2,000, there was needed more than the presumption of authority which existed during the conduct of the trial and prior to the rendition of the judgment. In Preston v. Hill, 50 Cal. 43, it was directly held that an attorney has no authority to bind his client by the compromise of a pending action without express authority from the client, and that the court is not authorized to enter a judgment upon such consent if the objection of the client is brought to its notice, or to enforce it in favor of the party for whom it was entered with knowledge that it was given without the consent of the client. The principles of that case and the reasoning of the court in its opinion fully sustain the position of the appellant herein in resisting the action of the court in modifying the judgment which was originally entered against him.

3. It is urged by the appellant that the court erred in entering the judgment against him individually, rather than in his representative capacity; that, as the findings of fact show that he received the money realized from the sale of the stocks as the assignee of Mackenzie, the judgment should run against him in the same manner. It is not necessary to determine whether this was error, as the respondent in his brief has consented that the judgment may be modified in this respect.

4. A motion was made to dismiss the appeal herein upon the ground that the transcript fails to show that the notice of appeal was served upon the respondent. In reply thereto the appellant has filed, as a portion of the record in the cause in the superior court, a copy of certain proceedings therein, properly certified by the clerk of that court, from which it appears that the original notice of appeal has been lost, and that it has been established to the satisfaction of that court that the notice of appeal (a copy of

which is set forth in the printed transcript herein) was on the 28th day of January, 1880, served upon the attorney of record for the respondent herein, and that a written admission of the service of said notice was by such attorney indorsed upon the same, and that the said notice of appeal was on the same day filed in the office of the clerk of that court, and that the court thereupon made an order directing that a copy of said notice of appeal, together with the affidavit showing its original filing and service, be filed nunc pro tunc, and that the same has been so filed. It was held, in Perri v. Beaumont, 88 Cal. 108, 25 Pac. 1109, that, if the evidence of the service of a notice of appeal as contained in the transcript is defective, the appellant will be allowed to show by proper proof that a sufficient service had been made, and, under the rule there given, an appeal will not be dismissed for failure of the transcript to contain proof of the service of the notice, if the appellant is able to show that service has been, in fact, properly made. Section 1045, Code Civ. Proc., provides that, "if an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original," and upon the order of the court made in the present case the substituted papers are entitled to the same weight as would be the originals.

The motion to dismiss the appeal is denied, and the superior court is directed to strike from the judgment the modification made therein May 24, 1889, and to cause the judgment against the appellant, Kaufman, to be entered against him as assignee of John Mackenzie, and in favor of the respondent Davis, for the sum of $3,822.52, as of the date of its original entry, January 31, 1889.

We concur: GAROUTTE, J.; VAN FLEET, J.

110 Cal. 204

KUMLE v. GRAND LODGE, ANCIENT ORDER OF UNITED WORKMEN OF CALIFORNIA. (No. 18,457.)[1]

(Supreme Court of California. Nov. 29, 1895.)

MUTUAL BENEFIT INSURANCE—VALIDITY OF MEMBERSHIP CERTIFICATE — ACTION ON — APPEAL—ASSIGNMENTS OF ERROR.

1. In an action by the beneficiary of an insurance certificate against a benefit society, the introduction of the certificate is prima facie evidence of decedent's good standing in the society, though an allegation in the complaint that decedent performed all the conditions of the certificate is denied by the answer, which alleges that at the time of his death decedent was suspended from the society for nonpayment of assessments.

2. Where the constitution of a benevolent society provides that a member may appeal from the decision of his lodge to the grand lodge, and from the grand to the supreme lodge, the beneficiary of an insurance certificate, whose claim is rejected by decedent's lodge and the grand lodge, is not precluded from suing on the certificate because she did not appeal to the supreme lodge, the constitution not providing that the action of the supreme lodge should be final.

3. A statement in the assignment of errors as to what the evidence establishes is not a compliance with Code Civ. Proc. § 659, providing that, when the notice of motion for a new trial designates as a ground thereof the insufficiency of the evidence to justify the verdict, the statement shall specify the particulars in which the evidence is insufficient. Dawson v. Schloss, 29 Pac. 31, 93 Cal. 194, followed.

4. An assignment of error, that "the verdict on special issues was error," made to each of several special findings, is not a valid objection to such findings.

Commissioners' decision. Department 2. Appeal from superior court, Yuba county; E. A. Davis, Judge.

Action by Julia E. Kumle against the Grand Lodge, Ancient Order of United Workmen of California, on an insurance certificate. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Eugene N. Deuprey and C. A. Webb, for appellant. W. H. Carlin and Jacob Samuels, for respondent.

SEARLS, C. Appeal from a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial. The action is brought by Julia E. Kumle to recover $2,000, as the beneficiary named in a certain beneficiary certificate issued by the defendant corporation to Peter Kumle on the 14th day of November, 1870, in the words and figures following:

"Grand Lodge, Ancient Order of United Workmen of California. No. 8,007. $2,000. This certificate, issued by the authority of the Supreme Lodge of the Ancient Order of United Workmen, witnesseth: That brother Peter Kumle, a master workman degree member of Sharon Lodge, No. 142, of said order, located at Brownsville, in the state of California, is entitled to all the rights and privileges of membership in the Ancient Order of United Workmen, and to participate in the beneficiary fund of the order to the amount of $2,000, which sum shall, at his death, be paid to his wife, Mrs. Julia E. Kumle. This certificate is issued upon the express condition that said Peter Kumle shall in every particular, while a member of said order, comply with all the laws, rules, and requirements thereof. In witness whereof, the Grand Lodge of California has caused this to be signed by its grand master workman and recorder, and the seal thereof to be attached, this 14th day of November, one thousand eight hundred and seventy-nine. Attest: H. G. Pratt, Grand Recorder. William H. Jordan, Grand Master Workman. [Seal of the Grand Lodge.]"

"We, the undersigned, master workman and recorder of Sharon Lodge, No. 142, do hereby countersign this certificate, and attach the seal of this lodge hereto, rendering the same valid and in full force, this 29th day of November, 1879. A. J. Hankin, Master Workman. Attest: F. P. Thurman, Recorder. [Seal of subordinate Sharon Lodge, No. 142.]"

The complaint may be said to be in the usual form in such cases. It contains a copy of the foregoing certificate, and, among other allegations, avers the acceptance of the certificate by Peter Kumle; that he, in every particular, complied with all the laws, rules, and requirements of the Ancient Order of United Workmen; that he, up to the time of his death, which occurred December 4, 1891, contributed to the funds of the order as required by the laws and rules thereof, and had at the time of his death duly performed all the conditions on his part to be performed in relation to said beneficiary certificate, and in relation to the payment thereto, to entitle the beneficiary named therein to have and recover $2,000, as in said certificate set forth, etc. The answer specified the objects of the corporation defendant; admitted the membership and issuance of the certificate to Kumle, but denied that he continued to be or was such member at the date of his death, or that he complied with the laws and regulations of defendant, and averred his suspension from the order for nonpayment of assessments more than six months before his death; set forth portions of the constitution of the order providing for suspension for nonpayment of assessments, etc. At the trial the plaintiff introduced in evidence the foregoing certificate; proved that plaintiff was the wife of Peter Kumle during his lifetime, and the person named in the certificate as the beneficiary; that Peter Kumle died December 4, 1891; and that no portion of the $2,000 mentioned in the certificate had been paid; and thereupon rested her case. Counsel for defendant moved for a nonsuit upon the grounds that plaintiff had failed to support the allegations of her complaint, or to show that the provisions of the certificate had been complied with by Peter Kumle, to whom the certificate issued, and that the proofs failed to support the allegations of the complaint upon which the right to recover was based. The court overruled the motion, to which ruling counsel for defendant excepted, and the action of the court is assigned as error.

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[1] Rehearing denied.

The question involved in appellant's motion, broadly stated, is this: Was the burden of proof cast upon plaintiff to show that, under the certificate issued to him by the defendant, he had, in every particular, while a member of the order, complied with all the laws, rules, and requirements thereof, as provided in said certificate; and, if so, was the proof sufficient to support the allegations in this behalf? The complaint avers, in general terms, such compliance. The answer denies such compliance, and avers that Kumle had failed to pay his assessments; that on March 29, 1891, he was suspended for the nonpayment of assessments for the month of March, 1891, and had not, up to the time of his death, been restored to membership, and was not at the date of his death a member of the order. The whole question is in a nutshell. The plaintiff's right of recovery being dependent upon the fact that the deceased was a member in good standing at the time of his death, and such fact being denied by the answer, the burden of proof to establish it is on the plaintiff. Siebert v. Chosen Friends, 23 Mo. App. 268. But the issuing of a certificate of membership by a mutual benefit society is evidence of the holder's good standing in the order when it issued, and such good standing will be presumed to continue, unless there is legitimate proof that it no longer exists; and, to rebut such presumption, it devolves upon the defendant, in the absence of proof thereof by plaintiff, to show the loss of such good standing. Order of Foresters v. Zak, 136 Ill. 185, 26 N. E. 593; Stewart v. Supreme Council, 36 Mo. App. 319; Mulroy v. Knights of Honor, 28 Mo. App. 463; Supreme Lodge v. Johnson, 78 Ind. 110; Mills v. Rebstock, 29 Minn. 380, 13 N. W. 162; Elmer v. Association (Sup.) 19 N. Y. Supp. 289. In Stewart v. Supreme Council, supra, the court, in affirming the action of the court below in denying a nonsuit, said: "We think the court did not err in refusing to nonsuit the plaintiff. The plaintiff made out a prima facie case by offering the benefit certificate, which recites that Hugh Stewart is a member in good standing, and that she offered to make proof of his death to the defendant, which the defendant refused to receive. The status of the member, once fixed, is presumed to continue." "In an action upon a life insurance policy, although the answers in the applications are warranties, the burden of proof is on the defendant to show the falsity of any such answers, in accordance with the general rule that the law does not require a party to prove a negative." Bac. Ben. Soc. § 469; Insurance Co. v. Ewing, 92 U. S. 377; Insurance Co. v. Gridley, 100 U. S. 614. The burden of establishing the failure to pay assessments is upon the defendant. Tobin v. Society, 72 Iowa, 261, 33 N. W. 663; Spencer v. Association (N. Y. App.) 37 N. E. 617; Black, Ben. Soc. § 454, and cases there cited. The motion for a nonsuit was properly denied.

2. Appellant claims that the court had no jurisdiction to hear and determine this cause, for the reason that the claim of plaintiff was submitted to the Grand Lodge of California, which decided against the validity of the claim, and no appeal was taken therefrom to the Supreme Lodge. The contention is that, plaintiff "having failed to exhaust such procedure and take such appeal, she waived the right to appeal, and also any right to proceed in the courts of the land as against the tribunal of the order." I fail to observe anything in the record which brings the plaintiff within the rules of law invoked by appellant. (1) There is nothing in the certificate, constitution, laws, or regulations of the order, so far as the records show, requiring differences of the character involved in the present controversy to be submitted to the order for adjustment, or, if submitted, making its action final. (2) There was no submission of the controversy, in the sense of an arbitration. The Ancient Order of United Workmen is a fraternal, charitable, beneficial, and benevolent order, and is governed by a supreme lodge, and in this state by the Grand Lodge of Ancient Order of United Workmen of California, and by subordinate lodges. The Grand Lodge of California has exclusive original jurisdiction over all subordinate lodges, subject to the provisions of the Supreme Lodge constitution and right of appeal. The Grand Lodge, by its constitution, "guaranties to each member of the order of the W. [Workmen] degree (to be paid to such person or persons as said member may have directed while living) the sum of two thousand dollars: provided said member shall have complied, in all particulars, with all the laws, regulations, and requirements of the order." It issues all certificates, which are to be countersigned by the master workman of the subordinate lodge of which the recipient is a member, with the seal of the subordinate lodge attached, etc. Peter Kumle was a member of one of these subordinate lodges, viz. of

Sharon Lodge, No. 142, situate at Brown's Valley, in the county of Yuba, and, as such member, received in due form the certificate hereinbefore set forth. The constitution of subordinate lodges provides, in reference to appeals therefrom, that "any member considering that injustice has been done by the decision of the lodge may, within one month thereafter, appeal in writing to the G. M. W. of [or] Grand Lodge, if in session," etc. This right of appeal is given to members only, and cannot apply to the plaintiff, who was not a member. What she did in fact do was to present her papers and proofs of death to one Meek, who was a member of the order, to submit them for her to the Grand Lodge, and to secure and demand from it the payment of the $2,000. Meek filed a written request that the Grand Lodge would consider the matter, giving reasons therefor, and showing that the subordinate lodge had refused to acknowledge the claim. The Grand Lodge appointed a committee, which reported against payment, and its report was approved. The privilege of an appeal from the Grand Lodge is given as follows: "Any member of the Grand Lodge, or any party to an appeal determined by the Grand Lodge, may appeal to the Supreme Lodge from the decision of such Grand Lodge." As plaintiff was not and could not be a party to an appeal determined by the Grand Lodge, and was not a member thereof, she could not appeal therefrom to the Supreme Lodge. In all this, and in the absence of some rule or law of the order in view of which the contract might be supposed to have been made, I observe nothing to differentiate the application of plaintiff to defendant for the payment of her demand from the ordinary demand of payment by a creditor from his debtor. The alleged debtor, being a corporation, in its refusal to pay acted through the channel or medium usually provided for reaching a conclusion in similar cases. "An association cannot, by its constitution or by-laws, confer judicial powers upon its officers or committees, so as to enable such officers or committees (without voluntary submission to their authority on the part of lodges or members) to adjudge a forfeiture of property rights, or to deprive lodges or members of their property, or to arbitrarily take property away from one set of members, and give it to another set. This is on the ground that the creation of judicial tribunals is one of the functions of sovereign power, and because to allow such powers to be conferred would be contrary to public policy, just as agreements to refer future controversies to arbitration cannot be enforced. An adjudication of these officers or committees which has this effect of forfeiture of property or property rights is not good, either as an award or as a judgment." Bac. Ben. Soc. § 123, and cases there cited. It must not be understood from the foregoing quotation that Grand Lodges may not, by their laws, regulate the internal policy of the lodges under their jurisdiction, or that subordinate lodges may not, by their regulations, provide when, how, and under what circumstances membership and consequent rights and privileges may be obtained and lost. The question of the extent to which such regulations may reach, and of the power of the associations to make their determination thereof final, involves considerations upon which there is a wide divergence of opinion, as expressed in the reported cases. We are not concerned with that question, for the reason that in the present case the defendant has not attempted by its laws to make its action either exclusive or final, and upon the money demand of the plaintiff, growing out of a contract with the defendant, we have no doubt but that the superior court of Yuba county had jurisdiction.

Defendant's notice of motion for a new trial stated, as one of the grounds of the motion, "insufficiency of the evidence to justify the verdict, and that it is against law." The statement on motion for new trial contains no such specification of the insufficiency of the evidence as will warrant us in an examination of the question. Section 659 of the Code of Civil Procedure provides that "when the notice of the motion designates, as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient." There is not in fact any specification in the statement of the particulars in which the evidence is alleged to be insufficient. In the assignment of errors, and under the head of "Insufficiency of the Evidence to Justify the Verdict," there is a statement consisting of four paragraphs, in which the attorney sets forth his views of the result of the testimony. We quote the first paragraph, as fairly illustrative of the whole. It is as follows: "The evidence conclusively established that Peter Kumle was, by operation of law of the order, and binding upon him, suspended from the subordinate lodge, Sharon, No. 142, A. O. U. W., and from all of the benefits and privileges of the Ancient Order United Workmen, California, March 28, 1891. Also, that said Peter Kumle was not at any time reinstated, or his beneficiary certificate renewed, under the laws of the order, after March 28, 1891. Furthermore, the proof positively determined the fact that Peter Kumle was not in the order, A. O. U. W., California, either in good standing or at all, when he died, December 4, 1891, and that all rights and privileges that he may ever have had were long previously forfeited and waived by his own acts, and that his beneficiary certificate stood avoided and of no effect." This question was fully considered in the late case of Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31, and the opinion in that case is so full and explicit that nothing need be added here to show the defects in the present statement. See, also, Baird v. Peall, 92 Cal. 235, 28 Pac. 285; Menk v. Insurance Co., 76 Cal. 50, 14 Pac. 837, and 18 Pac. 117; Eddelbuttel v. Durrell, 55 Cal. 277; Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Parker v. Reay, 76 Cal. 103, 18 Pac. 124. In this case there was, in addition to the general verdict, special findings by the jury upon 23 special issues submitted to them, which findings are objected to in the following manner: Under the head of "Errors of Law Occurring at the Trial, and Excepted to by the Defendant," is the following: "The verdict on special issue 1 was error." And the same statement is made as to each of the findings upon the other 22 issues. These special findings, which are in themselves amply sufficient to support the judgment, stand without valid objection. The other objections urged do not call for special mention. There are a few errors of law assigned, based upon the admission and rejection of evidence, but, as they are not urged by appellant, we need not comment upon them. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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5 Cal. Unrep. 203

HAIGHT v. SEXTON. (No. 15,843.)

(Supreme Court of California. Nov. 30, 1895.)

HARMLESS ERROR—REVIEW ON APPEAL—INSOLVENCY—ACTION BY ASSIGNEE—FINDINGS.

1. A finding by the trial court on evidence in which there is no substantial conflict will not, on appeal, be disturbed.

2. A reversal of a judgment cannot be had because a finding was made on an issue outside the pleadings, where other findings in the cause are sufficient to support it.

3. Where, in an action by an assignee in insolvency for possession of property, defendant claims under a bill of sale, a finding that defendant procured it by fraud is proper as a fact bearing on defendant's right to possession, though the issue of fraud is not raised by the pleadings.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Robert Haight, assignee, against David T. Sexton. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Sullivan & Sullivan, for appellant. Alex T. Vogelsang and I. I. Brown, for respondent.

PER CURIAM. Action by an assignee in insolvency to recover possession of goods and chattels as the property of the insolvents. It is mainly urged that the findings of the trial court that the insolvents were entitled, at the date of the adjudication of insolvency, to the possession of the property, and that defendant had no right thereto, is not supported by the evidence; but we are constrained to hold against such contention. While the evidence is such as to make the impression upon our minds that the court below might well have found to the contrary, and that such finding would have been clearly sustained by the evidence, there is nevertheless to be found in the record evidence tending to support the view taken by the trial court of a character to raise a substantial conflict upon the point; and under the well-established rule obtaining in such cases we are not at liberty to disturb the findings.

As to the finding that defendant procured the delivery of the bill of sale, under which he claimed to hold the property, to be made to him by fraud and misrepresentation, it may be conceded, as contended by appellant, that it is without any issue in the pleadings, and therefore erroneous. But it is an error which cannot avail appellant, since the other findings in the case fully support the judgment, and the finding objected to becomes immaterial. As we regard it, however, the finding should be taken more in the nature of a probative fact from which the court deduced the ultimate fact that defendant was not entitled to the possession of the property. In this view it was not improper, there being evidence tending to support it.

We perceive no prejudicial error in the rulings of the court upon the objections made to the introduction of the record in the insolvency proceedings; nor upon the ground as to the authority of the assignee to maintain the action. Independently of the question as to the power of the court to direct the assignment to be made by the clerk nunc pro tunc, we think the authority of the assignee was sufficient to entitle him to maintain an action for the mere possession of the property. The judgment and order are affirmed.

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5 Cal. Unrep. 205

NEWELL v. STEELE et al. (No. 16,012.)

(Supreme Court of California. Nov. 30, 1895.)

APPEAL—REVIEW—EVIDENCE.

A judgment based on conflicting evidence will not be disturbed.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Emily S. Newell against Mary J. Steele and others. From a judgment for plaintiff and order denying a new trial, defendants appeal. Affirmed.

William H. Jordan, for appellants. James G. Maguire and W. C. & L. G. Burnett, for respondent.

PER CURIAM. This is an appeal by defendants from the judgment and an order denying a new trial in a case wherein plaintiff was awarded damages for a withdrawal of lateral support, and consequent injury to her property; and the single question presented is whether the evidence supports the findings, the contention being that it does not. It would be profitless to state the evidence, or advert specially to the views of counsel for appellants in his very able and ingenious effort to sustain his contention, since it is clear to us, after a very careful examination of the evidence, that the fact which, under the settled doctrine of this court, bars us from reversing a case upon the facts,—a substantial conflict in the evidence,—is presented by the record. This conflict is sharply defined upon the two main issues,—that of previous reasonable notice of defendants' intention to make the excavation complained of, and the exercise of reasonable care in doing the work; and while, upon the question of damages suffered, we are inclined to think the lower court adopted rather extreme figures, in view of the testimony of most of plaintiff's own witnesses, there is evidence to sustain this finding as well, and it cannot therefore be disturbed. The judgment and order are affirmed.

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110 Cal. 236

YEARSLEY v. SUNSET TELEPHONE & TELEGRAPH CO. (L. A. 30.)

(Supreme Court of California. Nov. 30, 1895.)

MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE APPLIANCES.

A servant engaged in stringing wires on telephone poles cannot recover from his master damages for injuries received from falling from a tree, by reason of a limb breaking, which he had climbed in order to arrange the wires which passed through the tree.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by A. P. Yearsley against the Sunset Telephone & Telegraph Company, a corporation. From a judgment of nonsuit, and from an order denying a new trial, plaintiff appeals. Affirmed.

McComas & Schutze, for appellant. Graff & Latham, for respondent.

GAROUTTE, J. Plaintiff brought an action against defendant to recover damages for personal injuries received by him while in its employ. He was nonsuited, moved for a new trial, and now appeals from the judgment, and also from the order denying his motion. The facts may be briefly stated as follows: Plaintiff was a lineman of defendant, a telephone and telegraph company, and was ordered by defendant to string a line of wire upon certain telephone poles. A pepper tree, situated upon private land, and between two of these poles, was to some extent an obstruction in stringing the wire. Thereupon plaintiff climbed the tree, and, while engaged in arranging the wire, the limb upon which he was standing gave way, and he was precipitated to the ground, with serious injury to himself.

The judgment of nonsuit was properly granted, as we fail to discover by the record any evidence of negligence upon the part of the defendant. Appellant's argument goes to the extent that defendant was guilty of negligence in furnishing defective appliances to be used in stringing the wires. But it cannot be claimed that this pepper tree was an appliance furnished by defendant. It belonged to a stranger, and was upon private property. Even conceding it an appliance, and a defective one, it was one of plaintiff's own choosing, and he must bear the burdens resulting from a bad exercise of judgment upon his part. Let us suppose plaintiff had fallen from a defective fence encountered in the line of his duty while stringing this wire, and had suffered injuries; would defendant be liable? Or let us assume that he had undertaken to swim a stream while in the line of his duty, and had been drowned; would there be a liability against defendant? We fail to discover it. Plaintiff was ordered to do certain work, namely, string wires. He was furnished the poles upon which to string them. Without demanding further appliances of any kind, or informing defendant that others were needed, he proceeded with the work, and, while so engaged, called to his aid additional appliances, of his own selection. He stands in the same position as though he had chosen for his use a frail plank or a rickety ladder, rather than a pepper tree. As to the comparative knowledge of plaintiff and defendant pertaining to the defects in the tree, and the dangers arising from its use as an appliance, we pass the subject without consideration. For the foregoing reasons the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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110 Cal. 215

WULFF v. SUPERIOR COURT OF SAN JOAQUIN COUNTY. (S. F. 195.)

(Supreme Court of California. Nov. 29, 1895.)

RECEIVERS—SALE OF BUSINESS PENDENTE LITE.

In a suit for the dissolution of a partnership, in which a receiver was appointed, the court, pendente lite, may order a sale of the business and good will of the partnership, the partnership being insolvent, and the business being carried on by the receiver at a loss.

Department 1. Writ of review to superior court, San Joaquin county; J. K. Law, Judge.

Petition by one Wulff against the superior court of San Joaquin county and J. K. Law, acting judge, to review a judgment in the case of one Parsons against petitioner. Judgment affirmed.

Paul C. Morf and James A. Loutitt, for petitioner. John E. Budd and F. H. Gould, for respondent.

GAROUTTE, J. This is a writ of review, issued by the supreme court in the above-entitled action, to review the action of the superior court of San Joaquin county, in ordering a sale of certain partnership property, now in the hands of a receiver, consisting of the stock and good will in a certain paint, oil, and wall paper business in the city of Stockton.

The action of Parsons v. Wulff was for a dissolution of the partnership and an accounting. Wulff filed his answer, denying the allegations of the complaint, and the cause had not come to trial at the time the order for a sale of the partnership business was made. It is contended upon the part of petitioner that until a dissolution of the partnership had been decreed by the court, it had no power to order a sale of the partnership business, and such is the question presented for our consideration. The record of the lower court is before us, including certain supplemental findings of fact made by it, and by that record, taken as a whole, this jurisdictional question must be determined. Blair v. Hamilton, 32 Cal. 52. The record discloses the petition for sale to have been filed by the receiver, and the petition states that the partnership is largely insolvent; that it is for the best interests of the creditors and the partnership that the business be sold, and that it be sold as a whole; that the business, since it came into the hands of the receiver, has been carried on at a loss, and that the loss will be still further increased if the business is continued; that the business has been conducted in a proper and skillful manner by the receiver, an experienced man; and that, by a continuance of the business, the assets will be dissipated and lost to the partners and creditors. Taking into consideration the fact that the assets were not equal to the liabilities, and that the first claim upon the assets rested with the creditors, and that their right to present their claims at any subsequent stage of the litigation was still existent, we think their interests were proper subject-matter for the cognizance of the court in dealing with these assets, notwithstanding they were in no way parties to the record. And, taking all the facts into consideration, we see no excess of power exercised by the trial court in ordering the sale. It must be conceded that the court, by its receiver, had the power to sell perishable property, and upon the showing here made this business was clearly property of that character. The assets consisted of articles of trade and the good will of the business. The tangible assets were becoming dissipated and lost, in spite of care and skill in the management of them, and without these assets the good will would seem to be entirely valueless. These two classes of property were indissolubly connected, and, if the court had the power to sell either, it had the power to sell both. Likewise, the book accounts. If any part of these assets could be sold, and it was for the best interests of the copartnership and the creditors that these accounts should go with the business, the court had the power to so adjudge.

A litigious partner, by means incident to litigation, might be able to delay the entry of a decree of dissolution for years and thereby encompass the utter destruction of the entire partnership assets; and it would seem, in the interests of parties having claims upon these assets, that a court of equity was vested with the right to give relief by converting them into money. But few cases in point have been cited upon either side. In Crane v. Ford, 1 Hopk. Ch. 115, the power of the court to sell partnership property pendente lite is fully recognized; and in Marten v. Van Schaick, 4 Paige, 479, the court said, in speaking of a newspaper partnership: "If a receiver is appointed, he must proceed and sell the establishment without delay, and in the meantime the business must be carried on by him as usual, so that the good will thereof may be secured to the purchaser, and the full value of the establishment realized by the partners on such sale. But the court will not take upon itself the responsibility of continuing the publication of a political paper by a receiver any longer than is absolutely necessary to prevent a sacrifice of the property." And again, in Williams v. Wilson, 4 Sandf. Ch. 380, the court said: "Then, as to the course to be pursued by the receiver, when vested with the good will of the concern, it is impossible for him to conduct an insane hospital, or a lazaretto for foreign immigrants. The only practical course is for him to sell immediately the lease of the premises where the business was conducted, with the good will of the business and the movables which belong to the institution. And, in order to give efficacy to the sale of the good will, either of the parties may become the purchaser." An analogous principle is recognized in McLane v. Railroad Co., 66 Cal. 629, 630, 6 Pac. 748. In the cases cited, the court held itself possessed of the power to sell, by reason of an actual, present necessity of sale, in order that the assets might be preserved, to the final good fortune of the parties interested therein. There was no more reason for a sale in those cases than in this case. The assets of the present partnership are rapidly depreciating, in spite of the exercise of care and skill in their management, and it would appear to be a mere matter of time when they would become wholly lost. We conclude that the facts in the present case are such that a power of sale in the court, pendente lite, existed. For the foregoing reasons, the orders complained of, made by the trial court, were within its jurisdiction, and they are hereby affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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110 Cal. 198

ROSENTHAL et ux. v. MERCED BANK.

(No. 18,373.)

(Supreme Court of California. Nov. 28, 1895.)

HOMESTEAD—TENANCIES IN COMMON—DEED—AFFIDAVIT DENYING GENUINENESS—ACKNOWLEDGMENT.

1. A homestead cannot be created by a cotenant in lands held as such cotenant.

2. Since the filing of a declaration of homestead by a tenant in lands held in common does not create a homestead therein, a subsequent conveyance to him of his cotenant's share is ineffectual for that purpose.

3. The mode of creating a homestead in lands as prescribed by Civ. Code, §§ 1262–1264, is exclusive.

4. Where, in an action to quiet title, defendant claims under a deed from plaintiff, a copy of which is annexed to the answer, and plaintiff fails to file or serve an affidavit denying its genuineness and due execution, they are "deemed admitted," under Code Civ. Proc. § 448, and the deed need not be put in evidence.

5. A conveyance of land other than a homestead, by a husband alone, transfers his title therein, though the deed is not acknowledged.

Department 1. Appeal from superior court, Merced county; Joseph H. Budd, Judge.

Action by A. Rosenthal and wife against Merced Bank, a corporation, to quiet title. From a judgment for plaintiffs, defendant appeals. Reversed.

Jas. F. Peck, for appellant. Farrar & Ostrander, for respondents.

PER CURIAM. Rosenthal and wife brought this action to quiet their title to lot 7 in block 147 in the city of Merced. The complaint was in the usual form. Defendant answered, and, in addition to denials, alleged that since July 20, 1893, it has been the owner in fee simple of said premises, "on which said last-mentioned date the said plaintiffs made, executed, acknowledged, and delivered to defendant their certain deed in writing, a copy of which said deed is hereto annexed, marked 'Exhibit A,' and hereby referred to and made a part hereof; and on the 11th of October, 1893, in an action then pending before the superior court of Merced county, between the same parties hereto, by the judgment of said court, duly given and made, it was adjudged and decreed that said deed transferred and conveyed said premises described in the complaint herein to defendant, and said judgment has never been reversed, annulled, or set aside, and the same is now a final judgment of said court." Said Exhibit A, attached to said answer, purports to be a copy of a deed signed by A. Rosenthal and Betsy Rosenthal, said signatures being followed by the words, "Signed, sealed, and delivered in the presence of Samuel C. Bates," but no acknowledgment appears thereon. The plaintiffs did not file or serve an affidavit denying the genuineness and due execution of said deed under the provisions of section 448, Code Civ. Proc. The cause was tried by the court, and findings and judgment were in favor of the plaintiffs; and from said judgment the defendant appeals upon the judgment roll, including a bill of exceptions.

A preliminary recital, under the head of "Findings of Fact and Conclusions of Law," states, among other things, that "the defendant failed and refused to introduce any evidence whatever in said cause." The followlowing are, in substance, the facts found, viz.: That plaintiffs are, and since prior to the year 1877 have been, husband and wife; that on March 10, 1877, Charles Crocker was the owner in fee in said lot, and on that day granted and conveyed the same to the plaintiff A. Rosenthal and his brother, D. Rosenthal, and that said deed was duly recorded in said year; that on and prior to June 15, 1882, the plaintiffs resided with their family in a dwelling house upon said lot, and claimed and used said lot and dwelling as their home and homestead; that said A. Rosenthal has never selected any homestead; that on the 15th of June, 1882, said Betsy Rosenthal selected the said lot and dwelling house as the homestead of herself and her said husband, and executed and acknowledged the selection and declaration of said homestead in due form for the joint benefit of herself and husband, and said declaration was duly filed for record and recorded in the office of the county recorder of said county on June 16, 1882; that "said premises so selected as a homestead were at the time of such selection in the exclusive occupation of the plaintiffs, and were inclosed with a picket fence, and they have been ever since such selection, and are now, inclosed with a picket fence, and in the exclusive possession of the plaintiffs, as their homestead," and that the actual cash value of said premises at the time of said selection was $2,500, and that the present actual cash value does not exceed $3,000; that on the 20th day of July, 1883, said D. Rosenthal executed and delivered to said A. Rosenthal a grant, bargain, and sale deed of said premises, which was duly acknowledged, and was afterwards, on the 4th day of August, 1883, duly recorded; and that plaintiffs have ever since the execution of said deed been the owners in fee, and as their homestead, of said lot No. 7, mentioned in the complaint. The bill of exceptions specifies that the evidence is insufficient to justify the finding that the plaintiffs have, ever since the execution of said deed of D. Rosenthal to A. Rosenthal, been the owners in fee, and as their homestead, of the said lot, because, as appellant claims, the deed alleged in defendant's answer, and the genuineness and due execution of which are admitted by the pleadings, was a transfer and conveyance of said premises from plaintiffs to defendant.

It is admitted by plaintiffs' attorney that no affidavit denying the genuineness and due execution of the deed, a copy of which was attached to defendant's answer, had been made or served upon defendant. Upon these facts, appellant contends: First, that a homestead cannot be declared upon realty held in tenancy in common; that, therefore, the lot in question was not a homestead, and could be conveyed by the deed, such as is attached to the answer, whether it was acknowledged or not; and, second, that, whether the lot was a homestead or not, all the title that plaintiffs attempted to prove was acquired by them prior to the date of the deed to defendant, set out in the answer, and that the genuineness and due execution of that deed are admitted by the pleadings, plaintiffs having failed to file an affidavit denying its genuineness and due execution. It is conceded that, at the time the declaration of homestead was filed, the legal title to the lot in question was vested in A. and D. Rosenthal, as tenants in common.

It has been uniformly held in this state that a homestead cannot be created upon land held in cotenancy, or tenancy in common, in favor of one of the cotenants (Wolf v. Fleischacker, 5 Cal. 244; Giblin v. Jordan, 6 Cal. 416; Seaton v. Son, 32 Cal. 481; Cameto v. Dupuy, 47 Cal. 79; Bank v. De la Guerra, 61 Cal. 109; Fitzgerald v. Fernandez, 71 Cal. 504, 12 Pac. 562), even though the declarant supposed himself to be the sole owner (Seaton v. Son, 32 Cal. 481), and that a conveyance by the husband and wife of an undivided moiety of the land would destroy the homestead right (Carroll v. Ellis, 63 Cal. 440). As early as 1865 it was said, in answer to an effort to overturn this rule: "It is now too late to reinvestigate the reasons upon which those decisions are based. The first of the series (Wolf v. Fleischacker) was made nine years ago. The decision was affirmed in several cases [naming them], and since that time the construction of the statute upon the point involved has been regarded as settled. The parties in this case may have relied upon those decisions in dispensing with the signature of the wife to the mortgage." Elias v. Verdugo, 27 Cal. 418. As recently as in Re Carriger's Estate, 40 Pac. 1032, it was said: "It is well settled in this state that a homestead cannot be created by a cotenant in lands held by tenancy in common." Under these uniform decisions, it must be held that, at the time that the declaration of homestead was filed by Mrs. Rosenthal, the land was not susceptible of being impressed with a homestead. It is equally clear that, unless the land was impressed with the characteristics of a homestead at the time of making and filing her declaration, it did not become a homestead by any subsequent act of a third party, or by the subsequent conveyance from the cotenant to her husband. See Reynolds v. Pixley, 6 Cal. 165. Sections 1262–1264 of the Civil Code prescribe the mode of creating a homestead in lands, and the mode thus prescribed is exclusive.

The declaration of homestead by Mrs. Rosenthal did not, therefore, create a homestead in the land, and the title of her husband therein was not affected, but could be conveyed by a deed from himself alone; and it was not necessary that his deed should be acknowledged, in order to be effective as a transfer of his title. A copy of this deed was annexed to the answer of the defendant, and, as the plaintiffs did not file an affidavit denying its genuineness and due execution, they are "deemed admitted" (Code Civ. Proc. § 448), and it was not necessary for the defendant to offer the deed in evidence. The judgment is reversed.

110 Cal. 226

BLYTHE v. AYRES et al. (S. F. 119.)

(Supreme Court of California. Nov. 30, 1895.)

PROBATE PRACTICE—ENTRY OF DECREE.

A proceeding under Code Civ. Proc. § 1664, providing that any person claiming to be heir to a decedent may file a petition to the probate court praying it to declare the rights of all persons in the estate, is not a civil action, within section 668, requiring that judgments shall be entered in the "judgment book"; and the entry of a decree in such a proceeding in the minute book of the probate court is sufficient.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Proceeding by Florence Blythe against Abbie Ayres and others to determine the rights of all persons in the estate of Thomas H. Blythe, deceased. Defendants' motion to dismiss the proceeding was denied, and they appeal. Affirmed.

S. W. & E. B. Holladay, for appellants. Garber, Boalt & Bishop, W. W. Foote, W. H. H. Hart, and Henry I. Kowalsky, for respondent.

HENSHAW, J. Appellant Henry T. Blythe and others moved the court sitting in the matter of said estate to dismiss the above-entitled proceeding, upon the ground that the party entitled to judgment therein had neglected to demand and have the same entered for more than six months. Code Civ. Proc. § 581, subd. 6. His motion being denied, this appeal is taken.

The facts are that in the proceeding had under section 1664 of the Code of Civil Procedure,[1] in the matter of said estate, the order or decree of the court determining heirship and rights to property was upon October 22, 1890, spread at length upon the probate minutes, as required by section 1704 of the Code of Civil Procedure. Appellant prosecuted his appeal from this decree, basing it, as appears from the transcript therein filed, upon the entry thereof made in the minute book. That appeal having been decided adversely to his contention, he makes this motion to dismiss all proceedings taken under said section 1664, for the neglect of respondent, but lately discovered, in failing to have the decree or judgment from which he appealed entered in the proper book. To support the contention, the claim is made that the proceeding under section 1664, Code Civ. Proc., is a civil action; that the final determination of a civil action is a judgment; that a judgment must be entered in a judgment book (Id. § 668); that this judgment admittedly was not so entered; and that the penalty for the omission should be a dismissal.

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[1] Code Civ. Proc. § 1664, provides that any person claiming to be heir to a decedent may file a petition in the probate court praying the court to declare the rights of all persons in the estate.

But the proceeding under section 1664, Code Civ. Proc., while partaking in form of the nature of a civil action, is not a civil action; and the final determination, while having features in common with a judgment, is not a judgment in a civil action. It is unnecessary to discuss the nature and scope of this proceeding, for that has already been elaborately done in this estate in Blythe v. Ayres, 102 Cal. 254, 258, 36 Pac. 522, as well as in the case of In re Burton, 93 Cal. 463, 29 Pac. 36, where it is said: "The proceeding permitted by section 1664 of the Code of Civil Procedure is a special proceeding (Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206), and is embraced within the scope of 'matter in probate' as clearly as is the proceeding for the sale of real property to pay debts of an estate." Moreover, the very contention raised upon this appeal has twice before been presented in motions made by parties to the original proceeding, and both times decided against the contention. In Blythe v. Ayres, No. 15,479 (36 Pac. 588), the record showed the entry of the decree appealed from in the probate minute book, and a motion was made to recall the remittitur as having been improvidently issued, upon the ground that the record disclosed that no entry of the judgment appealed from had been made, the point made being that the entry should have been made in the judgment book; and in Blythe v. Ayres, No. 15,788 (38 Pac. 1108), the motion was made after suggestion of a diminution of the record, for that it did not disclose an entry of the judgment, and the entry shown to have been made in the minute book was not sufficient. In denying these motions, since consent could not confer jurisdiction, it was of necessity held that the final decree, when spread at length upon the minute book of the court in probate, was properly entered. The order appealed from is affirmed.

We concur: McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.; TEMPLE, J.

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110 Cal. 229

In re BLYTHE'S ESTATE. (S. F. 98.)

(Supreme Court of California. Nov. 30, 1895.)

EXECUTORS AND ADMINISTRATORS—PROBATE PRACTICE—JUDGMENT—ENTRY.

An entry of a judgment in probate proceedings in the minute book instead of the judgment book is sufficient to sustain a decree of distribution based thereon.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Appeal by Henry T. Blythe and others from a decree of distribution in the matter of the estate of Thomas H. Blythe. Affirmed.

S. W. & E. B. Holladay, for appellants. Garber, Boalt & Bishop, W. H. H. Hart, W. W. Foote, H. I. Kowalsky, and T. I. Bergin, for respondent.

HENSHAW, J. This is an appeal by Henry T. Blythe and others from the decree of distribution in the matter of the above-entitled estate. The petition for distribution was presented by Florence Blythe. She averred, as the foundation of her claim, the decision and judgment made in the matter of said estate in the proceeding entitled "Florence Blythe vs. Abbie Ayres et al." The appellants appeared, joined issue with the petitioner, and pleaded nul tiel record. Upon the hearing the decision of the court as entered in the probate minute book upon October 22, 1890, was offered and admitted in evidence over the objection of appellants. Appellants, in turn, "offered and demanded that they be permitted to prove that no such judgment existed against them as is alleged against them in the said petition for distribution, because the said judgment (rendered October 22, 1890, in the action or proceeding of Florence Blythe vs. Abbie Ayres et al.) had never been entered in the judgment book; the time to appeal from said judgment had never arrived; the said judgment had never been entered; the action or proceeding was still pending; the alleged appeal taken by Henry T. Blythe et al. as from said judgment was taken by inadvertence, under the impression that said judgment had been entered, and without the knowledge of said parties or their attorneys of the nonentry of said judgment; that said Henry T. Blythe et al. were parties defendant in said action or proceeding, and were making a bona fide claim to the heirship and ownership of said estate; that said alleged appeal of Henry T. Blythe et al. as from said judgment was futile; that the action of the supreme court as in affirming said judgment was without jurisdiction and void; that its remittitur to the superior court certifying its said action was void; that said remittitur was never attached to the judgment roll, and no minute of said affirmance of the supreme court was ever entered on the docket of said superior court." The court sustained the objection of petitioner to this offer. The offer, it will be observed, was to show that the alleged judgment did not exist, because it had never been entered in the judgment book. No claim was made by petitioner that it had been so entered. Indeed, petitioner rested her cause upon the affirmative showing that entry had been made in the minute book. That this entry was sufficient has thrice been decided in the matter of this estate. Blythe v. Ayres (S. F. 119; filed November 30, 1895) 42 Pac. 641. There was thus before the court an affirmative showing of a sufficient entry. For appellants to have proved that it was not entered in some other book could not have advantaged them, and the refusal of the court to allow them to make such proof could not have injured them. The decree and order appealed from are affirmed.

The order of this court, made upon application of appellants herein, restraining the probate court from proceeding further in the matter of the distribution of said estate, is also vacated and dissolved.

We concur: McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.; TEMPLE, J.

110 Cal. 231

In re BLYTHE'S ESTATE. (S. F. 207.)

Appeal of DAVIS.

(Supreme Court of California. Nov. 30, 1895.)

EXECUTORS AND ADMINISTRATORS—APPEAL FROM PROBATE—JUDGMENT—EVIDENCE.

1. The decision of the trial court against a claim of kinship to an intestate, the claim being based on exceedingly light and flimsy evidence, will not be disturbed.

2. A judgment of distribution of a decedent's estate will not be disturbed on appeal by a person not interested in the estate.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Appeal by Sarah Davis from a decree of distribution in the matter of the estate of Thomas H. Blythe. Affirmed.

For other appeals, see 36 Pac. 522, 588, 37 Pac. 392, and 42 Pac. 642.

Timothy J. Lyons, John H. Dwist, and Jas. Alva Watt, for appellant. W. H. H. Hart, Garber, Boalt & Bishop, H. I. Kowalsky, and W. W. Foote, for respondent.

McFARLAND, J. This is an appeal by Sarah Davis from a decree of distribution to Florence Blythe Hinckley of the property and estate of Thomas H. Blythe, deceased. The said Blythe died intestate in April, 1883. Letters of administration upon his estate were issued in that year to Philip A. Roach, who was afterwards succeeded by others as administrators. More than one year after the issuance of letters the respondent herein, Florence Blythe Hinckley,—then Florence Blythe,—commenced proceedings under section 1664 of the Code of Civil Procedure to have the claims of all persons to said estate, and its distribution, ascertained and declared in the manner provided by that section. She filed her petition in October, 1885, claiming to be the daughter and sole heir of said deceased, and entitled to the distribution of his whole estate. The court duly made an order requiring all persons, named or unnamed, to appear on February 1, 1886, and exhibit their claims of heirship, ownership, or interest in said estate, which was duly published; and on said day nearly 200 persons appeared, claiming such heirship. Within the time prescribed by law, said Florence filed her complaint, setting forth the facts constituting her heirship to the deceased, and her claim to said estate; and the numerous persons who had appeared filed pleadings, or "answers," as they are called in the section, setting up the facts constituting their claims to heirship and distribution. They are mostly associated in certain groups, and their claims were mostly inconsistent with and hostile to each other; each group contending that the deceased was descended from parents different from those alleged by either of the other claimants. After various proceedings, not necessary to be mentioned here, and after a full hearing and trial, the court, in October, 1890, made its decision and entered its decree or judgment, by which it was adjudged and decreed that the said Florence was the daughter of said deceased, and his sole heir, and therefore entitled to the distribution of the whole of said estate; and that neither of the said persons appearing as aforesaid, nor any other person, was heir to said deceased, or entitled to any of said estate. From this judgment various appeals were taken, but upon all the appeals the judgment was affirmed. See Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522, also eight other cases there mentioned; Id., 96 Cal. 532, 31 Pac. 915; Hinckley v. Ayres (No. 15,788) 105 Cal. 357, 38 Pac. 735. Two of the persons who appeared and answered and took appeals, as above stated, were William Savage and his brother, David Savage; and these two were brothers of the appellant Sarah Davis. These two brothers, during the above-mentioned proceedings, presented and contested for the claim of the group called the "London Savages"; and this appellant, although she knew that this claim, in which she was interested jointly with her brothers, was thus being litigated, and gave testimony, by a deposition, for her brothers in support of that claim, did not appear as a party; and she now claims the right to open up and again contest for the said alleged London Savage heirship, and to disregard all the proceedings and decisions above mentioned,—which, after full and protracted litigation resulted in the judicial determination of all said conflicting claims in favor of said Florence,—upon the ground that there was no legal service upon appellant of the notice of said proceeding, because she was not individually named in said notice or in an affidavit for publication. Of course, under these circumstances, she is entitled to no equitable consideration, and must stand upon her strict legal rights, if any such she has.

The contention of appellant is that the said proceedings and decree under Code Civ. Proc. § 1664 (styled "Blythe v. Ayres") are not conclusive as against her. But that question does not necessarily arise in this case. Considering the state of the law before the enactment of section 1664, the character of the remedy which that section was intended to provide is quite apparent. It was intended to construct a wider, better, and more just and effective method of determining heirship to one dying intestate, where there are many conflicting claimants of such heirship. It gives a longer time, and affords ampler opportunities to contestants to present and litigate their claims, than they formerly had, when the ordinary decree of distribution was conclusive; and we have no doubt that the legislature intended by said section to make the decree under it conclusive against all persons, and the unquestioned basis for the decree of distribution which was to follow. And this, of course, the legislature could do in a proceeding in rem, such as the one under discussion. But we are not called upon in this case to determine definitely whether or not the somewhat bungling language of the section has in any material way obscured what was apparently the legislative intent. In the case at bar the question arises upon the objections by appellant to the introduction by the respondent of the prior proceedings in the administration of the estate of Thomas H. Blythe, including the proceedings under said section 1664, and the judgment and decree rendered therein. These proceedings were properly set forth by respondent in her petition for distribution, and they were all specifically denied by the appellant in her answer to said petition. If there is any one of the averments of the petition—from the death of Blythe to the moment when the answer was filed—that is not denied by the answer we have failed to discover it. The English language seems to have been tortured in the answer through apparent fear that the denials might not be considered comprehensive and complete. She denies that any proceeding was taken under section 1664, or that any person appeared and filed an answer therein, or that any judgment was rendered, or any appeal taken by any one. The following are some specimens of said denials: "The said Sarah Davis denies that said or any decision so duly or otherwise given or made or as aforesaid or otherwise or at all was in the words or figures following, to wit, as set forth in the said petition, or otherwise or at all." "The said Sarah Davis denies that said or any judgment so or otherwise duly or otherwise given or made or entered or otherwise as aforesaid or otherwise or at all was or is in words or figures following, to wit, as set forth in the said petition, or otherwise or at all." "The said Sarah Davis denies that the said or any judgment still remains in full or any force or effect or otherwise or at all, or has not been in any wise reversed or vacated or annulled, or that certain or any of the aforesaid parties, or any party who appeared as above stated or otherwise in said cause or any cause, or at all, or who appeared upon the or any trial of said or any cause as above or otherwise stated, or at all, appealed from said or any judgment to the supreme or any court of said or any state of California or otherwise or at all," etc.; and it is denied in similar verbiage that "the supreme court or any court or otherwise or at all" rendered judgments on said appeals. It is quite apparent, therefore, that the said evidence objected to was properly introduced in proof of averments denied by the appellant, and necessary to respondent's application for distribution. Moreover, the evidence objected to was admissible, generally, as proof of respondent's status as sole heir of the deceased. Whether it would be conclusive as against appellant, or whether it would have been evidence at all against her on the question of the status of respondent, if appellant were "interested in the estate," is, as before stated, not a necessary question here. Upon the issue of her interest in the estate the court below allowed her to introduce all the evidence she had to offer; and it found that she is in no manner akin to said Blythe, deceased, and has no interest in or claim to any of his estate. It is contended that the finding is against the evidence, and that we ought to say here that upon the testimony introduced by appellant the court below should have found that she is akin to the deceased, and has an interest in his estate. But the testimony on that point was of an exceedingly slight and flimsy character, and we would be without warrant in disturbing the conclusion of the trial judge on this question of fact. See Blankman v. Vallejo, 15 Cal. 646; Mogk v. Peterson, 75 Cal. 501, 17 Pac. 446; Baker v. Insurance Co., 79 Cal. 41, 21 Pac. 357; Elwood v. Telegraph Co., 45 N. Y. 553; Sipple v. State, 99 N. Y. 289, 1 N. E. 892, and 3 N. E. 657. Therefore, as the appellant has no interest in the estate, she is not concerned with its distribution. There are no other points in the case necessary to be noticed. The judgment and decree of distribution appealed from are affirmed.

We concur: HENSHAW, J.; VAN FLEET, J.; GAROUTTE, J.

BEATTY, C. J., and HARRISON, J., deeming themselves disqualified, took no part in the decision of this cause.

110 Cal. 252

In re MULLIN'S ESTATE. (S. F. 3.)

(Supreme Court of California. Dec. 3, 1895.)

WITNESS—PRIVILEGED COMMUNICATIONS—CROSS-EXAMINATION—WILLS—EXECUTION—SIGNATURE OF TESTATOR—PUBLICATION—REQUEST TO WITNESS TO SIGN.

1. Code Civ. Proc. § 1881, subd. 2, providing that an attorney cannot be examined, without the consent of his client, as to communications made to him by the client in the course of professional employment, does not preclude an attorney who witnessed a will he had drawn for decedent from testifying as to testator's mental capacity and instructions in regard to the will, as, by requesting him to witness the will, decedent waived the provisions of the statute.

2. Nor does subdivision 4, which contains the same provision in regard to physicians, preclude the physician who attended decedent during his sickness, and who, at decedent's request, witnessed the will, from testifying as to his mental capacity.

3. Such physician, after testifying as to decedent's mental capacity, may be cross-examined as to his learning and qualifications as an expert, and as to the character of decedent's sickness.

4. That testator, in response to the statement of his attorney in regard to signing the will, that "You can make your cross, and I can sign for you, if you so direct," stated, "Very well; do so," shows a sufficient signature by testator.

5. The testator, in response to the question of his attorney, "What is this instrument?" (testator having just signed it), responded, "That is my will," is a sufficient publication.

6. That testator, in response to the question of his attorney as to whether he wished certain persons, in whose presence he had just signed and acknowledged his will, to witness the same, answered "Yes," is a sufficient request for such persons to witness the will.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Appeal by Mary T. Mullin, in the contest of a will in the matter of the estate of Henry J. Mullin, from a judgment refusing to admit a will to probate. Reversed.

Geo. A. Proctor and D. I. Mahoney, for appellant. Dunne & McPike, for respondent.

HENSHAW, J. Mary T. Mullin, widow of deceased, offered his will for probate. A contest over its administration was raised by the brothers and sister of the deceased. The jury, upon special issues presented for their consideration, found that the deceased at the time of the making of the purported will was not of sound and disposing mind; that the deceased did not subscribe his name to the will, nor did any person so subscribe his name in his presence and by his direction; that no such subscription was made in the presence of the attesting witnesses, or was acknowledged by deceased to them to have been made by him or by his authority. In accordance with these findings, the court entered its judgment and decree denying the instrument probate, and from this decree, and from the order denying a new trial, the proponent appeals.

1. George A. Proctor, called as a witness for proponent, was a subscribing witness to the will, and was also the attorney at law of the deceased in preparing and drawing the will. Proctor was summoned to prepare the will. He visited the deceased, who was then in his last sickness, received his instructions, retired to an adjoining room, reduced them to writing, and returned to the sick chamber, where the will was executed, he becoming a subscribing witness. Objection was made by contestants to questions put to him upon direct examination touching the declarations made to him by deceased, and the instructions given him, and the occurrences at the interview immediately preceding the drafting of the instrument, upon the ground that the evidence was incompetent under section 1881, subd. 2, of the Code of Civil Procedure.[1] The court sustained the objection. In this it erred. Evidence of the occurrences between the attorney and testator, and the latter's instructions, would have offered a valuable aid to the jury in determining the question of the testator's mental capacity at the time of the testamentary act, which followed immediately. The testimony was therefore clearly material, and the conversation was admissible if not in violation of section 1881, Code Civ. Proc. That section is designed to protect the interest of the client. It is his privilege to seal the lips of his attorney, or to permit him to make disclosures of confidential communications. When a testator has requested his attorney to become an attesting witness to his will, he thereby expressly waives the privilege. It is so held by the court of appeals of New York, under the provisions of section 835 of their Code of Civil Procedure, which in substance is identical with section 1881, subd. 2, of our own. As is said in Alberti v. Railroad Co., 118 N. Y. 77, 23 N. E. 35: "But, although dead, he may leave behind him evidence which indicates an express intention to waive the privilege; as, for instance, where he requests his attorney to sign the attestation clause of his will, he by so doing expressly waives the provisions of the statutes, and makes him a competent witness to testify as to the circumstances attending its execution, including the mental condition of the testator at the time. In re Will of Coleman, 111 N. Y. 220, 19 N. E. 71." It is true that the New York Code, in section 836, now expressly authorizes an attorney who has become a subscribing witness to a will to testify to its preparation and execution; but this provision was inserted by amendment adopted in 1892, and merely followed the judicial declaration to that effect. In Re Flint's Estate, 100 Cal. 395, 34 Pac. 863, our Code provisions and the policy of the law are fully considered; and In re Wax's Estate, 106 Cal. 343, 39 Pac. 624, adopts the interpretation above quoted.

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[1] Code Civ. Proc. § 1881, subd. 2, provides that "an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment."

2. Dr. John Lagan was called as a witness by proponent. He was a practicing physician and surgeon, attended the deceased professionally during his last sickness, and was a subscribing witness to the will. These facts were brought forth upon his direct examination. After detailing the circumstances attending the execution of the will, he was asked—still upon direct examination—his opinion of the "mental sanity" of the deceased at the time of such execution, and answered: "At the time he signed he appeared to me to be of sound mind. That is my opinion." Upon cross-examination the court permitted counsel to interrogate the witness as to the character of his patient's affliction, which appeared to be serous apoplexy, resulting in hemiplegy, and to show that the brain is involved and affected by this disease; likewise, that the accompanying paralysis evinced itself upon the Thursday preceding the Monday upon which the will was executed and the testator died. In addition, the witness was interrogated as to the disclosures which the autopsy made of the physical condition of the deceased, and finally he was subjected to a cross-examination, keen and comprehensive, touching his professional learning and qualifications, and as an expert. Appellant contends that this cross-examination was error—First, in violating the privilege accorded by section 1881, subd. 4, of the Code of Civil Procedure;[2] and, second, in permitting a cross-examination touching the expert qualifications of a witness who had been called to testify, as would an ordinary layman, merely to the mental condition of the deceased at the time he was called in to attest the will. But these objections are not to be upheld. In making his attending physician a subscribing witness to his will, the deceased did exactly what he effected in the case of his attorney at law,—waived the privilege, and invited a full and proper examination of the matters and facts upon which their lips would otherwise have been sealed. The evidence was not objectionable as evoking privileged matter, and was pertinent and admissible, if within the range of legitimate cross-examination. And that it was we entertain no doubt. Upon direct examination the jury was informed that this witness was a physician and surgeon, with years of experience and practice, and that he was the physician who attended the testator during his last sickness. Then, for their enlightenment, he is asked his opinion of the mental condition of the testator at the time of the testamentary act, and answers that he was of sound mind. The answer to the question of necessity involved the use of the intimate knowledge by the physician acquired in prescribing for and treating his patient. It would be absurd to say that it was to be limited to the outward seeming and appearance of the patient at that particular moment, or, in other words, that the witness would have been justified in answering (exempli gratia) that from external appearances, and judging as a layman, his opinion was that he was of sound mind, but that using his professional skill and knowledge and intimate acquaintanceship with the patient, acquired as his physician, his opinion was that he was mentally incompetent. Having answered that in his opinion the man was of disposing mind, there were open to the cross-examiner two fields of inquiry: First, the soundness of the witness' judgment, or, in other words, his qualifications as an alienist; and, second, the character of the patient's infirmities,—that is to say, the facts and circumstances upon which the judgment was exercised and the conclusion reached. The cross-examination was confined within these bounds, and was strictly proper.

3. The jury, finding upon special issues, declared that Mullin neither subscribed nor authorized the subscription of his name to the will; that no such subscription was made in the presence of the attesting witnesses, or acknowledged by deceased to have been made by him or by his authority; that the instrument was never declared by Mullin to the attesting witnesses to be his last will; that the attesting witnesses did not sign in the presence and at the request of Mullin; that the instrument was not witnessed as a will by two competent witnesses, each signing his name in the presence of Mullin and at his request; and, finally, that Mullin did not make his mark to said will in the presence of said subscribing witnesses. These findings are absolutely without support, excepting such as they receive from the conclusion reached and expressed by the jury, that, at the time of the making of the will, Mullin was not of sound and disposing mind. If into each of these special verdicts it is to be read, by intendment, that none of these things was done because Mullin was not of sound and disposing mind at the doing of them, then these findings may at least be understood, if not approved. But if they are to be accepted for their face value, as declarations by the jury that the acts did not take place, and the alleged facts had no existence, then are they at absolute variance with the uncontradicted testimony. Three persons were present at the time of the execution of the will. All were called as witnesses. All testified to substantially the same occurrences, and there was no conflicting or opposing evidence. The testimony of the witness Proctor, corroborated by that of the other two, is as follows: "I walked around to the right of the bed, and asked Mr. Mullin if he

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[2] Code Civ. Proc. § 1881, subd. 4, provides that "a licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient."

desired me to read the instrument that I held in my hand. He said 'Yes.' I read it in a loud tone of voice, and when I finished I asked him if that was the disposition he wanted made of his property. He said 'Yes.' I said, 'Do you want your wife to act as executrix without bonds?' He said 'Yes.' I then said, 'Please sign this instrument,' and he made a motion with his right hand to reach up this way (showing), and I reached and handed him the pen that was on the stand. He made the remark, as I put the pen in his hand, 'I am afraid I cannot sign it.' Doctor Lagan supported his back, his hand trembled considerably, and I said, 'If you cannot sign your name, Mr. Mullin, it is not necessary, under the law. You can make your cross, and I can sign it for you, if you so direct me.' He says, 'Very well; do so.' He made his cross by my supporting his wrist and hand. He held the pen in his fingers; his hand was trembling very perceptibly; and I steadied his hand, and he made his mark. I then stepped to the stand, and wrote 'Henry E. Mullin,' as it appears there, and my name to the left of it, as a witness to that mark; and I then stepped back to his bedside, and said, 'Mr. Mullin, what is this instrument?' and he replied, 'That is my will.' I asked him, 'Do you request Doctor Lagan, Mr. Duggan, and myself to witness it?' He answered 'Yes.' We each of us signed our name at the bottom of the instrument as they appear on the instrument." This evidence does not require analysis. It shows a legal execution of the instrument, provided the deceased had sufficient mental capacity and understanding, and it is not contradicted. In re Guilfoyle, 96 Cal. 598, 31 Pac. 553. The judgment and order appealed from are reversed, and the cause remanded for a new trial upon the contest.

We concur: TEMPLE, J.; McFARLAND, J.

110 Cal. 318

MULLER v. ROWELL. (L. A. 29.)

(Supreme Court of California. Dec. 7, 1895.)

AGREED STATEMENT OF FACTS—FINDINGS BY COURT.

Where the parties agree to a statement of facts which is sufficient to support the judgment, a formal finding of facts by the court is unnecessary.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by Joseph Muller against Elmer E. Rowell. Plaintiff had judgment, and defendant appeals. Affirmed.

E. E. Rowell (A. Brunson, of counsel), for appellant. Paris & Allison, for respondent.

VAN FLEET, J. This is an appeal from the judgment upon the judgment roll, with a bill of exceptions, and the only point made for a reversal is that the lower court did not file findings, which were not waived. While the record shows that no formal findings were signed and filed by the judge, it does disclose that the parties presented and filed an agreed statement of facts covering all the issues, and it is recited: "That upon the said statement of facts hereinbefore set forth being filed in the cause, the court ordered judgment in favor of the plaintiff in the said action upon the facts of the case as disclosed by the said statement of facts before referred to and set forth, and that thereupon and on the same day judgment was made and entered in the said action in favor of the plaintiff and against the defendant as prayed for in the complaint." It thus appears that the court adopted the facts stipulated by the parties as the facts of the case, and based its judgment thereon. Under such circumstances, and it appearing that these facts fully support the judgment, no other or more formal findings were required. The statement of facts so agreed to took the place and served all the purposes of a formal finding by the court. Brewster v. Hartley, 37 Cal. 15. It is only where the facts are in issue that findings thereon by the court are necessary in any case; and, where the parties stipulate in writing as to what the facts are, and file such stipulation in the action, it is in all substantial respects the equivalent of admitting them in the pleadings. It is very apparent, we think, from the record, that this appeal was taken purely for delay, since it presents the merest pretense of merit, without any in fact; and we think it a case where, as respondent suggests, the appellant should be mulcted in damages as for a frivolous appeal. The judgment is affirmed, with $50 damages.

We concur: GAROUTTE, J.; HARRISON, J.

110 Cal. 292

CASTRO v. GEIL et al. (No. 15,820.)

(Supreme Court of California. Dec. 6, 1895.)

EQUITY—RESCISSION—PLEADING—STATUTE OF LIMITATIONS—TAKING ADVANTAGE OF BY DEMURRER—RUNNING OF STATUTE.

1. Civ. Code, § 38, provides that the conveyance of a person of unsound mind "not entirely without understanding" may be avoided. Section 39 provides that a person of unsound mind under guardianship can make no conveyance. *Held*, that a complaint alleging that a grantor, at the time of the execution of a deed, was, from disease, etc., and from the undue influence exercised by the grantee, incompetent to manage her property, and was incompetent to understand, and did not understand, the nature of the transaction, does not show that she was "entirely without understanding," and therefore merely shows that the deed was voidable.

2. Under Code Civ. Proc. § 338, subd. 4, providing that actions for relief on the ground of fraud must be brought within three years, the cause of action in such cases though not to be deemed to have accrued until the discovery of the fraud, a complaint in such an action which shows that the fraud occurred more than three years before the commencement of the action is demurrable unless it alleges the discovery thereof within the three years.

3. Where the statute had commenced to run against a decedent, the minority of his heirs does not prevent the running of the statute against them.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by Juan B. Castro against Josefa S. Geil and others. From a judgment for defendants, plaintiff appeals. Reversed.

A. Craig, W. H. Webb, and J. A. Johnson, for appellant. S. F. Geil and John J. Wyatt, for respondents.

HAYNES, C. This action was brought by the plaintiff to quiet his title to a lot in the town of Monterey. On December 14, 1882, Maria Antonia Pico De Castro, the mother of plaintiff, executed a deed purporting to convey said property to the plaintiff in fee simple. The deed was duly acknowledged, and two days thereafter was recorded. Said Maria Antonia Pico De Castro died December 12, 1883, intestate. The defendants, claiming as heirs at law of said intestate, answered the complaint, and at the same time filed a cross complaint, alleging "that at the time said Maria Antonia Pico De Castro signed said deed, she was, from disease, old age, ignorance, weakness of mind and body, and from the undue influence and control exercised over her by said

Juan B. Castro, mentally incompetent to manage her property, or of transacting any business whatever, and was then and there incapable to comprehend or understand, and in fact did not comprehend or understand, the character, nature, or effect of said transaction," and that she was then, and for a long time prior thereto had been, of unsound mind. Defendants further alleged that said Maria Antonia Pico De Castro died intestate on December 12, 1883, leaving, surviving her, as next of kin and her only heirs entitled to inherit the premises described in the complaint, the plaintiff and the defendants; that, as between the parties to the action, the plaintiff was entitled to an undivided $^{30}/_{60}$ thereof, and the several defendants, in different proportions therein stated, the remainder thereof; and prayed that said deed be set aside and canceled; and that the parties to this action be declared to be the owners in fee of said premises in the proportions above set forth; and that the plaintiff be required to convey to the defendants their said interest. The plaintiff demurred to said cross complaint, upon the grounds—First, that said cross complaint does not state facts sufficient to constitute a cause of action; and, second, that the cause of action therein stated is barred by the provision of subdivision 4 of section 338 of the Code of Civil Procedure. This demurrer was overruled, and plaintiff answered the cross complaint, putting in issue all the material allegations thereof. The cause was tried upon the cross complaint and the answer thereto, and findings and judgment were in favor of defendants, and this appeal is by the plaintiff from said judgment and an order denying his motion for a new trial.

The demurrer should have been sustained. Section 338, Code Civ Proc., limits the time within which the actions there enumerated shall be commenced to three years. Subdivision 4 of said section is as follows: "(4) An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." In People v. Blankenship, 52 Cal. 619, it was held that, "when the acts constituting the fraud occurred more than three years before the commencement of the action, the plaintiff must allege the discovery thereof within three years, in order to avoid the bar of the statute." That was an action to set aside a deed on the ground of fraud, and it was held the demurrer should have been sustained. See, also, People v. Lumber Co., 99 Cal. 459, 460, 34 Pac. 96; Boyd v. Blankman, 29 Cal. 19.

The cross complaint alleges that the deed from Maria Antonia Pico De Castro to appellant was made on December 14, 1882, and that she died December 12, 1883. This cross complaint was filed April 5, 1893, or more than 10 years after the execution of the deed, and it contains no averment as to the date at which the alleged fraud and undue influence of appellant were discovered. It is contended by respondents, however, that it is alleged that at the time said deed was executed, and for a long time prior thereto, said grantor had been of unsound mind, and that, therefore, the deed was void, "without regard to any fraud or undue influence"; meaning thereby that the deed was wholly inoperative, and did not convey to or vest in appellant any title or seisin. "The deed of a person non compos mentis, who is not under guardianship, transfers a seisin, and is merely voidable." Devl. Deeds, § 73, and cases cited in note 4. To the same effect are the provisions of our Civil Code (section 38): "A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family." Section 39: "A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this Code." And section 40 provides: "After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until his restoration to capacity. * * *" In More v. Calkins, 85 Cal. 177, 190, 24 Pac. 729, it was said: "I think the demurrer to the second cause of action attempted to be stated in the complaint, based upon sections 38 and 39 of the Civil Code, was properly sustained. That A. S. More was 'entirely without understanding' is not directly or indirectly, definitely or indefinitely, stated in the complaint, and therefore the instrument executed by him was not void." This language applies with equal force and propriety to the case before us. It is therefore conclusively settled that the deed in question vested the title in appellant, and that it could not be divested otherwise than by judicial action, or the voluntary conveyance of the grantee; and, if by judicial action, that the complaint must allege facts which show upon the face of it that the action is not barred by the statute of limitations.

The doctrine of laches, as applied in equity, need not be considered, as the statute of limitations here invoked applies to equity cases. Boyd v. Blankman, 29 Cal. 19; Broderick's Will Case, 21 Wall. 503, 520.

Respondents also contend that some of them are minors, and that they are not affected by the statute of limitations. But the cross complaint shows that these minors were not heirs of appellant's grantor when the deed was made, their parents, through whom they claim, being then, and for years afterwards, in life; and subsequent disabilities do not stop the running of the statute. Alvarado v. Nordholt, 95 Cal. 116, 30 Pac. 211; McLeran v. Benton, 73 Cal. 329, 14 Pac. 879.

It follows that the judgment and order appealed from should be reversed, with directions to sustain said demurrer, and with leave to all parties to amend their pleadings if they shall be so advised.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, with directions to the court to sustain said demurrer, with leave to all parties to amend their pleadings as they may be advised.

110 Cal. 221

LAVER v. ELLERT et al., Commissioners.

(No. 15,947.)

(Supreme Court of California. Nov. 29, 1895.)

MUNICIPAL CORPORATIONS—CITY HALL COMMISSIONERS—POWERS.

St. 1870, p. 738, creating the new city hall commissioners, provided that they should adopt such plans for the erection of such city hall as in their judgment were best calculated to serve the purposes of the city and county of San Francisco. Act March 24, 1876, created the present board of new city hall commissioners, and directed it to take charge of the new city hall, and to proceed with the construction of the building "according to the plans heretofore adopted for a permanent building as contemplated by an act of the legislature," etc., and provided that no change in the plans or specifications should be made after proposals for doing work or furnishing materials were called for. *Held*, that the present commissioners have the same discretionary powers to change the plans and specifications of such building as their predecessors.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Augustus Laver against L. R. Ellert, William Broderick, and H. T. Creswell, the commissioners composing the board of new city hall commissioners, for an injunction. From a judgment entered after sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Gale & Peery and J. T. Fleming, for appellant. W. S. Barnes and Stafford & Stafford, for respondents.

PER CURIAM. This is an appeal from the judgment entered after demurrer sustained. It appears from the complaint that the board of new city hall commissioners had entered into a contract with the firm of O'Connell & Lewis for the erection and construction of a dome upon the new city hall in the city and county of San Francisco, in place of a square clock tower contemplated by the original plans. It was averred that the dome, if constructed, would be wholly unlike, in external appearance, the tower, which was to be built according to the adopted plans; that it would cost more, and "would be greatly out of harmony with the other parts of said building already completed, and materially detract from its architectural beauty." A perpetual injunction was sought against the defendants, to restrain them from proceeding further under the contract, and a judgment was asked decreeing the contract to be null and void. A demurrer was sustained to the complaint upon the ground that it failed to state a cause of action.

The question presented involves the power of the board of new city hall commissioners to make any deviations in the construction of the building from the plans adopted by the commissioners in 1871, under the provisions of the act of 1870. St. 1869–70, p. 738. This question, however, has ceased to be of any public importance whatever, and, indeed, of very little concern to the plaintiff himself, by reason of the ratifying act of the last legislature, which it is conceded validates the contract, even if, in the first instance, it were improperly entered into by the commissioners. St. 1895, p. 165; Nevertheless, we are of opinion that the court properly sustained the demurrer. The act of the legislature creating the new city hall commissioners (St. 1870, p. 738) provided that the commissioners should "adopt such plans for the erection of said city hall as in their judgment best calculated to serve the purposes of said city and county, having in view the necessity of providing a permanent building which will furnish sufficient and suitable rooms to accommodate the different courts and boards of city and county officers, hall of records, and also offices for the various officers of said city and county." The object of the act was to secure the erection of a permanent and suitable building for the purposes named, and the duty enjoined upon the board of adopting plans was to further this object. Nowhere, by the act, was the original board prohibited from changing or modifying the plans, when once adopted, and for the proper performance of the duty imposed upon them it was necessary that some discretion should be left to them in the matter. They should have the power to correct mistakes in plans once adopted. They should have the power to vary an adopted plan, if further investigation satisfied them that the execution of it would not achieve the end in view. Nothing in this act can fairly be said to prohibit the commissioners from changing or modifying plans once adopted, if, in the bona fide exercise of their judgment, they believed the changes or alterations would better meet the objects of the law. By the act of the legislature approved March 24, 1876, the present board of new city hall commissioners was called into being, and was directed to take charge of the new city hall and improvements therein, "and to proceed with the construction of the building on said premises known as the new city hall, according to the plans heretofore adopted for a permanent building, as contemplated by an act of the legislature," etc. It is this language which appellant claims deprives the commissioners of any and all discretion, and compels them to proceed with the work under the plans adopted by the former board. But such a construction is not supported by reason, nor borne out by the language of the act itself. It cannot be seen why the successors of the original board should not have the same discretionary powers which were vested in their predecessors, nor do we find in the terms of the act any express declaration depriving them of that discretion. By section 4 of the act they are empowered to employ an architect. By section 6 it is made the architect's duty to draw specifications of the work to be done, and make drawings therefor. Quite as much room is left for the exercise of discretionary power in the matter of the specifications as in the matter of the original plans, and discretion over the specifications is expressly awarded to the new board; but by section 14 of the act the right of the board to change adopted plans is expressly recognized. It is there declared "that no change or modification in the place [plan] or specification shall be made after proposals for so doing work or furnishing materials shall be called for." We conclude that the discretionary powers of the present board under the act of 1875–76 are not different from those enjoyed by their predecessors, and that the contemplated change was not in abuse or in excess of a reasonable exercise of those powers. The judgment appealed from is affirmed.

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110 Cal. 224

WITTE v. TAYLOR. (L. A. 56.)

(Supreme Court of California. Nov. 30, 1895.)

REAL-ESTATE AGENTS—COMMISSIONS.

A contract by defendant to pay plaintiff a specified commission after six months from the delivery to defendant of a deed for a one-half interest in a ranch owned by a third person is indivisible, and plaintiff cannot, upon defendant's purchase of a one-third interest in such ranch, recover a proportionate commission.

Department 1. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by William A. Witte against R. B. Taylor to recover commissions for the sale of real estate. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

H. W. Chynoweth, for appellant. E. W. Freeman, for respondent.

GAROUTTE, J. This is an action to recover commissions for the sale of certain real estate. A general demurrer was sustained to the complaint, and plaintiff appeals from the judgment rendered thereon. The action is based upon the following clause of a written contract entered into between plaintiff and defendant: "It is further understood and agreed that when said Taylor can secure from Plez James, of Anaheim, a deed conveying to said Taylor the undivided one-half interest in said ranch now owned by said Plez James in said Nevada ranch, then said Taylor will pay said Witte the sum of $2,000 as a commission on said purchase and sale from said James; and said Taylor agrees that he will purchase said lots in East Riverside and Hastings from said Witte for the sum of $1,000, the said purchase from said James to be at terms satisfactory to said Taylor, and the said sums of $2,000 as commission and $1,000 for lots to be due and payable at any time after six months from date and delivery of deed from said Plez James for said one-half interest in said ranch to said Taylor." The complaint sets out the contract, and then alleges that plaintiff used his best efforts to make the sale, and succeeded in obtaining from James an offer to sell said undivided one-half of the ranch to defendant, but that defendant refused to purchase said undivided one-half, but thereupon purchased an undivided one-third from said James, upon terms satisfactory to him (defendant). The complaint prays for judgment for the sum of $1,333.33, that sum being a proportionate amount of the agreed compensation of $2,000. The complaint fails to state a cause of action. It is based upon a written contract, and there is no allegation that a compliance has been had with its terms, but, on the contrary, the affirmative allegations show that the main condition precedent to the payment of the commission has never occurred. Again, the commission was not to be paid until six months "from date and delivery of deed from said Plez James for said one-half interest in said ranch to said Taylor," and it is not even claimed that the time above referred to has ever arrived. The action has been brought upon the theory that the contract is separable, and that the commissions pro tanto should be paid in proportion to the amount of land purchased by Taylor. The contract does not so provide, and it is not for this court to change its terms. It is not even alleged that the sale of the undivided one-third interest in the ranch was made to Taylor by reason of the labor and influence of plaintiff. But, beyond all that, it is impossible for this court to say that defendant agreed to, or was even willing, to pay any commission whatever for the purchase of an undivided one-third interest in the ranch. We think the contract is indivisible in this regard, and must stand or fall as a whole. For the foregoing reasons the judgment is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

110 Cal. 238

YORE et al. v. BOOTH. (No. 18,302.)

(Supreme Court of California. Dec. 2, 1895.)

LIFE INSURANCE—BENEFICIARIES—"LEGAL HEIRS" — EVIDENCE — DECLARATIONS OF INSURED—CONCLUSIVENESS.

1. Where one designates his "legal heirs" as beneficiaries in a life policy, an irrevocable interest in the policy vests in those then living, and, on their birth, those subsequently born, who would on insured's death be his heirs.

2. In an action by beneficiaries on a life policy, declarations of insured as to his age in applications for other insurance are inadmissible to show that the age given by him in the application on which the policy in suit was issued was false.

3. The fact that insured signed the name of his wife, who survived him, to the applications, and that the wife was one of the beneficiaries of the policy in suit, did not render the applications admissible, in the absence of evidence that the wife was actually cognizant of their contents.

4. In an action on a life policy, evidence that the proof of death furnished by plaintiff states that insured was born in 1829 does not require a finding that the statement by insured in his application that he was born in 1830 was false.

In bank. Appeal from superior court, Yuba county; E. A. Davis, Judge.

Action by Eliza Yore and others against A. G. Booth, receiver of the Bankers' & Merchants' Mutual Life Insurance Association, on a life policy. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Van Ness & Redman, for appellant. Forbes & Dinsmore and Mastick, Belcher & Mastick, for respondents.

BEATTY, C. J. This is an action by the widow and children of Peter Yore, deceased, to recover the amount of a policy on his life issued May 10, 1886, by the Bankers' & Merchants' Mutual Life Insurance Association, and made payable to his "legal heirs." The defendant is receiver of said association, and is appealing from a judgment in favor of the plaintiffs, and from an order denying his motion for a new trial.

The policy in question was issued upon a written application made by Peter Yore, and the action is defended upon the ground that in his application he stated that he was only 56 years of age, when in fact he was older. At the trial the defendant, in order to prove the falsity of the statement as to age, offered in evidence (1) an application made by the deceased to the Pacific Mutual Life Insurance Company in 1868, in which he stated that he was born in 1825; (2) a statement made in 1878, in an application to the Mutual Life Insurance Company of New York, that he was born in 1829; (3) an entry on the great register of Sierra county, made in 1879, showing that he was born in 1822. All this evidence was rejected, upon the ground of incompetency. I was at first inclined to regard this ruling as erroneous, but an examination of a large number of cases has convinced me that it is sustained at all points by the decided weight of authority.

It seems to be the settled doctrine, with but slight dissent in the courts of this country, that a person who procures a policy upon his own life payable to a designated beneficiary, although he pays the premiums himself, and keeps the policy in his exclusive possession, has no power to change the beneficiary, unless the policy itself or the charter of the insurance company so provides. In other words, it is held that the beneficiary named in the policy, although he has parted with nothing, and is simply the object of another's bounty, has acquired a vested and irrevocable interest in the policy, which he may keep alive for his own benefit by paying the premiums or assessments if the person who effected the insurance fails or refuses to do so. It is contended, however, that this doctrine is inapplicable to a case in which the designated beneficiaries are the "legal heirs" of the person effecting the insurance, because a living person has no heirs, and therefore it is argued no interest can vest in anyone during his lifetime. But this would seem to be a very technical ground for making a distinction in the application of a doctrine which, if it is a sound and wholesome one, ought to protect these plaintiffs and others in like situation as completely as if they had been named. It appears that, when Peter Yore applied for his insurance, he had a wife and a number of children living. If he had designated them by name, or the survivors of them, as his beneficiaries, and had added a proviso that any after-born child should come in for an equal share, we can see no reason why such designation would not have been effectual, and this, in legal effect, is what he did. If, in the case supposed, an interest in the policy would have vested in the named beneficiaries, as we think it would, the same interest vested in these plaintiffs on the issuance of the policy, and it was not in the power of Peter Yore thereafter to change beneficiaries or revoke his benefaction. This precise point was so ruled in Weisert v. Muehl, 81 Ky. 336, and we have not been referred to any case holding the contrary. From this it follows that, as to these plaintiffs, any declarations of the deceased not made at the time of procuring the policy, or as part of the res gestæ, were hearsay and incompetent. The authorities in support of this proposition are numerous, and need not be cited here.

It is, however, claimed that the application to the Pacific Mutual should have been admitted, because it was signed by Eliza Yore (the widow). But her name was so signed by her husband, and not by her in person. Undoubtedly, the statements made in that application would have been competent evidence against her in an action upon the policy issued thereon, but in favor of a stranger they are not evidence without proof that she was actually cognizant of them, and there was no such proof in this case.

The proof of death furnished by one of these plaintiffs was admitted in evidence, and contained a statement that the deceased was born in 1829. Appellant contends that, in the absence of any explanation or rebuttal, the court could not, in the face of this evidence, avoid finding that the statement of deceased that he was born in 1830 was false. We do not think, however, that this statement in the proof of death, wholly immaterial, as it was, and evidently hearsay, was of such weight and cogency as necessarily to overcome the presumption in favor of the truth of the statement upon which the policy was issued.

In view of these conclusions, the other points discussed by counsel become immaterial. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; TEMPLE, J.; HENSHAW, J.

Mr. Justice VAN FLEET, deeming himself disqualified, did not participate in the foregoing.

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110 Cal. 247

RICE v. TRINITY COUNTY. (No. 18,365.)

(Supreme Court of California. Dec. 3, 1895.)

COUNTIES—BOUNDARIES—SURVEYOR GENERAL.

Pol. Code, § 3969, providing that the survey of the boundary lines between counties may be "made by the surveyor general," on application of the board of supervisors of any county affected thereby, does not require that the survey should be made personally by the surveyor general or his deputy. His approval of a survey by a surveyor appointed by him is sufficient.

Department 1. Appeal from superior court, Trinity county; T. E. Jones, Judge.

Action by S. H. Rice against Trinity county. From a judgment for defendant, plaintiff appeals. Reversed.

Thomas B. Bond, for appellant. James W. Bartlett, for respondent.

PER CURIAM. The plaintiff brought this action to recover from the defendant its proportionate share of the cost of surveying and definitely marking out the boundary line between the counties of Humboldt and Trinity, on the one side, and the county of Mendocino, on the other side. The defendant demurred to the complaint on various grounds, and the demurrer was sustained. The plaintiff declined to amend, and thereupon judgment was entered that he take nothing by his action, from which he appeals.

The facts stated in the complaint are, in substance, as follows: Each of the counties named was at all the times mentioned in the complaint a body corporate and politic, and an organized county of the state of California. The southern boundary line of the counties of Humboldt and Trinity is coincident with the northern boundary line of the county of Mendocino, and is the fortieth parallel of north latitude. The whole length of this boundary line is 57.492 miles, and the length of it between the counties of Humboldt and Mendocino is 25.725 miles, and between the counties of Trinity and Mendocino is 31.768 miles. On the 22d day of July, 1891, the said boundary line was not marked by natural objects or lines, or by surveys lawfully made, and on that day the board of supervisors of Mendocino county made application to the surveyor general of the state to have the said line surveyed and definitely established. In pursuance of this application, the surveyor general, on August 17, 1891, duly appointed the plaintiff a surveyor to make a survey of said boundary line, and authorized and empowered him to make such survey. In pursuance of said appointment and authority, the plaintiff made a survey of said boundary line, and definitely marked the same, and established the common corners of said three counties on the fortieth parallel of north latitude. The said survey was made between September 1, 1891, and December 18, 1891; and on the last named day the surveyor general duly approved the same, and it was filed in his office, and is of record therein. The cost of making said survey was $5,161.66, and the proportion thereof chargeable to the defendant was $1,427.19. In November, 1892, and within a year after the last item of account had accrued, plaintiff filed with the clerk of the board of supervisors of defendant, and duly presented to said board for allowance, his claim and bill for his services in making said survey, the same being properly made out and verified. The said claim came up to be heard by the said board on January 4, 1893, and on that day the board made an order rejecting the claim, and refused to allow the same or any part thereof. It is then alleged that the defendant is indebted to the plaintiff in the sum of $1,427.19 for the costs of making said survey; that the services of plaintiff in making the survey were reasonably worth that sum, and the same is due and owing by defendant to plaintiff; and that no part thereof has been paid. Wherefore plaintiff demands judgment, etc.

The Political Code contains the following provisions:

"Sec. 483. It is the duty of the surveyor-general: * * * (2) When required, to survey and mark the boundary lines of counties, cities, villages and towns."

"Sec. 3969. All common boundaries and common corners of counties not adequately marked by natural objects or lines, or by surveys lawfully made, must be definitely established by surveys jointly made by the surveyors of all the counties affected thereby, and approved by the boards of supervisors of such counties, or by a survey made by the surveyor-general, on application of the board of supervisors of any county affected thereby."

In sustaining the demurrer the superior court adopted the view, now most strongly relied upon by respondent, that, under the provisions of the Code above cited, a survey to establish the common boundary between two or more counties must be actually made in the field by the surveyor general in person, or by a deputy, and that in no other way can a legal and effective survey for such purpose be made; that, inasmuch as the complaint fails to show that the survey which forms the basis of the action was so made, no case is made showing any legal obligation upon defendant to pay any part of the cost of said work. This, in our judgment, is an erroneous view of the meaning and purpose of the statute. In providing that such surveys shall be "made by the surveyor-general" it was never contemplated by the legislature that that officer should go personally into the field, and direct or perform the detail work of running lines and marking boundaries. The general character of the many and important duties to be performed by the surveyor general, as such, and as ex officio register of the state land office, are wholly incompatible with any such requirement. What is meant and intended is that the survey shall be made under his direction and supervision, and, when completed, shall have his official sanction and approval. When so made and approved, the survey becomes his act, and is "made by the surveyor-general." By necessary implication the law, in casting upon the surveyor general the duty of making public surveys, clothes him with the requisite power to enable him to properly perform that duty, and for this purpose it is perfectly competent for him to employ surveyors and other functionaries usual and necessary in running the lines and doing the detail work required. He is made the agent of the state for the making of such surveys, and as such agent he may delegate the mechanical part of the work to others. Civ. Code, § 2349. Nor is it necessary that the field work should be done by or under the direct supervision of a deputy. The surveyor general is given but one deputy (Pol. Code, § 343), and has no power to appoint more (Id. § 877); and the general duties and powers of the deputy are the same as those of the principal (Id. § 865), excepting, of course, that they are exercised in the name of the latter. There is therefore no more reason for supposing that the legislature intended such work to be done by the deputy than by the surveyor general himself.

The other points made by respondent against the sufficiency of the complaint do not call for special notice, as they are without merit. The judgment is reversed and cause remanded, with directions to overrule the demurrer.

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110 Cal. 243

GIBSON et al. v. WHEELER et al. (L. A. 49.)

(Supreme Court of California. Dec. 3, 1895.)

MECHANIC'S LIEN—FINDINGS—VARIANCE.

1. Plaintiffs, in their complaint in an action to foreclose a mechanic's lien, having alleged that they furnished material, under agreement with the contractor, and that there was a sum due from the owner to the contractor, cannot recover against the owner under a finding that the owner had paid out more than the contract price.

2. A finding that, after said material was furnished, the owner promised to pay therefor, will not entitle plaintiffs to a lien, nor, on account of the variance, will it support a personal judgment.

3. A finding that the owner purchased certain material from plaintiffs will not sustain a judgment on account of the variance.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by W. P. Gibson and another, partners, against Ella A. Wheeler and another, to enforce a material man's lien. Plaintiffs had judgment, and defendant Ella A. Wheeler appeals. Reversed.

W. R. Bacon and M. K. Young, for appellant. R. B. Treat and C. K. Holloway, for respondents.

GAROUTTE, J. This is an action to foreclose a material man's lien. The owner of the property, Wheeler, and Tetro, the contractor, are joined as defendants. Plaintiffs recovered judgment in the sum of $122.73, which sum was adjudged a lien upon the property, and defendant Wheeler now appeals upon the judgment roll, without a bill of exceptions. The status and rights of the contractor are not here involved. The main contention of appellant is that a fatal variance exists between the allegations of the complaint and the findings of fact made by the trial court. The complaint alleges that a certain balance of the contract price, which was $768, is still in the hands of the defendant Wheeler, and bases a right of recovery upon that ground. It not being necessary to record the contracts, owing to the fact that the contract price was less than $1,000, it would seem that no recovery could be had under any other theory than the one suggested. To be sure, we find an allegation in the complaint that "A. Tetro, as the agent and contractor for the owner, Ella A. Wheeler, entered into a contract with the plaintiffs, by which said plaintiffs agreed to furnish material," etc.; but there is no allegation anywhere that Wheeler agreed to pay for this material under any such contract or any contract, and it is quite apparent upon the face of the statement itself, and even more apparent when we consider the pleading as a whole, that such allegation is not, and was not intended by the pleader as, an allegation that the contractor bought this material acting as the agent of the owner, Wheeler, but it is evident that the statement is made in the sense of the term "agent" as used in section 1183 of the Code of Civil Procedure;

and such was the construction given a similar allegation of a pleading by this court in Renton v. Conley, 49 Cal. 185.

The court found as a fact that defendant Wheeler had paid out more than the contract price of the building prior to the commencement of this action, and owed the contractor nothing. As a general rule of law, in a case like the one at bar, this finding of fact would defeat plaintiffs' right of recovery against Wheeler; but it is claimed that certain other findings of fact made by the trial court support the judgment, and to those our attention will now be addressed. The court found that when plaintiffs had furnished material to the contractor to the value of $104, and which material was used in the construction of the building, Wheeler requested plaintiffs to furnish no further material, as the contract price had been exhausted, and then and there agreed to pay plaintiffs for the material so furnished to the amount of $104, and no more. Standing alone, there is no comfort for respondents to be derived from this finding of fact, and it is doubly objectionable when viewed in the light of the complaint. Even if the complaint was broad enough to justify this finding, still an agreement by the owner of the building to pay a present existing indebtedness could never furnish material sufficient to base a charge of mechanic's lien upon the building. There are cases named in the statute where materials are deemed to have been furnished at the instance and request of the owner, and charges of lien so created, but there an entirely different principle is involved. We know of no case where an assumption of a debt, or an agreement to pay a debt, by the owner, will carry or create a right of lien. Again, no such contract is sued upon in the complaint. The contract there relied upon for recovery is one made by the contractor with plaintiffs prior to the furnishing of the material. The contract founded upon by the court is one made by the owner with plaintiffs, and made after the materials were furnished and used in the construction of the building. As to the binding force and effect of this promise made by Wheeler to pay the sum of $104 (by reason of its being oral and probably without consideration), we refrain from deciding. We also conclude, by reason of variance between the complaint and the finding, which we have already noticed, that plaintiffs are not entitled to a personal judgment for this amount.

The court made a finding to the effect that, subsequent to the agreement referred to in the above-mentioned finding, defendant Wheeler bought certain materials from plaintiffs upon her own account to the amount of $18.33, to be used, and which were used, in the construction of the building, and a recovery and lien is also adjudged for this amount. But, as we have seen, the complaint proceeded upon no such theory. No such contract, or any contract with defendant, is alleged therein, and the finding is without, and not justified by, the issues made. Certainly, upon a judgment roll containing no bill of exceptions, plaintiffs' cause of action cannot be better proved than stated.

For the foregoing reasons, the judgment is reversed, and the cause remanded.

We concur: HARRISON, J.; VAN FLEET, J.

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110 Cal. 311

EASTERBROOK v. FARQUHARSON.[1]

(No. 15,839.)

(Supreme Court of California. Dec. 6, 1895.)

LEASE—IMPROVEMENTS BY LESSEE—CONTRACT BY LESSOR TO PURCHASE—APPRAISAL—RIGHT TO INTEREST—UNLIQUIDATED CLAIM.

1. In a suit by a lessor to determine the amount due the lessee under a lease providing that the lessee should erect a building on the land, and that on the last day of the term the lessor should pay the lessee two-thirds of its appraised value; that the appraisal should be made by three persons, two selected by the parties, and the third by such two, and that, if two-thirds of the value "so determined" should not be paid on said day the amount of the appraisement should bear interest at 2 per cent. per month, compounding monthly until paid,—it appeared that both parties appointed appraisers in due time, but that they failed to select a third, or to agree on an appraisal. *Held*, that complainant was not chargeable with the stipulated interest on a valuation fixed by the court.

2. A lease required the lessor on the last day of the term to pay the lessee two-thirds of the value of a building erected by the lessee on the land, to be fixed by three appraisers, one appointed by each party and the third by the first two; and that, if the two-thirds "so determined" was not paid on such day, it should bear interest at 2 per cent. per month, compounding monthly. Appraisers were named by each party, but they failed to appoint a third, and no appraisal was made. *Held*, in a suit by the lessor to determine the amount due the lessee, that, since the amount was unliquidated, and unascertainable from the contract, complainant, who had made no default under the contract, was not chargeable with legal interest on the amount ascertained by the court from the date of the expiration of the lease to the date of the judgment.

In bank. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Bill by D. E. Easterbrook against David Farquharson. Decree for defendant, and plaintiff appeals. Modified.

Haven & Haven, for appellant. J. F. Cowdery and Robert Harrison, for respondent.

HENSHAW, J. Plaintiff, as lessor, and one Apel, as lessee (to whose rights defendant succeeded), entered into a contract of lease which provided for the erection of a building by the lessee upon the demised land, and the payment by him of a stipulated ground rent. It further provided that the lessor, upon the last day of the term, would pay to the lessee two-thirds of the appraised value of the building, which value was to be ascertained and determined as follows: "Each party shall select a disinterested, practical builder of good repute and standing, residing and doing business in said city and county, and they two shall select a real-estate dealer in said city and county; the three to appraise and determine such value. Such selection shall be made ten (10) days before such term expires, and a majority of the three shall determine such value. Each party shall pay one-half (½) of the charges of said persons so selected. If two-thirds (⅔) of the value so determined shall not be paid on said day (provided said building shall then be standing), the amount of such appraisement shall draw and bear interest at the rate of two (2) per cent. per month, compounding monthly until paid, and shall be a lien and incumbrance upon said demised premises." The building was erected by defendant, and on the appointed day each of the parties named an appraiser. These two failed to select the third, and failed to agree upon the value of the building. Time passed. The premises were duly surrendered to plaintiff, but no adjustment was had of the difficulty, though communications looking to this end were had between them. Finally, about six months after the date of the expiration of the lease, plaintiff went into court with a complaint setting up the facts, averring his readiness at all times to pay the defendant two-thirds of the cash value of the building, asserting the impracticability of the scheme of appraisement contemplated in the lease, and asking the court to determine the value of the building at the date of the termination of the lease, and to fix the amount due from him to defendant. The defendant made answer generally admitting the allegations of the complaint, but denied the impracticability of the method of determining the value set forth in the lease, and averred that the sole impracticability came from the lack of qualifications of the appraiser selected by plaintiff. He claimed the building to be of the value of $80,000. The court, in its findings, did not fix responsibility for the failure to agree upon either the plaintiff or his appraiser. It determined that the value of the building at the expiration of the lease was $48,000, two-thirds of which sum was decreed to be due defendant from plaintiff, with interest thereon at the rate of 2 per cent. per month, compounding monthly, from the date of the expiration of the lease to the entry of judgment. Plaintiff paid the principal amount found due by the judgment, and appeals from that portion charging him with interest. The questions presented are: (1) Is plaintiff liable for conventional interest under the terms of the contract? (2) Is he liable for interest at the legal rate?

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[1] Rehearing denied.

1. Other covenants of the lease provide for interest at the rate of 2 per cent. per month, compounding monthly, and a consideration of them may aid in the interpretation of the disputed clause. If rent be unpaid when due, the amount shall bear interest at the stipulated rate, compounding monthly. If the lessor shall pay insurance premiums, the amount so paid shall bear the conventional interest until paid, and a like provision is found as to payment by the lessor of taxes. In each of these cases the interest is a compensation for the detention of money as defined by section 1915 of the Civil Code, and it is something more. The high rate exacted and the monthly compound are designed to prevent default, and to insure a prompt performance of conditions, as well as to penalize the delinquent. In each case the lessee can avoid the penalty by paying a known and fixed amount at a known and definite time. By the covenant in dispute the lessor did not agree to pay to the lessee, upon the last day of the term, two-thirds of the then value if determined, and, if not determined, then the amount when found due to bear interest at the rate of 2 per cent. a month, compounding monthly until paid, from the last day of the term, which, in effect, was the interpretation and decree of the court. What he did agree to pay was two-thirds of the value, determined in a specific way; and if upon the last day of the term he did not pay the sum "so determined" as interest and penalty for his default, the amount was to bear the stipulated interest. Every consideration points to this as the true interpretation of the contract. First, the contract itself declares that it is the amount due under the appraisement which is to bear interest; thus contemplating a breach and default by the lessor before the interest begins to run. Again, it is quite reasonable to suppose that one might be willing to lay himself liable to the penalty of so high a rate of interest if the liability for it arose only by his default. But it is not easy to believe that he would agree to pay it unless the question of his liability could be determined by his own conduct. But under the construction given, and without any default on his part, the lessor could neither prevent the interest from beginning to run nor could he, within any reasonable time, check its accumulation. Such are the actual circumstances of this case. It appears that the lessor did all that the contract called upon him to do, but the appraisement was not made. The record fixes no responsibility upon him for the failure. He could not pay upon the appraised value. Yet two-thirds of the appraised value was what he was holden for. Here, then, he was stopped by no default of his own. Nor could he make a tender, for unless by inspiration or prevision he offered the exact amount of an undetermined sum, his tender would not avail to stop interest. Patterson v. Sharp, 41 Cal. 133; Graham v. Linden, 50 N. Y. 547. In short, plaintiff was so situated that he could do nothing other than he did do,

which was to ask a court of equity to find and decree the sum. And we think it clear that he was not liable for conventional interest upon that sum.

2. To entitle respondent to interest as damages he must bring himself within the terms of section 3287 of the Civil Code. That section awards interest to every person who is entitled to recover damages, certain, or capable of being made certain by calculation, where the right of recovery is vested in him upon a particular day. But damages are compensation for the unlawful act or omission of another (Civ. Code, § 3281), and, as has been said, appellant had been guilty of no wrong. He went into court asking a settlement of his account with respondent, and under section 1917 of the Civil Code the sum bore interest only from the day of its judicial ascertainment. When, at the date of the expiration of the lease, the appraisers had failed to determine the value of the building, the scheme of valuation contemplated by the lease had come to an end so far as to entitle the lessee to seek the aid of a court to ascertain the amount due him by the lessor. In such an action interest would have been allowed only from the date of the judgment. Civ. Code, § 1917. The lessee failed to avail himself of this right of speedy determination and payment, and his failure cannot be urged as ground for the award of interest in an action which the lessor was finally compelled to bring against him. No useful purpose can be subserved by a discussion of the authorities upon the question of allowing interest upon unliquidated claims. The task has been performed by this court in the case of Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100. The language there employed in summarization is, mutatis mutandis, apposite to this case: "We are not prepared to say, in general terms, that no interest in any case can be recovered in an action upon contract for an unliquidated demand. Mix v. Miller, 57 Cal. 356, decided since the adoption of the Code, and McFadden v. Crawford, 39 Cal. 662, decided previously, attest the doctrine that in this state interest is allowable on such demand under some circumstances. These were cases in which the contract had been fully performed by the creditors, the fruits thereof accepted by the debtors without objection, and they were clearly in default; and in the latter case the only question was as to value. But where, as in the case at bar, the amount of these services, their character and value, can only be established by evidence in court, or by an accord between the parties, and are not susceptible of ascertainment, either by computation or by reference to market values or other known standard, we are of opinion plaintiff is not entitled to interest prior to verdict or judgment." To the same effect are the cases of Brady v. Wilcoxson, 44 Cal. 245, and Coburn v. Goodall, 72 Cal. 498, 14 Pac. 190. But here, not only is the demand unliquidated, and unascertainable from the face of the contract or from well-established market values, and not only does it require process of law for its ascertainment, but the party against whom the award is made has never been in default, and finally has been the first to resort to equity to the end that he might ascertain and pay the amount justly due respondent. For the foregoing reasons, the appeal is sustained, and the judgment of the trial court is ordered modified by striking therefrom the portion appealed from which awards interest to respondent to the date of the entry of judgment.

We concur: BEATTY, C. J.; TEMPLE, J.; McFARLAND, J.; GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.

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5 Cal. Unrep. 206

FLICK et al. v. BELL. (Sac. 11.)

(Supreme Court of California. Dec. 6, 1895.)

PAROL LICENSE—REVOCATION.

A landowner orally granted B. a license to construct a reservoir and lay pipes on his land to convey water from a certain spring, in consideration that B. would give him the right to use such water in case of fire, and would so construct the reservoir as to enable him to take water therefrom in case of fire. There was no agreement as to the time they should be maintained. B. afterwards expended $1,500 in improvements, which were used by him and such landowner. *Held*, that the landowner, or his grantees with actual notice, could revoke such license only on condition that the licensee should be permitted to remove his improvements, if it could be accomplished without material loss, or, if not, that the licensor should make just compensation therefor.

Commissioners' decision. Department 1. Appeal from superior court, Shasta county; Edward Sweeny, Judge.

Action by Carl Flick and others against Joseph E. Bell to enjoin defendant from removing certain water pipes and destroying a certain reservoir situated on plaintiffs' land, to adjudge that defendant had no right or claim to such pipes and reservoir, and to quiet plaintiffs' title thereto. From a judgment for defendant, and from an order denying their motion for a new trial, plaintiffs appeal. Affirmed.

Frank W. Smith and L. V. Hitchcock, for appellants. Aaron Bell, Clay W. Taylor, and J. Chadbourne, for respondent.

HAYNES, C. This suit was brought by appellants to enjoin the defendant from removing certain water pipes and destroying a certain reservoir situate upon the lands of appellants, and to adjudge that respondent has no right or claim to said pipes and reservoir, and to quiet plaintiffs' title thereto. The answer of defendant alleged that in 1890 one Samuel Gruber was the owner in fee and in the possession of the lands, described in the plaintiffs' complaint; that defendant then desiring to construct said reservoir and lay said pipes for the purpose of conveying water from a certain spring, and using the same for power and other useful purposes, upon respondent's premises, in the town of Shasta, applied to said Gruber for the right, license, and privilege to construct said reservoir and lay said pipes in and upon said land; that Gruber, in consideration that the defendant would give him the right to use water from said reservoir in case of fire, and would so construct the reservoir, with trapdoors and openings, as to enable him to take water therefrom in case of fire, orally granted defendant the right, license, and privilege to construct said reservoir and lay down said pipes; that defendant agreed to the terms and conditions imposed by Gruber, and constructed said reservoir and laid said pipes, and that said Gruber and defendant used and continued to use and enjoy the same uninterruptedly until said Gruber conveyed said land to plaintiffs, in August, 1892; that plaintiffs purchased said lands with full and actual notice and knowledge thereof; that defendant constructed said reservoir and laid said pipes, and that the same belonged to and were the property of defendant; and that, ever since the purchase and occupation of said lands by plaintiffs, defendant has continued to use and enjoy said reservoir and pipes in the same manner as before, down to the commencement of this action, without objection and with the acquiescence of plaintiffs. The answer further alleged that plaintiffs have never revoked said right, license, and privilege, nor attempted to rescind said agreement so made and entered into by said Gruber and defendant. The findings followed the allegations of the answer, and judgment was entered for the defendant for costs. The appeal herein is by the plaintiffs, from said judgment, and from an order denying their motion for a new trial. The errors specified go to the sufficiency of the evidence to sustain the findings, and to certain alleged errors in the admission and rejection of testimony, and that the findings do not support the judgment.

As to the first and second findings of fact, it is sufficient to say that the evidence is conflicting, and these findings therefore cannot be disturbed. As to the third finding, to the effect that plaintiffs had not revoked the rights, privileges, or license granted by Gruber to the defendant, nor given any notice of their intention to do so, nor taken any steps to rescind the agreement for which said rights and privileges were granted, it is contended by appellants that the conveyance of the lands by Gruber to the plaintiffs was a revocation of the license, and that the beginning of the present action is evidence of the revocation of any right, privilege, or license existing prior thereto; and this finding, and the further contention on the part of the appellants that the pipe and reservoir became part of their land, and that respondent has no right to remove the same, present the principal questions in the case.

The excavation for the reservoir in question was 10x14 feet, and 5 feet in depth, and was walled up with stone and cement. From the spring to the reservoir there is about 2,500 feet of pipe, part of it 1¼ inches, and the remainder 1¾ inches, in size; and from the reservoir to defendant's place in the town of Shasta, where the water is used, there is 800 or 900 feet of pipe. At the time the excavation was commenced, defendant supposed the place selected was upon the town site. Finding that he was upon Gruber's land, he obtained permission, as the court found, to proceed with and complete the work, upon condition that he would provide means of access to the reservoir, so that, in case of fire, Gruber might use the water. This condition the defendant complied with. At the time the license was given by Gruber, the defendant had expended about $100, and about $1,500 more was expended in completing the work. There does not appear to have been any agreement or understanding as to the length of time the pipe line or reservoir should be maintained. That an unexecuted parol license may be revoked by the licensor at any time, either expressly, or by a conveyance of the premises to be affected thereby, or that his death will so operate, is clearly settled; but, as to executed parol licenses, the decisions in the different states are not only conflicting, but incapable of being reconciled. One line of cases holds that a parol license to be exercised upon the land of another creates an interest in the land, is within the statute of frauds, and may be revoked by the licensor at any time, no matter whether or not the licensee has exercised acts under the license, or expended money in reliance thereon. Another line of cases holds that the licensor is deemed to be equitably estopped from revoking the license after permitting the licensee to perform acts thereunder, or to make expenditures in reliance upon the license. In Flickinger v. Shaw, 87 Cal. 126, 25 Pac. 268, it was held that an executed license may become an agreement for a valuable consideration, and where the revocation of the license would operate as a fraud upon the licensee, who has expended money and made improvements upon the faith of it, equity will hold the owner of the land as a trustee ex maleficio, to prevent such revocation; and in Grimshaw v. Belcher, 88 Cal. 217, 26 Pac. 84, it was held that, "in cases where the revocation of the license would be a fraud, courts of equity give a remedy, either by restraining a revocation, or by construing the license as an agreement to give the right, and compelling specific performance"; and the following authorities from other states more or less directly support the conclusion reached in those cases: Clark v. Glidden, 60 Vt. 702, 15 Atl. 358; Brewing Co. v. Morton, 47 N. J. Eq. 158, 20 Atl. 286; Railroad Co. v. Mitchell, 69 Ga. 114; Cook v. Pridgen, 45 Ga. 331; Curtis v. Water Co., 20 Or. 34, 23 Pac. 808, and 25 Pac. 378; Nowlin v. Whipple, 120 Ind. 596, 22 N. E. 669; Saucer v. Keller, 129 Ind. 475, 28 N. E. 1117; Pierce v. Cleland, 133 Pa. St. 189, 19 Atl. 352; Lee v. McLeod, 12 Nev. 280. Coming to the case before us, if the license given by Gruber to the defendant is revocable unconditionally, at his pleasure, or that of his successors in interest, and upon such revocation the personal property placed by defendant upon the licensor's land becomes his property, it follows that Gruber might have revoked the license the moment the defendant had completed the work, and before he had enjoyed for a single day the fruits of his labor and the expenditure of his money. Such revocation, followed as it must be (upon the theory of appellants) with the absolute forfeiture and loss of defendant's labor and property, would shock the sense of justice of every right-minded man, and would be a stain upon the administration of justice. Nor is it necessary, in order to do justice, to hold that the license given by Gruber amounted to a grant of any interest in the land, nor, upon the other hand, to hold that the license is not revocable at the pleasure of the licensor; but in such cases equity may impose, as a condition of such revocation, that the licensee may remove his improvements, if that can be accomplished without material loss, or, if not, that the licensor shall make just compensation therefor, as the circumstances of the case may require. The license given by Gruber having been executed by the defendant at large expense, the plaintiffs, having purchased with notice of the facts, are in no better position than Gruber, who granted the license. Their action was not brought for the purpose of revoking the license upon such terms as equity might impose, but for the purpose of depriving the defendant, not only of the use of the improvements under the license, but of all right of property in the improvements, and of appropriating the same to their own use, without compensation to the defendant. The evidence of Tucker and Hocking was properly admitted, as it tended to prove the fact that a license was given by Gruber.

Appellants' contention that "the issue presented by the pleadings as to whether or not the pipe and reservoir had been attached to and become a part of the real estate," should have been found by the court, is not sound. That is a conclusion of law from the facts, and as such was found by the court. We find in the record no ground upon which the judgment and order should be reversed, and advise that they be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

110 Cal. 387

In re WALKER'S ESTATE. (Sac. 34) [1]

(Supreme Court of California. Dec. 10, 1895.)

ATTESTATION OF WILL—ERRONEOUS NAME.

Where a witness, in attesting a will, inadvertently wrote the surname of the testator instead of his own, there was no sufficient compliance with Civ. Code, § 1276, providing that each of the attesting witnesses must sign his name at the end of the will. McFarland, Garoutte, and Van Fleet, JJ., dissenting.

In bank. Appeal from superior court, Butte county; John C. Gray, Judge.

C. G. Warren and F. C. Lusk, for appellant. Wm. H. Schooler and Reardan & White, for respondent.

HENSHAW, J. Appeals from the judgment revoking the probate of a will and from the order denying a motion for a new trial. The facts disclosed by the evidence without conflict are as follows: The will of Ozias Walker, deceased, was written by C. G. Warren, the attorney at law of the testator, and was executed in the presence of H. C. White and C. G. Warren, who were requested by the testator to attest, as witnesses, its execution. The requirements of the statute were complied with in all respects saving that the witness C. G. Warren, in signing his name as a witness at the end of the will, inadvertently wrote the name "C. G. Walker," thus employing his own initials but the testator's surname. Upon this showing the court revoked the probate of the instrument, and the propriety of its action in so doing is the sole question presented upon this appeal.

At the outset of this consideration it is proper to say that the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes. In conferring that right the legislature has seen fit to prescribe certain exactions and requirements looking to the execution and authentication of the instrument, and a compliance with these requirements becomes necessary to its exercise. As has been said (In re O'Neil, 91 N. Y. 521): "While the primary rule governing the interpretation of wills when admitted to probate recognizes and endeavors to carry out the intention of the testator, that rule cannot be invoked in the construction of the statute regulating their execution. In the latter case courts do not consider the intention of the testator, but that of the legislature." As a prerequisite to the exercise of the testamentary right in this state, the legislature has prescribed for the execution and authentication of wills such as this the following requirements: "(1) It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto. (2) The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority. (3) The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will. And (4) there must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request and in his presence." Civ. Code, § 1276. It is not for courts to say that these requirements, or any of them, are mere formalities, which may be waived without impairing the status of the instrument. It is not for courts to say that a mode of execution or authentication, other than that prescribed by law, subserves the same purpose, and is equally efficient to validate the instrument. The legislative mandates are supreme, and there is no right to make testamentary disposition except upon compliance with those mandates. It may be freely conceded that the question under consideration is of a nature purely technical, but it is to be remembered that the whole subject-matter of the execution and authentication of wills is technical, and nothing else; and it must not be forgotten that the technicalities are those which the lawmaking power has the right to impose, and has imposed, upon the maker of a will.

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[1] For opinion on rehearing, see 42 Pac. 1082.

It will be noted in the section of the Code above quoted that the duty enjoined upon the testator is to subscribe the will, while that imposed upon the attesting witnesses is that each must sign his name as a witness. The difference is neither immaterial nor accidental. A testator may be illiterate, or he may, by reason of paralysis, or other disabling cause, be incapacitated from signing his name, and the law has wisely and liberally provided for the due execution of a will by one so situated. It has required of him that he shall subscribe, and, while the word unquestionably has for one of its significations the signing of a name, it is a verb of comprehensive meaning. Any form or kind of underwriting is a subscription, and generally it has been held that any mark or writing by the testator meant by him to be his name, or to take the place of his signature, or to serve for his identification, will answer the requirements of a statute which calls merely for subscription or signing. The same liberality of construction and interpretation has been put by the courts upon statutes which require the witnesses merely to subscribe or to sign. There are thus numerous cases under such statutes which hold, in effect, that any signing by which alone, or by which aided by parol evidence, the identity of the subscriber may be ascertained, substantially complies with the statute. The case of the appellant upon this proposition cannot be more strongly stated than in the following extracts from the learned work of Mr. Jarman, discussing the Victorian wills act: "Examining the requirements common to the statute of frauds and the wills act in their order, the next condition prescribed for the validity of a will is that it should be signed, which suggests the inquiry, what amounts to a 'signing' by the testator? It has been decided that a mark is sufficient, and that notwithstanding the testator is able to write, and though his name does not appear on the face of the will. A mark being sufficient, of course the initials of the testator's name would also suffice. And it would be immaterial that he signed by a wrong or assumed name (since that name would be taken as a mark), or that against the mark was written a wrong name." 1 Jarm. Wills (6th Ed.) *79. "The next statutory requisition, which is common to the old and the present law, is that the will be 'attested and subscribed' by the witnesses. A mark has been decided to be a sufficient subscription. * * * The initials of the witnesses also amount to a sufficient subscription, if placed for their signature as attesting the execution. * * * A witness need not sign his own name if the name actually subscribed be intended to represent his name; or a description (without any name) is sufficient if intended to identify him as a witness. * * * In fact there seems to be no distinction in these respects between the word 'sign' and 'subscribe.' Any act, therefore, which, as before noticed, would be a good signature by a testator, would be a good signature by a witness." Id. *85, *86. An examination of the cases bearing upon the interpretation of the English statute shows that the text of the learned author is fully supported. The reasoning by which the conclusions are reached may be thus summarized: To "subscribe" is to attest or give consent or evidence knowledge by underwriting, usually (but not necessarily) the name of the subscriber. But the place of the writing is immaterial, since a still more general meaning of the word "subscribe" is to attest by writing, in which definition the locality is wholly disregarded. This is the reasoning of the leading English case of Roberts v. Phillips, 4 El. & Bl. 450. To "sign," in the primary sense of the word, is to make any mark. To sign an instrument or document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation. The signature is the sign thus made. And while, by long usage and custom, "signature" has come generally to mean the name of a person written by himself, and thus to be nearly an exact synonym of "autograph," that signification is derivative, and is not inherent in the word itself, any more than it is in "autograph," which strictly conveys no more than the idea of a specimen of an individual's writing. Any "mark" may be a signature, and that species of mark which we call a "cross" (independent of an accompanying name) was early used as a signature of assent, and indeed was designated "signum." While marksmen have become fewer with the spread of education, the mark of the cross is still recognized by statute law as a method of signing. Therefore, as the wills act required only a signing by the testator, and as this requirement of signing only was also found in the statute of frauds, the courts early decided not to be bound by any narow definition of "signing" or "signature" as meaning the writing of one's name, but to give to the word its broadest possible scope and significance, and thus held that any mark or signature made with the intent to bind the maker (in the case of the statute) or to be a sign (in the case of wills) should be deemed sufficient. As the English courts had still further obliterated from the word "subscription" the idea of place or locality, there was left no measurable distinction between the requirement upon the testator to sign and that upon the witness to subscribe.

In the decisions this broad rule is repeatedly asserted. In Goods of Clarke, 27 Law J. Prob. 18, the will of an illiterate person was executed by her mark, against which was written her maiden name instead of that properly borne by her in marriage. Says the court: "There is enough to show that the will is really that of the person whose it proposes to be. Her mark at the foot or end of it is a sufficient execution, and what somebody else wrote against the mark cannot vitiate it." In Goods of Clark, 2 Curt. Ecc. 329, the testator had made his mark, and requested the vicar to sign for him, which he did with his own name, and not that of the deceased. Says the court: "The statute allows a will to be signed for the testator by another person, and does not say that the signature must be in the testator's name. Here this gentleman, at the testator's request, signed the will for him; not in the testator's name, but using his own name. I incline to think this is a sufficient compliance with the act." In Goods of Bryce, Id. 325, the testatrix signed her will by a mark, her name nowhere appearing. Says the court: "Although the name of the testatrix does not appear upon the face of the instrument, the affidavit sufficiently accounts for the manner in which the will was signed. The statute does not say that the name of the testator shall appear at the foot of the will. The paper is identified as being the will of the deceased. * * * I am of opinion that the statute is sufficiently complied with." The foregoing cases deal with the "signing" by the testator. Coming to the subscribing by the witness, it is said in Goods of Eynon, L. R. 3 Prob. & Div. 92: "No particular form of attestation is necessary, but the act done by the witness must be intended by him to evidence his attestation of the will. I must find that I can draw an inference from what occurred that the witness made a mark of some kind, with the intention to evidence his attestation." In Goods of Christian, 2 Rob. Ecc. 110, it is said: "The attesting witnesses to the so-called 'codicil' have affixed their initials only. However, I have no doubt in the matter, although I believe this is the first instance under the act of the witnesses so signing. I am not aware that the witnesses can be required to sign their names. I am of opinion that there is a sufficient subscription on their parts, and therefore I decree probate as prayed." In Goods of Olliver, 2 Spinks, 57, it is said: "The statute says the witnesses 'shall attest and subscribe the will.' It does not say 'shall write their own names,' so that a mark is held to be a good subscription." These cases are quoted that there may be no room for misunderstanding of the English decisions or of the text of the book writers. But, as the matter is wholly statutory, they have no value as authority unless there be an identity in the statutory requirements of this state and England. But there is no such identity. Indeed, our statute seems to have been drawn with the express intent to foreclose and shut out the interpretation given to the English law. Thus the English statute requires subscription. That word had been judicially declared not to have reference to the place of writing. Our statute says that the will shall be subscribed at the end thereof, thus expressly making locality of writing an element of the subscription. The English statute required a signing. As interpreted by the court, this did not necessitate the signing of the name. By express language our statute commands that a witness shall sign his name. In England, therefore, a witness may sign in any one of a multitude of ways; by our law his signing is limited to the expression of his name. The case of Meehan v. Rourke, 2 Bradf. Sur. 385, is in no way opposed to, but rather is in full accord with this view. The statute of New York, from which ours was taken, likewise requires that the witnesses should sign their names. Eliza Green, one of the witnesses to the will under consideration, was unable to write. Her name was correctly written by the doctor, and she then made her mark across it, and acknowledged it to be her mark and signature. The court said that before the Revised Statutes a witness might attest a will by a mark; as in this state it may be done under section 14 of the Civil Code. The opinion declares: "Our statute requires the witness to 'sign his name.' * * * Where another person writes the name of the witness, and then the witness acknowledges the signature,—puts his mark to it, his signum,—he literally signs; and what he signs is his name,—i. e. he signs his name,—while a mark alone [the learned judge significantly adds] would not be sufficient." Yet a mark alone is held sufficient under the English statute.

I conclude, therefore, that as our law has seen fit to prescribe that the testator shall subscribe his will at the end thereof, so it has seen fit to require that attesting witnesses shall sign and shall sign only in one way,—

that is to say, by affixing their names. It cannot be said that some other mode of subscription will answer the purpose, or subserve the statutory requirement, when in truth it does not. As well could it be said that the requirement of two attesting witnesses is not mandatory, and that this will, having been duly attested by one witness, should be admitted to probate. That the overthrowing of any will works a hardship upon the devisees and legatees is obvious; but the law is no more tender of their claims than it is of the rights of the natural heirs. In the absence of any will, the law makes a wise, liberal, and beneficent distribution of the dead man's estate; so wise, indeed, that the policy of permitting wills at all is often gravely questioned. When a will is proved, every exertion of the court is directed to giving effect to the wishes of the testator therein expressed, but in the proving of the instrument the sole consideration before the court is whether or not the legislative mandates have been complied with. If not, then the law makes the will, and it is often a better one, embracing a more equitable disposition of his property, than that which the deceased attempted but failed to execute. The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; HARRISON, J.; TEMPLE, J.

McFARLAND, J. I dissent. In my opinion there was in this case a sufficient compliance with the formalities prescribed by the Code for the attestation of a will. It is true that the right to make testamentary disposition of property—like most other rights—rests upon the legislative will; but that legislative will has been uniformly exercised in favor of the right in all English-speaking countries, and in nearly all others, from time immemorial, so that the right has come to be a usual, well-established, and most important attribute of ownership. Therefore, in dealing with an attempt to exercise that right, the general rules of construction should be applied; that is, the provisions of the Code "are to be liberally construed with a view to effect its objects." The signature of the witness Warren in this case, as shown beyond question, would be held good if any written instrument or paper known to the law were involved other than a will, and I see no good reason why the same rule should not apply here. To allow a will to be defeated by the careless (or intentional) misspelling of his name by a subscribing witness would lead, I fear, to great abuses. If a man should not have the right to make a will, let the legislature take it away; but, as long as he has it, let it be protected as other rights. I think that the judgment should be reversed.

GAROUTTE, J. I dissent. I do not think a man's testamentary disposition of his property should be defeated for the reasons here given. The argument requires a too technical analysis of terms and statutes in order to arrive at such a result. While the right to dispose of property by will is purely statutory, still it can hardly be said to be a mere matter of legislative grace, for it has become almost an inalienable right, made so by reason of its long practice and approval in all civilized nations. It is conceded that, if the testator, Walker, had made a like mistake, and signed his name "Warren," it would not have defeated the will; but it is now held that, the witness Warren having made the mistake in signing his name "Walker," the will is avoided. I have no idea that the legislature, in formulating the statute as to the character of the signatures, ever intended such results to follow; and I am satisfied it never intended to attach any different meaning to the two phrases, namely, "sign his name as a witness," and "subscribed by the testator," or that the legislature ever intended to bar a man from being a witness to a will who was unable to sign his name, any more than it intended to bar a man from making his will who was likewise so unfortunate. I believe that for the purposes of this statute the person's mark, properly witnessed, is his name; and further, I believe any name that the party should attach to the will as a witness is his name. I do not think it is for a contestant of the will to say to a witness, "That is not your name;" and neither is it for the witness to appear upon the stand and say, "That is not my name." If we are to be so technical in this matter, the statute should have said "true name." The true names of witnesses are often unknown to the testator, and to say that a person could intentionally and corruptly sign a false name to a will as a witness, and thereby defeat it, is to go to great lengths. No case in the books has ever gone that far, to my knowledge. Still that doctrine would seem to be declared by the main opinion of the court in the present case. A name signed by mistake of the witness is no different from one signed in fraud. The knave wrote the name as his name, and for the purposes intended by the testator it was his name. In the present case the attorney, as a witness, unintentionally wrote a name which was not his true name, but he intended the writing to be his name, and he made the writing for his name, and for the purposes intended by the testator; and as to those purposes it should be held to be his name. If, one hour previous to the signing of the will, he had concluded to change his name to C. G. Walker, and had so signed it, or, for the very purpose of concealing his true name, had signed the will "John Brown," to my mind the will would be legally witnessed; and in the present case the same conclusion should be declared.

VAN FLEET, J. I dissent from the conclusion reached by the majority of the court, and agree with what is said by Justices McFARLAND and GAROUTTE. I think by a too close adherence to the mere letter of the statute the court, in the main opinion, loses sight of the evident purpose intended to be subserved by the provision in question. When the witness Warren, intending in perfect good faith, as is conceded, to write his own name, wrote his own initials, but inadvertently added the name of the testator instead of his own, it was, to all essential intents and purposes, a signing of his name within the spirit and intent of the statute, since it met every purpose designed to be subserved thereby. And this view, in my judgment, is sustained by the case of Meehan v. Rourke, 2 Bradf. Sur. 385, cited in the main opinion. There the name of the witness was written by another, and merely viséd by the mark of the witness himself, although the requirement of the statute, like our own, was that the witness should sign his name. But it is said by the surrogate, in addition to the language quoted in the majority opinion: "I think the requisition of the statute sufficiently complied with by the name of the witness being written at the end of the will, and the witness putting his mark thereto. This construction meets the design of the legislature in having the name of the witness, and excluding wills attested only by marks, and does not shut out the attestation of wills by illiterate persons, when a penman can be found to record the transaction. I should come to any other conclusion with regret, as otherwise I should be compelled very frequently to reject wills attested by marksmen, the experience of this office showing the mode of execution to be very common. But, aside from the consequences, I do not think the rule contended for justified by the language of the statute, or consistent with the distinction made between a witness writing his name when he has subscribed the testator's name, and being required in all other cases only to 'sign his name.'" I think the record shows a sufficient compliance with the requirements of the statute, and that the deceased should not, by any such slight lapse as is here disclosed, be deprived of the right of testamentary disposition of his property.

Whatever may be our personal views as to the provisions of the law for the distribution of the property of intestates, whether they meet with our approval or otherwise cannot affect our consideration here. The sole question is whether the testator, in endeavoring to avail himself of the privilege of the law to so dispose of his estate as to meet his own cherished desires, has so far complied with the statute as to make his purpose effectual; and this, I think, he has done, and that the judgment of the lower court should be reversed.

(January 8, 1896.)

The opinion heretofore rendered herein is modified by eliminating from the paragraph preceding the judgment the first and last sentences, so that the same will read: "When a will is proved, every exertion of the court is directed to giving effect to the wishes of the testator therein expressed, but in the proving of the instrument the sole consideration before the court is whether or not the legislative mandates have been complied with." As so amended the petition for a rehearing is denied.

McFARLAND, J., GAROUTTE, J., and VAN FLEET, J., dissent from the order denying the petition for rehearing.

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110 Cal. 267

In re BEISEL'S ESTATE. (No. 15,915.)

(Supreme Court of California. Dec. 4, 1895.)

In bank.

On rehearing. Modified.

For original opinion, see 40 Pac. 961.

PER CURIAM. After rehearing of this cause, the opinion of Commissioner VANCLIEF (40 Pac. 961), heretofore filed, is adopted as the opinion of the court down to paragraph 4, in place of which and of the judgment of the department the following is substituted:

4. Errors in the statement and settlement of respondent's account have resulted from the manner in which the debts and credits of the two minors have been mingled with each other and with the account of Emma N. Beisel. She is not formally a party to the proceeding, and the court does not appear to have acquired jurisdiction to make a decree binding upon her. But if she has made herself a party to the settlement, or shall hereafter become a party, her account should be settled upon a different basis from that of the two minors. That is to say, she is not entitled to be credited with one-third of the original $4,007 and interest, for the reason that she has elected to take, and has actually received her third of the proceeds of the sale of the house in which that money was invested.

As to the two minors, the account with each should be stated and settled separately, as follows:

The respondent in each account should be charged with one-third of cash:

Principal		$4,007 00
Interest		1,800 19
From sale of personalty	$ 618 00	
From rents of realty	1,987 00	
Total	$2,605 00	
Half of which belongs to minors		1,302 50
Making a total of		$7,109 69
One-third of which is		$2,369 89

In each account she should be credited with:

One-sixth of the whole expense of property	$ 710 00
One-half of support of minors for 52 months	1,040 00
One-half of family allowance for two years and one month	500 00
And one-half attorney's fee	50 00
	$2,300 00

Besides this, in her account with George D. Beisel she should be credited with $1,218, or whatever other sum or sums she has paid the guardian of his estate on account of proceeds of sale of house and lot or otherwise.

The judgment is reversed, and cause remanded for further proceedings in accordance with the views herein expressed.

110 Cal. 259

GRISWOLD v. PIERATT. (No. 15,668.)

(Supreme Court of California. Dec. 3, 1895.)

ACCOUNT STATED — COUNTERCLAIM — SUPERIOR COURT—JURISDICTION.

1. An employer who, after performance of services by an employé under contract, agrees to pay the employé, in "full discharge of the contract and in full settlement thereof," a certain sum for his services, cannot maintain an action against the employé for damages caused by his negligent performance of the services, in the absence of a showing that the settlement was fraudulently procured.

2. An existing contract, superseding one previously made, cannot, in an action on the original contract, be pleaded as a counterclaim, under Code Civ. Proc. § 438, subd. 1, allowing a cause of action "arising out of the transaction" on which plaintiff bases his action, or connected with the subject of the action, to be so pleaded.

3. Const. art. 6, § 5, confers jurisdiction on the superior court in all cases at law in which the demand amounts to $300. Code Civ. Proc. § 438, subd. 2, provides that, in an action on contract, any other contract demand existing when the action is commenced may be set up as a counterclaim. *Held*, that where the contract demand pleaded in counterclaim or in a cross complaint is for a less sum than $300, and shows that plaintiff's action is unfounded, because the contract on which it is based has been superseded by another contract, defendant is not entitled to judgment on his counterclaim or cross complaint.

Commissioners' decision. In bank. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by N. W. Griswold against James S. Pieratt for damages to fruit trees by negligence of defendant in budding them. From an affirmative judgment for defendant, plaintiff appeals. Modified.

E. H. Wakeman and J. A. Barham, for appellant. Rutledge & Pressley, for respondent.

BRITT, C. Plaintiff alleged in his complaint that he employed defendant to bud a quantity of young fruit trees; that defendant agreed to bud the same in a careful and skillful manner, and thereupon entered upon the execution of the contract, and budded the trees, but so negligently performed the work in certain specified particulars that plaintiff suffered damage to the amount of $1,858.50, for which sum he demanded judgment. Defendant admitted in his answer the fact of his employment by plaintiff, and that he budded the trees, but denied the alleged negligence, and averred, in substance, that any damage to the trees of plaintiff arose from the latter's mismanagement in the matter. Then, for a counterclaim, defendant pleaded that plaintiff agreed to pay him for his services in budding the trees as much as such services were reasonably worth; that he (the defendant) completed the work on October 29, 1892, and that his services were reasonably worth the sum of $240; that on November 1, 1892, the parties "had an accounting and settlement of all accounts and differences between them in relation to budding of said trees, and upon said settlement, and in * * * full discharge of the said contract, and in full settlement thereof, the plaintiff agreed to pay to defendant on December 1, 1892, the sum of $100, and to deliver to defendant 1,125 of said budded trees upon demand"; that plaintiff at the same time wrote his acceptance of a draft drawn by defendant on him for said sum of $100, such acceptance by its terms making the draft payable December 1, 1892, and also executed to defendant a written promise to deliver to him said 1,125 trees; that defendant presented said draft at maturity to plaintiff for payment, which was refused; that the cost of protesting the same, paid by him, was $5; that plaintiff delivered 400 of the trees only, and refused to deliver the remainder; and that those undelivered were worth $87.50; wherefore he prayed judgment against plaintiff for $192.50, etc. He also filed a cross complaint, alleging the same facts set out in his counterclaim, and prayed thereon the same relief. After trial, the court found all the issues in favor of the defendant, and awarded him judgment against plaintiff for the amount claimed by him (less the sum of $5, cost of protest of the draft) and costs of the action. Plaintiff appeals from the judgment; and the point made is that the facts pleaded as a counterclaim are insufficient for that purpose, because, as claimed, they do not constitute a cause of action arising out of the transaction set forth in the complaint or connected with the subject of the action (Code Civ. Proc. § 438), and because the amount of defendant's demand against plaintiff is less than $300, and so not within the jurisdiction of the superior court. On similar grounds, apparently, it is also maintained that the cross complaint is ineffectual as such.

Of course, if the matters set up by defendant constitute a cause of action in his favor properly cognizable by the superior court, either as a counterclaim or a cross complaint in this suit, the judgment must be upheld. The transaction between the parties on November 1, 1892, by which the compensation to be rendered defendant was fixed in money and trees, and the time of performance by plaintiff was enlarged, amounted to an agreed statement of the account of defendant for budding the trees (Baird v. Crank, 98 Cal. 293, 297, 33 Pac. 63); and even something further. It was a new contract (Civ. Code, §§ 1531, 1697), for which the original contract, or the performance thereof by defendant, furnished the consideration (Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371), and became, in the absence of legal impeachment, in itself an agreement, conclusive on both parties, that, as the net result of such performance, the defendant was entitled to receive the compensation then fixed. On such new contract an action would lie in defendant's favor (Green v. Thornton, 96 Cal. 67, 30 Pac. 965), and would be properly brought on the written instruments then executed by plaintiff (Bank v. Stone, 59 Cal. 183). The original contract was suspended, if not extinguished. Civ. Code, §§ 1531, 1682, 1697. The plaintiff, while the new compact between himself and defendant remained in force, could maintain no action for any breach of duty by defendant under the former. His only proper course, if such breach had occurred, was to impeach the settlement by appropriate pleading for fraud, accident, or mistake. Green v. Thornton, 96 Cal. 67, 30 Pac. 965. His complaint here is devoid of any allegation for that purpose. Had defendant brought his action on the written instruments made to him by plaintiff, the latter could not have resisted recovery upon the ground of any defect in defendant's performance of the original contract, unless by showing that the settlement of November 1, 1892, was induced by fraud or mistake. Walker v. Millard, 29 N. Y. 375; Thorpe v. White, 13 Johns. 53. For like reasons, the defendant could maintain no action against plaintiff for compensation under the original contract. Since defendant pleaded facts showing that the original contract was superseded by a new obligation, he showed that neither party has any rights based upon it; and, as there is no cause of action arising therefrom in favor of plaintiff, so there is no right of recoupment arising from it in favor of defendant. It has ceased to be a "transaction" giving rise to reciprocal demands, so as to be the basis for affirmative relief, under subdivision 1, § 438, Code Civ. Proc.[1] Consequently, the facts stated by defendant, although good as a defense, were insufficient as a counterclaim under that subdivision. For similar considerations, such facts were improperly pleaded as a cross complaint by defendant. But they show a cause of action in his favor "arising upon contract"; and it is a different contract from that described in the plaintiff's complaint; and hence is rightly pleaded as a counterclaim under subdivision 2 of said section 438, provided the court had jurisdiction to entertain it.

The constitution of the state allows to the superior court jurisdiction in all "cases at law * * * in which the demand * * * amounts to three hundred dollars." Article 6, § 5. This court has held that "the demand spoken of in the constitution is a demand for judgment evidenced by the prayer of a complaint, and a statement of facts which can uphold the judgment prayed for." Derby v. Stevens, 64 Cal. 288, 30 Pac. 820. Can it make any difference in the construction of this provision that the prayer for judgment and the statement of facts occur in a counterclaim on an independent contract instead of an original complaint? Is the constitution to have one meaning as applied to the demand of a plaintiff, and a diametrically opposite meaning as applied to the demand of a defendant, in such a case? It is incredible that the convention which framed or the people who adopted the instrument intended that the limitation under view should have effect or not according to the relation to the record occupied by the litigant seeking to enforce the demand. See Picquet v. Cormick, Dud. (Ga.) 21. In that case the court, speaking of a statute of the state of Georgia authorizing various defenses in an action, said: "This will allow the plea of set-off where there exist mutual debts; but it will not enlarge the jurisdiction of the court, and enable it to take cognizance of a debt or demand set up by a defendant which it would not entertain for a plaintiff. The limitation must apply alike to each party, and the court can no more take cognizance of a cause for one than for another where the pleadings themselves show the debt or demand not to be within its jurisdiction." Beyond question, if the defendant had commenced an action on the matters exhibited in his set-off, he must have done so in an inferior court; and in such action the plaintiff could not have set up any claim arising on contract in his (plaintiff's) favor, unless below $300 in amount. Code Civ. Proc. § 855; Maxfield v. Johnson, 30 Cal. 545. It scarcely seems probable that the makers of the law designed to provide in such a case that the defendant may have the right of set-off in the superior court merely because he is defendant, when, if he had commenced his action (as he must have done if he had commenced at all) in a court having jurisdiction of demands less than $300, the plaintiff would have been debarred the like privilege.

Of course, what is here said on the subject of jurisdiction has no application to the counterclaims provided for in the first subdivision of section 438, Code Civ. Proc. The amount of the cross demand under that subdivision is of no moment for jurisdictional purposes. Our remarks are to be understood as confined to the unconnected causes of action mentioned in the second subdivision of that section, and limited also to cases presenting the substantial features of the present. If the set-off, less than $300 in amount, exclusive of interest, held by a defendant, is pleaded by him as purely defensive matter in reduction or extingui ment of the claim of the plaintiff in an action triable by the superior court, it may well be that the court can properly entertain the same. Such was the case in Hart v. Cooper, 47 Cal. 77. It is under the statute (Code Civ. Proc. 440), perhaps, as much a matter of defense merely as would be a plea of payment of a like sum. But where a defendant in that court shows by his pleading, as in this instance, that the plaintiff's action, arising on contract, is wholly unfounded, we think it clear that he cannot also set up a cause of action on a different contract as the foundation for an affirmative judgment against the plaintiff, unless his demand, exclusive of interest, amounts to $300. The counterclaim set up in Webster v. Lumber Co., 101 Cal. 326, 35 Pac. 871, seems to have been properly referable to subdivision 1, § 438, Code Civ. Proc.; and the same is probably true of that mentioned in Clark v. Taylor, 91 Cal. 552, 27 Pac. 860. Nothing is decided in either of those cases contrary to the view here stated.

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[1] Code Civ. Proc. § 438: "The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; (2) in an action arising upon contract: any other cause of action also arising upon contract and existing at the commencement of the action."

Our conclusion is reached with less reluctance because the defendant may yet sue and recover in the proper court the sums due to him for breach of the plaintiff's contract, evidenced by the written instruments of November 1, 1892. The judgment should be modified by striking therefrom the recovery of $199.75, and interest thereon, allowed to defendant, and, as so modified, the same should be affirmed.

I concur: BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is modified by striking therefrom the recovery of $199.75, and interest thereon, allowed to defendant, and, as so modified, the same is affirmed.

BAHWELL v. SMITH et al. (Sac. 54.)

(Supreme Court of California. Dec. 9, 1895.)

Department 1. Appeal from superior court, Tulare county; W. A. Gray, Judge.

Action by Bahwell against Smith and others. Plaintiff had judgment, and defendants appeal. Affirmed.

J. A. Hannah and E. D. Miller, for appellants. Lamberson & Middlecoff, for respondent.

PER CURIAM. The propositions of law involved in this appeal are the same as those determined in Daw v. Niles, 104 Cal. 106, 37 Pac. 876, and upon the authority of that case the judgment and order are affirmed.

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110 Cal. 277

REDFIELD et al. v. OAKLAND CONSOLIDATED ST. RY. CO. (No. 15,942.)[1]

(Supreme Court of California. Dec. 6, 1895.)

Death by Wrongful Act—Parties—Damages—Measure — Excessiveness — Instructions — Trolley Company—Negligence—Evidence.

1. Code Civ. Proc. § 377, provides that, in an action for the death of an adult by wrongful act, "such damages may be given as under all the circumstances may be just." *Held*, that in an action by a husband, personally and as guardian of his two minor children, about 12 years old, against a street-car company, for death of his wife, a verdict of $14,000 will not be set aside as excessive where it appears that the expectation of life of the deceased was 31.8, and of the husband 29.62, years, and that the wife was highly educated and competent to instruct the children, and was a devoted mother and wife, and an excellent housekeeper.

2. A requested instruction, submitting a rule on the measure of damages, is properly refused where, under instructions already given, the rule presented may be adopted.

3. Under Code Civ. Proc. § 377, allowing heirs to recover for the death of an adult killed by wrongful act, in an action by minors for the death of their mother, loss of benefits of a pecuniary value, which plaintiffs would probably have received from their mother, had she lived after their arrival at majority, could be considered in determining the damages.

4. The word "heirs," in Code Civ. Proc. § 377, allowing heirs to recover for the death of an adult by wrongful act, includes all those capable of inheriting from the deceased generally, uncontrolled by limitation of statutes relating to the distribution of community property, and hence includes minor children of deceased.

5. Under Code Civ. Proc. § 377, allowing heirs to recover for the death of an adult by wrongful act, a husband, on the death of his wife by wrongful act, may in one action recover personally, and as guardian ad litem of their minor children, for her death.

6. In an action against a street-railway company, for death of a passenger, it appeared that, in passing a switch at the top of an incline, the trolley had to be adjusted from the rear of the car; that there was but one person in charge of the car, whose position was in front, and that he, without stopping the car, went to the rear end, adjusted the trolley, and got off to run ahead to the front end; and that while running he fell, and was unable to overtake the car, which finally jumped the track and killed deceased. *Held*, that defendant was liable.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Horace A. Redfield, personally and as guardian of two minor children, against the Oakland Consolidated Street-Railway Company, for the death of his wife through defendant's negligence. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Chickering, Thomas & Gregory, R. M. Fitzgerald, and Carl H. Abbott, for appellant. Hall & Earl, for respondents.

HAYNES, C. The defendant, the Oakland Consolidated Street-Railway Company, operated an electric street-car line between the city of Oakland and Mountain View Cemetery. On May 6, 1893, Adeline B. Redfield and her children, Lowell M. Redfield and Mattie A. Redfield, got upon one of the defendant's cars, at or near Mountain View Cemetery, to return to the city of Oakland. This car was operated by only one man, as was customary upon that line. The car in question had a solid glass partition separating the body of the car, in which the seats were, from the platforms at each end, which

[1] Rehearing denied, and modified. See 42 Pac. 1063.

were intended for the motorman; and the only way the motorman could pass from one end of the car to the other was along the step on the outside of the car. From the cemetery the track runs towards the city, for some distance, on a practically level grade; then ascends a grade to the summit of a hill, at a switch, which is the highest point of the track. From that point the track descends. On the summit of the hill the track is comparatively straight for about 35 feet. From the switch the track descends at a varying grade for a distance of about one-half a mile to Booth street, and then turns to the right, or west. When the car was going up the hill above mentioned, the motorman, who was then upon the front end of the car, jumped off, and got on again at the rear end of the car, and took hold of the trolley rope to adjust the trolley around a curve over the switch, the car going up the hill slowly. When the switch was reached the motorman had some trouble in putting the trolley on the right wire. In attempting to return to the front platform, he fell to the ground, and when he got up he was unable to catch the car, which by this time was going down the hill. The car ran down the hill to the curve, where it left the track and went across the road on one side, until it struck the gutter, when it righted itself and flew across a field until it stopped. Said Adeline B. Redfield in some way struck her head and fell off the car after it left the track, and received such injuries that she died therefrom on the 29th day of June, 1893. This action is prosecuted by her husband, Horace A. Redfield, and her two minor children, for the recovery of damages. The jury returned a verdict for the sum of $14,000, upon which judgment was entered; and this appeal is from the judgment, and also from an order denying the defendant's motion for a new trial. The points made by appellant will be noticed substantially in the order in which they are presented in its brief.

1. "The damages are excessive. The sum of $14,000 is so large, in view of the law of the case and the instructions of the court, that it conclusively appears to have been given under the influence of passion or prejudice." This action is brought under section 377 of the Code of Civil Procedure, which is as follows: "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or, if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just." Appellant's contention as to the true mode of ascertaining the amount of damages to be awarded in cases such as this is stated in an instruction requested by appellant to be given to the jury, as follows: "If you find for the plaintiffs, you must find in such amount as shall to you seem just, considering the present worth of the life of the deceased to the plaintiffs; that is to say, you must not find any such sum as would produce a given income for the time fixed, the principal remaining on hand at the end of that time, but the present value of such principal,—that is, what it would be worth to-day. It is shown by the American experience tables of mortality that a person aged 35 years would probably live 31.8 years longer. You must determine the present value of that life, and not find any such sum as would produce a fixed income for the supposed term of life, and leave the principal in the hands of the plaintiffs at the expiration of that time; but you must find the present value of that amount, and render the verdict accordingly." Mrs. Redfield at the time of her death was 35 years of age, and was the wife of the plaintiff Horace A. Redfield, and the mother of plaintiffs Lowell A. Redfield and Mattie A. Redfield. Her expectancy of life was 31.8 years, and the expectancy of life of her husband was 29.62 years. The children were aged 12 and 11 years, respectively. She was an educated lady,—a graduate of Field's Seminary. The testimony shows that she was competent to give lessons and instruct her children upon the piano and in vocal music; was a thorough housekeeper; did all her own work; made all the clothing, including the trimming of hats and bonnets, for her children and herself; took pains in directing the education of her children; cared for them when they were sick; and looked after the comfort of her husband as well. The testimony further shows that she was devoted to her children, was extremely solicitous in regard to their care, and was constantly watchful of their conduct and the training of them morally, as well as otherwise. It is true that in all such cases it is difficult to fix the definite money value of the services of such a wife and mother. Precise accuracy in that regard is not capable of being attained either by a court or jury. In eleven states the amount of damages that can be awarded for the death of a person is limited to $5,000, in one state to $7,000, and in eight states and territories, including the District of Columbia, it is limited to $10,000. In this state there is no statutory restriction or direction, except the general statement that "such damages may be given as under all the circumstances may be just." In those states where the amount of the recovery is limited it may or it may not happen that just compensation is made, inasmuch as circumstances would often occur which would make the maximum amount far less than a just compensation. It is contended by appellant that so many states have determined that it is wise to

limit the amount that can be recovered as damages, in cases like the present, that we should look to such limitations, in determining the amount to be recovered, and be governed thereby; but such statutes were in existence long before section 377, Code Civ. Proc., was enacted, and this provision of the Code is a direct determination of our legislature that the policy adopted by other states in that regard should not exist here. So, too, it may be said that, while such sum as would purchase an annuity equal to the money value of the life and services of the deceased would give an exact measure of the damages sustained by the survivor or survivors, the legislature has not seen proper to declare that to be the measure of damages in such cases, but has determined to leave the subject of determining the amount at large, with the single restriction that the damages allowed should be just, under all the circumstances of the case. That, as a general rule, such questions can be better determined by a jury than by the court, is generally conceded, and our statute has limited the power of the court over the verdicts of juries in such cases. Section 657, Code Civ. Proc., provides that the verdict or other decision may be vacated, and a new trial granted, for any of the following causes materially affecting the substantial rights of such party: (5) "Excessive damages appearing to have been given under the influence of passion or prejudice." In Morgan v. Southern Pac. Co., 95 Cal. 501, 30 Pac. 601, this court said (page 508, 95 Cal., and page 601, 30 Pac.): "The amount of the verdict is certainly quite large,—larger than we, if sitting as a jury, would have felt it our duty to give. But that consideration alone is not sufficient to warrant us in disturbing the verdict. There is no absolute rule in such a case, and about all that can be safely said on the subject may be found in the opinion of the court in Aldrich v. Palmer, 24 Cal. 513, and the cases there cited. The general conclusion, as nearly as can be formulated, is as there stated, namely, that a verdict will not be disturbed, because excessive, unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury." We are unable to say, after a careful review of the testimony, that the damages awarded by the jury "appear to have been given under the influence of passion or prejudice," and such appears to have been the conclusion of the learned trial judge who denied appellant's motion for a new trial. It is not necessary to review the very large number of authorities cited by appellant as to the mode of estimating the value of a life, since, if we were to apply that rule, we would be compelled to place ourselves in the position of jurors, and pursue an independent investigation for the purpose of determining the annual value to the plaintiffs of the life of the deceased, and upon that basis determine the sum required to purchase an annuity which should equal the annual value of the life of the deceased. This we do not feel called upon to do, at least in the absence of a conviction, based upon all the facts of the case, that the jury were influenced by passion or prejudice in fixing the amount of damages awarded the plaintiffs.

2. Appellant further contends that the court erred in refusing to give the instruction requested by appellant, and which is quoted above. The instructions given by the court to the jury are very full, and cover every point upon which an instruction should be given. Some portions of the instructions given will be noticed, in view of the exception taken by appellant to the refusal of the court to give the instruction above referred to. The court said: "You are to award the plaintiffs such damage as will fairly and fully equal the pecuniary value to them of the life of the wife and mother. In fixing the damage to the husband, you have a right to allow for the loss of the services of the wife, suffered by him, if any, from the time of the death of the wife to this date, and also for the value of future services, considering her age and his age, and the probable duration of their lives. In determining the value of the services of the wife to the husband, you are to consider her ability and willingness to perform such services, and the relations existing between her and her husband, as disclosed by the evidence. In other words, you are not limited, in determining the value of a wife, to the estimate of the value of similar services performed by a hired servant, but you are at liberty to consider the value of such services in the light of the character of the wife and companion in which they are performed. And so, in determining the amount of damages to the children, you have a right to consider the value of the nurture and instruction, moral and physical, and intellectual training, if any, which the mother gives to the children. * * * If you find a verdict for plaintiffs, you must award such a lump sum for damages as will fully compensate the plaintiffs, both husband and children, for the pecuniary value to them of the life of the wife and mother. In other words, you may give such damages as under the circumstances of the case may be just. * * * Sympathy and pity must not guide you in your verdict. * * * Neither the desire to help plaintiffs nor to punish the defendants should be exercised. You are at liberty to determine what pecuniary loss the plaintiffs suffered by the death of the deceased, and to find in that amount, and no greater amount. * * * The measure of damages in this case is, as we have seen, the pecuniary loss suffered by the plaintiffs, without allowance for distress of mind, sorrow, or mental anguish. In this

connection, therefore, the plaintiffs, the husband and the children of the deceased, if entitled to recover under the evidence, should get what the deceased would have probably contributed by her labor, instruction, training, comfort, society, and protection, to the support of the plaintiffs, taking into consideration her age, ability, and disposition to labor." These instructions fairly presented the case to the jury, and permitted them to adopt the mode suggested by the defendant's request in determining the amount of damages which should be allowed the plaintiffs, and rendered the giving of the special instruction requested unnecessary.

3. It is contended that the court erred in giving the following instruction: "The pecuniary interest of children in the lives of their parents does not necessarily end with their arrival at the age of majority; but you may allow for the probable loss of any benefit, if any, of a pecuniary value, which the child would probably receive from its mother after its arrival at majority." This instruction was given as a part of the general instruction above quoted. We see no error in this instruction. Immediately preceding the instruction last above quoted the jury were instructed as follows: "And so, in determining the amount of damages to the children, you have a right to consider the value of the nurture and instruction, moral and physical, and intellectual training, if any, which the mother gives to the children; and, in determining such value, you are not limited to a case of similar services rendered by a hired servant, but may take into consideration the value of such services when rendered by the mother to her children, having regard to the evidence in this case, if there be any, as to the ability and willingness of the deceased to nurture, care for, train, and educate her children." It is contended, however, that no special or any circumstances were shown which would cause the children to depend upon their mother after they arrived at majority, or that after that time they would suffer loss from her death. It is true that the only evidence which tended to show an injury to the children resulting from the loss of the mother was her care and labor bestowed upon them, her education, her character, her ability to train and guide them, and efforts for their welfare; and in applying such testimony the jury were authorized to draw such conclusions therefrom as their intelligence, experience, and observation should justify. Nor are we prepared to say that her intelligent care and assistance would be less valuable to them at the critical period of their lives when they are about to enter or have entered upon a more or less distinct and separate life, after attaining their majority. Besides, the statute does not limit the right to prosecute the action or to recover damages to minor children or minor heirs.

4. But it is contended by appellant that the minor plaintiffs are not entitled to recover damages at all; that section 377, Code Civ. Proc., gives a right of action in such cases only to the "heirs or personal representatives," and that in this state, where community property is recognized, the husband is the only heir of the wife; and that the damages recoverable are based entirely upon such community relation. This point was not made in the court below. Section 430, Id. specifies as one of the grounds of demurrer "a defect or misjoinder of parties plaintiff or defendant"; and section 434 provides that if no objection be taken, either by demurrer or answer, upon the grounds stated in section 430, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and that the complaint does not state facts sufficient to constitute a cause of action. Nor was any objection or exception taken to evidence upon the trial tending to prove damages sustained by the children. If the record in any manner presents the question, it is upon a general exception to certain instructions given to the jury, and which exceptions give no hint of the point now made, though possibly broad enough to include it. We think, however, that appellant is mistaken in its construction of section 337, Code Civ. Proc. The damages recoverable are not the product of the community effort or of community accumulations, nor does the word "heirs," as there used, refer to those persons who would succeed to the money so recoverable if it had been in the possession of the community, as community property, at the time of Mrs. Redfield's death; but the word is used in its common-law sense, and denotes those who are capable of inheriting from the deceased person generally, and without the limitation resulting from statutes relating to the distribution of community property. It is true that, under section 1401 of the Civil Code, upon the death of the wife the entire community property, without administration, belongs to the surviving husband (with certain exceptions not affecting this question), but the damages here sought to be recovered arose upon Mrs. Redfield's death, and in consequence thereof, and had no existence prior to her death; and the husband's right to recover them is not based upon the supposition that they were a part of her estate which existed even a moment before her death, but his claim to damages is for an injury personal to himself, and not for injuries inflicted upon the wife, and which passed to him under the statute relating to the succession or inheritance of property. Her personal representative might have maintained the action, but in such case the damages recovered would not have belonged to her estate, nor been liable for her debts; and the same thing would be true if the husband had died from similar injuries, and the recovery had been obtained by his personal representative. The recovery is for the injury inflicted upon the plaintiffs personally, and not for injuries inflicted upon her; and the word "heirs" in the statute is

intended to limit the right of recovery to a class of persons who, because of their relation to the deceased, are supposed to be injured by her death. Tell v. Gibson, 66 Cal. 247, 5 Pac. 223, and McFadden v. Railway Co., 87 Cal. 467, 25 Pac. 681, were actions to recover damages for personal injuries to the wife not resulting in death, and have no application to the question before us.

5. It is also contended that the verdict and judgment are against law, in that the judgment cannot run in favor of Horace A. Redfield as an individual, and also as guardian ad litem of the minors. Dias v. Phillips, 59 Cal. 293, cited by appellant, has no application here. That was an action brought by the plaintiff as an individual, and also in his capacity as an executor. There is no authority of law for such joinder. But here the statute authorized the action to be brought by the "heirs," no matter how many there may be. The fact that the minors appeared by a guardian ad litem, as they were compelled to do, does not affect their interest in the judgment, nor vest any part of or interest in it in the guardian ad litem.

6. It is also contended "that the evidence shows that the injury complained of was the result of an unavoidable accident and inevitable casualty," and that, therefore, the evidence was insufficient to justify the verdict. The fact that in passing the switch the attention of one man was required at each end of the car, and that one man could not be at both ends at the same time, conclusively shows negligence on the part of the defendant in putting but one man in charge of the car to perform both duties. Or if, on the other hand, the man in charge could have stopped the car by shutting off the power, and changed the trolley to the proper wire, it was negligence for him to leave the motor with the power on, and the car in motion, to go to the other end of the car to adjust the trolley. The fall of the motorman while attempting to return to the front platform was accidental, but it was not accidental that but one man was put in charge of the car when two were required, or that the one man did not stop the car to adjust the trolley, if the adjustment could be made in that way. The fact that for some months one man had operated the car without accident does not show the absence of constant danger, while the circumstances under which the accident occurred show that it might have occurred many times, and that it was a constant and continuing negligence to operate the car with but one man in charge. We find no ground upon which the judgment and order appealed from should be reversed, and advise that they be affirmed.

We concur: SEARLES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

110 Cal. 297

LEVY v. MAGNOLIA LODGE, NO. 29, I. O. O. F. (S. F. No. 49.)[1]

(Supreme Court of California. Dec. 6, 1895.)

BENEVOLENT SOCIETIES—CONSTITUTION—PROVISIONS FOR EXPULSION FROM MEMBERSHIP—VALIDITY—EXPULSION—SUFFICIENCY OF CHARGES—MANDAMUS FOR RESTORATION—DEFENSE.

1. The fact that one discharged from membership in a voluntary benevolent association has not pursued the remedies for reinstatement provided by laws of the association is a good defense in a civil action against the association for reinstatement.

2. A provision in the constitution of an unincorporated voluntary association requiring the committee for the trial of members accused of violating the laws of the order to report a member who fails, when properly summoned, to appear before it for trial, guilty of contempt, and makes their report conclusive, and the punishment for contempt expulsion, is valid and binding on the members of the association, where the constitution is agreed to as a part of the contract of membership by all persons joining the order.

3. In mandamus for reinstatement to membership in a voluntary association after being expelled for contempt in refusing to appear before a committee of the order for trial on charges of violation of laws of the order, the objection that the charges were insufficient cannot be urged if the charges were sufficiently specific to apprise plaintiff "of the nature thereof, and to enable him to prepare for his defense" (though, possibly, subject to special demurrer in a court of law), where their sufficiency was not objected to in the proceedings before the order.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Application by Max M. Levy against Magnolia Lodge, No. 29, I. O. O. F., for writ of mandamus to compel defendant to reinstate plaintiff as a member. From a judgment awarding the writ, and an order denying it a new trial, defendant appeals. Reversed.

Marcus Rosenthal, for appellant. Geo. D. Collins, for respondent.

VANCLIEF, C. The defendant has appealed from a judgment of the superior court awarding a peremptory writ of mandate commanding defendant to restore the plaintiff to his former status as a member of said lodge, from which he had been expelled, and also from an order denying his motion for a new trial.

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[1] Rehearing denied.

The material facts of record are as follow: The defendant is a voluntary, unincorporated, fraternal, and beneficial association, organized in the city of San Francisco, and governed by a written constitution and bylaws signed by all its members. It is subordinate to a higher organization known as the "Grand Lodge of I. O. O. F. of the State of California," which, in its turn, is subordinate to a sovereign grand lodge. The constitution of the defendant lodge (section 7) provides that "the constitution, laws and decisions of the sovereign grand lodge * * * and the constitution, laws, and decisions of the grand lodge * * * of the state of California are laws of this lodge; and all persons, by becoming members of this lodge, consent to and agree to abide by the same." Section 18 of the by-laws of the defendant lodge provides that every member in good standing, who has attained to the third degree, "shall, in case of sickness, infirmity, or bodily accident, rendering him unable to earn a livelihood, receive from the lodge fund a weekly benefit of ten dollars, * * * and in all cases benefits shall only be granted on the recommendation of the noble or vice grand, subject to the restrictions hereinafter provided, and no benefit shall be paid for a part of a week's sickness, nor for any sickness which is only of one week's duration, nor for any sickness caused by intemperance or immoral conduct." Section 21 of the bylaws provides: "A member who, though sick or disabled, but who is able to collect debts, settle accounts, to make contracts, to oversee or superintend any business, shall not be entitled to benefits as a matter of right or legal claim; but such member may be granted relief by a vote of the lodge." Section 6, art. 4, of the constitution of the defendant lodge, is as follows: "Sec. 6. This constitution, and all laws, rules, and regulations providing for the granting of sick, funeral, and other benefits, or of any aid, relief, assistance, allowance, expenses, or money to any member, wife, widow, orphan, or any person whatever, or providing for the payment to the lodge of dues, assessments, and demands by a member, are not intended and shall not be construed to create the relation of debtor and creditor, nor to create legal rights, liabilities, nor responsibilities, nor any legal contractual relation, nor confer any right to enforce the granting or payment of the same by resort to courts of law. On the contrary, all questions, whether of law or fact, relative to the granting, payment, or refusal of the same, relate to moral duties or obligations, and not to legal ones, and appertain to the sole jurisdiction of this lodge and the authorities of this order; and their decisions in the premises shall be binding, conclusive, and final upon all members, wives, widows, orphans, or persons. Every person, by becoming or continuing a member of this lodge, consents to, and agrees to abide by, all the laws and decisions of this lodge and of the authorities of the order."

Plaintiff became a third-degree member of the defendant lodge in November, 1883, and so continued until he was expelled, in April, 1894. In 1893 he claimed to be permanently sick, and unable to earn a livelihood, and was so reported to his lodge; and thereupon the lodge commenced to pay him sick benefits at the rate of $10 a week; but, after having paid such benefits for a number of months (not specified in the record), the lodge declined to pay plaintiff any further benefits, though he still claimed and demanded them. In this state of his case the constitution of defendant (section 5, art. 4) provided for him the following remedies, and no other: "If a lodge refuses or neglects to grant sick benefits to a brother, he may, at any time within four weeks thereafter, demand in writing that the lodge appoint a committee to investigate the matter, whereupon the lodge shall appoint a committee of five to hear the evidence and report the facts and their conclusions to the lodge. Such committee shall, without unnecessary delay, notify the brother of the time and place of their meeting, and investigate the case. They shall keep full minutes of the evidence and of their proceedings, and report the same to the lodge, with their conclusion. * * * Upon the report being made, notice thereof shall forthwith be given by the secretary to the party against whom the verdict is rendered, and he shall have two weeks in which to file his exceptions. If no exceptions are filed within two weeks, the lodge shall proceed to pronounce its judgment and decision. An appeal from the judgment of the lodge may be taken at any time within two weeks thereafter to the grand lodge, on questions of law or fact or both, and, if no such appeal is taken, the judgment of the lodge is final. When a bill of exceptions to the report of the committee is filed as above provided, the lodge may determine upon its merits, and either change, modify, or sustain the report of the committee, or refer the same back to the same or another committee, or order a new investigation. If the lodge shall deem the exceptions not well taken, it shall proceed to pronounce its judgment and decision. Each witness, at the conclusion of his testimony, and before other proceedings in the case are had, shall have his testimony as taken down by the committee read over to him, and shall make such corrections thereof as he may deem proper, and shall thereupon sign each page of said testimony. The brother has the affirmative of the issue; and the committees appointed under this section shall be appointed and governed by the rules applicable to committees upon trials under charges." In accordance with this section the plaintiff demanded, in writing, that the lodge appoint a committee to investigate the question as to whether he was entitled to further benefits; whereupon the lodge appointed such committee, and the committee without delay notified plaintiff of their appointment, and also of a time and place when and where they would meet and investigate the matter; and the committee met at the time and place appointed, but the plaintiff refused to meet the committee at that time and place, or at any other time or place, and soon thereafter commenced an action against the defendant in a justice's court to recover benefits alleged to be due him, and obtained a judgment for the sum of $60 and costs. Thereafter, on March 20, 1894, a member of the defendant lodge made and filed in the lodge charges in writing against the plaintiff, specifying that plaintiff had violated his contract with the lodge, and thereby violated the rules and regulations of the lodge and of the grand lodge, by commencing and prosecuting said action in the justice's court; and also that during the year 1893 the plaintiff "claimed and received sick benefits from said lodge to which he was not entitled, thereby defrauding the said lodge, he having violated section 21 of the by-laws." On the day these charges were made, the lodge, in compliance with its rules, appointed a committee of five members to investigate said charges, and to report the result to the lodge. The committee immediately summoned plaintiff to appear before it on April 3, 1894, at 7 o'clock p. m., to answer said charges, and notified him that, in case he made default, he would be reported to the lodge as being guilty of contempt. This summons was served on plaintiff March 21, 1894, by delivering to him a copy thereof, attached to a copy of said charges against him. On March 31, 1894, the lodge received the following: "Magnolia Lodge, No. 29, I. O. O. F. of Cal.—Gents: Being convinced of a total absence of power in your organization to expel a member upon the 'charges' made against Max Levy, I have advised him that any action that you may take against him in that direction will be a nullity, and I therefore, on his behalf, respectfully suggest that you dismiss the 'charges' and proceedings that have been taken in respect thereto, as the entire matter is beyond the scope of your authority. Yours, respectfully, Geo. D. Collins, Attorney for Max Levy." The lodge took no action on this letter, and the committee met at the hour appointed in the summons, and called the plaintiff, and waited for him three hours, but he failed to appear. (Plaintiff testified that he declined to appear before the committee on the advice of Mr. Collins, his attorney.) Thereupon the committee fully reported to the lodge their action, and that plaintiff failed to appear, and also their conclusion that plaintiff was guilty of contempt of the authority of the lodge. The lodge adopted the report of the committee, and thereupon, without further notice to plaintiff, expelled him from the lodge; but immediately thereafter served on him the following written notice: "Hall of Magnolia Lodge, No. 29, I. O. O. F., Odd Fellows' Hall, Corner Seventh and Market Sts. San Francisco, Cal., April 3, 1894. To Max Levy, City—Dear Sir and Bro.: Please take notice that at the regular meeting of this lodge, held this evening, the committee appointed to try certain charges preferred against you by Bro. E. O. Flanders, P. G., reported you in contempt according to section 5 of article VIII. of the constitution, you having failed to appear before it, after having been duly subpœnaed, and the lodge adopted the report and you was accordingly expelled from membership in the same. Yours in F., L. and T., [Seal.] Samuel Polack, Secretary." The plaintiff did not except to the report of the committee, nor appeal from the order of expulsion, nor seek any other relief from the lodge; but instead thereof commenced this proceeding for a writ of mandate.

Section 5 of article 8, referred to in the above notice to plaintiff of his expulsion, is included in the following extract from that article, embracing sections 2 to 6, inclusive.

"Sec. 2. Any member who shall violate any of the principles of the order, or offend against the constitution, by-laws, or rules of order of this lodge, or the penal laws of the land, shall be fined, reprimanded, suspended, or expelled, as the by-laws may direct or the lodge determine.

"Sec. 3. Every member shall be entitled to a fair trial for any offense involving reprimand, suspension, or expulsion. No member shall be put upon trial unless charges duly specifying the offense, so as fully to apprise him of the nature thereof, and to enable him to prepare for his defense, shall be submitted to the lodge, in writing, and signed by a member of a lodge within this jurisdiction, and a copy thereof, under seal of the lodge, be served upon him.

"Sec. 4. Such charges shall be referred to a committee of five members, who shall, without unnecessary delay, summon the parties, and try the case. They shall keep full minutes of the evidence and of their proceedings, and report the same to the lodge, with their verdict. * * * Upon the report being made, notice thereof shall forthwith be given by the secretary to the party against whom the verdict is rendered, and he shall have two weeks in which to file his exceptions. If no exceptions are filed within two weeks, the lodge shall proceed to pronounce judgment upon the verdict, and affix the penalty. An appeal from the judgment of the lodge may be taken, at any time within two weeks thereafter, to the grand lodge; and, if no such appeal is taken, the judgment of the lodge shall be final. When a bill of exceptions to the report of the committee is filed, as above provided, the lodge may determine upon its merits, and either sustain the report of the committee or refer the same back to the same or another committee, or grant a new trial. If the lodge deems the exceptions not well taken, it shall proceed to pronounce its judgment, and affix the penalty

"Sec. 5. If the accused refuse or neglect to stand trial when duly summoned, the committee shall report him guilty of contempt of the lodge, which report shall be conclusive; and the punishment shall be expulsion.

"Sec. 6. If a specific penalty for an offense be provided in the constitution or by-laws, the noble grand shall enforce it. If none be so provided, the lodge shall decide by paper ballot whether the penalty shall be expulsion, suspension, or reprimand and fine. During the ballot the accused brother shall withdraw from the lodge room. If upon the first ballot it shall appear that two-thirds of the ballots are cast for expulsion, such shall be the penalty. If two-thirds of the ballots are not cast for expulsion, then the lodge shall proceed to ballot for suspension, and if two-thirds of the ballots are cast for suspension, suspension shall be the penalty, and the lodge shall proceed to fix the duration of such suspension, which shall not exceed two years. If neither expulsion nor suspension is determined as the penalty as above provided, then the penalty shall either be reprimand, fine, or both. If fine is determined upon, then the lodge shall fix the amount, not exceeding $10; if reprimand is decided upon, then the accused shall be reprimanded in open lodge by the acting noble grand." No ballot held under this section shall be reconsidered.

Those portions of the constitution and by-laws hereinabove set out are all fully set out in the pleadings, and none of them is denied by either party. The statement on motion for new trial shows that they were all introduced in evidence without objection. Both parties have properly treated them here as facts of record, without objection on the ground that they are not expressly found as facts by the court, and they are so considered in this opinion.

The only express findings purporting to be findings of fact, requiring any consideration, are the following: "(1) That plaintiff did not at any time demand or receive from defendant sick benefits to which he was not entitled. (2) That neither of said charges [which he was summoned to answer before the committee] constitutes any offense against said defendant's constitution or by-laws; nor does either of said charges warrant the expulsion of plaintiff from membership in defendant organization; nor has defendant any power, authority, or jurisdiction to try plaintiff upon said charges, or to expel him from membership therefor. (3) That there is no by-law, rule, or regulation of defendant making or prescribing said charges a ground of expulsion from membership in said defendant lodge."

The first one of these findings is wholly irrelevant to any material issue of fact in this proceeding, it being responsive only to the charges which the plaintiff was cited to answer before the committee, and which he never denied. Those charges are relevant to this proceeding only for the purpose of determining whether they constitute an infraction of the constitution or by-laws of the defendant lodge, for which the plaintiff was liable to be tried in the manner proposed and punished in any way; and they can be considered on this appeal for no other purpose.

The second and third of these findings are mere conclusions of law, involving only a construction of the constitution and by-laws of the association, or those portions thereof set forth in the record. Indeed, the record presents no question of fact. That the charges which plaintiff was summoned to answer before the committee constituted a penal offense against the constitution and by-laws of the defendant lodge, which the lodge had jurisdiction to try in the mode proposed, was made sufficiently manifest by the extracts from the constitution and by-laws above set out, to wit, section 2 of article 8, read in connection with sections 5 and 6 of article 4 of the constitution and section 21 of the by-laws. It was surely a violation of these to demand and receive benefits to which they did not entitle him. The abandonment of his proceeding before the lodge to test his alleged right to benefits, and the commencement of the action in the justice's court, were also a plain violation of valid laws of the lodge, which deprived him of the right to recover such benefits in any court of the state, though they did not deprive such courts of jurisdiction to hear and dispose of his complaint. Yet the fact that the laws of the lodge provided a remedy for the grievance complained of, which he had not pursued and exhausted, would have been a perfect defense to his action in any state court. Robinson v. Society, 67 Cal. 135, 7 Pac. 435; Association v. Benson, 76 Tex. 552, 13 S. W. 379; People v. St. George's Soc., 28 Mich. 261; German Reformed Church v. Com., 3 Pa. St. 282; Olery v. Brown, 51 How. Prac. 92; White v. Brownell, 2 Daly, 329; Robinson v. Yates City Lodge, 86 Ill. 598; Otto v. Benevolent Union, 75 Cal. 308, 17 Pac. 217; Bac. Ben. Soc. (2d Ed.) § 94. On the same principle courts of equity decline to interfere with voluntary benevolent associations so long as the means of relief provided by the society itself have not been availed of and exhausted. Lafond v. Deems, 81 N. Y. 507; Dolan v. Court of Good Samaritan, 128 Mass. 437; Chamberlain v. Lincoln, 129 Mass. 70.

It is objected to those charges against plaintiff (here for the first time) that they are not sufficiently specific. They are sufficiently specific to apprise the plaintiff "of the nature thereof, and to enable him to prepare for his defense," though the first step in such defense may have been in the nature of a well-grounded special demurrer in a court of law. But they would not be subject to a general demurrer on the ground that they state no offense against the constitution or by-laws of the lodge, even in the courts of the state. There was no demurrer, however, nor any motion to have the charges made more specific. The letter of Mr. Collins to the lodge merely denied the power of the lodge to expel plaintiff on those charges, and gave notice that any action taken by the lodge in that direction would be a nullity. It contains no complaint that the charges are not sufficiently specific. Besides, plaintiff testified that on the advice of Mr. Collins he refused to appear before the committee; therefore his default was intentional, and without other excuse than that stated in the letter of his attorney to the lodge. In a case very similar to this (People v. St. George's Soc., 28 Mich. 261), in which mandamus to reinstate a member was denied, the court said: "As these are proceedings under articles agreed to by all the members, it is necessary to consider them without much regard to technicalities, and to follow substantial justice more than form." In that case the defendant was incorporated.

Whether the penalty of either of those charges might have been expulsion, or only a fine of $10, is immaterial, since plaintiff was not tried nor expelled on either of those charges, but was expelled for contempt of the authority of the lodge in refusing to appear before the committee, or to stand trial on those charges. His expulsion was in strict accordance with section 5 of article 8 of the constitution; and whether that section is valid and binding on the defendant seems to be the only remaining debatable question presented for decision. The only objections suggested by counsel to section 5, art. 8, are that it makes the report of the committee conclusive, and affords the party reported to be in contempt no opportunity to except to the report of the committee; and that it provides for no appeal from the order of expulsion in that class of cases. Conceding, without deciding, that both grounds of the objection existed, the question is whether or not the right to except to the report of the committee, or the right to appeal from the order of expulsion, is such that the plaintiff could not have waived it by contract; since there is no question that the plaintiff did all in his power to waive them by signing the constitution and by-laws of the association, which association existed and exercised its functions only by virtue of the contract expressed in its constitution and by-laws, signed by all its members. It is well settled that a person may waive any legal right unless such waiver injuriously affects some other person, or is forbidden by law, or opposed to public policy. A party may, by contract, waive a statutory right (Bowen v. Aubrey, 22 Cal. 566); and where, in a criminal case, a verdict has been returned, the defendant may waive the delay of sentence allowed by statute for his benefit by consenting that judgment on the verdict may be pronounced immediately (People v. Robinson, 46 Cal. 94). He may also, by contract, waive his constitutional right to notice of and opportunity to defend a civil action against him; for example, a motion for judgment against him on an appeal bond signed by him as surety in accordance with section 942 of the Code of Civil Procedure (Meredith v. Association, 60 Cal. 617, and cases there cited; Mowry v. Heney, 86 Cal. 471, 25 Pac. 17), on the theory that said section of the Code enters into and becomes a part of the bond; whereas in the case at bar, the plaintiff, without reference to any statute, expressly contracted that the report of the committee in question should be conclusive.

In answer to the suggestion that section 5, art. 8, of the constitution of the defendant is unreasonable and oppressive, and therefore invalid, it is to be observed: (1) That said section is not a by-law, in the ordinary sense of the word as applied to corporations, it being a part of the written contract (constitution) by which the unincorporated association (the lodge) was created, and bears the same relation to the association as do charters by the legislature to private corporations (Hogan v. Endowment League, 99 Cal. 248, 33 Pac. 924); (2) but, even if the defendant lodge had been incorporated, and section 5 of its present constitution had been enacted as a by-law conceded to be unreasonable, and therefore invalid as a by-law, it would nevertheless be valid as a contract if signed or agreed to by all the members of the corporation. "What is bad as a by-law, as against common right, may, however, be good as a contract, since, as a learned writer (Ang. & Ames) expresses it: 'A man may part with a common right voluntarily, of which it would be impolitic and unjust to deprive him of by a by-law passed without his assent, or perhaps knowledge, by those who would not consult his individual interests." Bac. Ben. Soc. (2d Ed.) § 87, and authorities there cited. See, also, Slee v. Bloom, 19 Johns. 456; Cooper v. Frederick, 9 Ala. 738; Amesbury v. Insurance Co., 6 Gray, 596; Davis v. Proprietors, 8 Metc. (Mass.) 321.

On the facts found and admitted by the pleadings, I think the plaintiff was lawfully expelled from the defendant lodge, and that it was not the duty of the defendant to reinstate him at the time this proceeding was commenced, or at any time since; and, therefore, that the judgment awarding the writ of mandate should be reversed, and the court below instructed to dismiss the proceedings.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment awarding the writ of mandate is reversed, and the court below instructed to dismiss the proceeding.

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110 Cal. 335

RYAN v. HOLLIDAY et al. (L. A. 80.)

(Supreme Court of California. Dec. 10, 1895.)

MORTGAGE FORECLOSURE—NONPAYMENT—ALLEGATION—CLAIM AGAINST ESTATE.

1. An allegation in a complaint to foreclose a mortgage that there is now due and owing plaintiff a certain sum, is not equivalent to an averment of nonpayment.

2. Failure to allege nonpayment in a complaint to foreclose a mortgage may be taken ad-

vantage of on appeal, though no demurrer was interposed, and judgment went by default.

3. A mortgage existing on land at the time it was purchased by decedent is not within Code Civ. Proc. § 1500, providing that claims against the estate shall be presented to the executor, except that an action may be brought on a mortgage where all recourse against any other property of the estate is waived.

Department 1. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by George W. Ryan against Clara Holliday and others to foreclose a mortgage. From a judgment of foreclosure, defendant Heber Ingle, administrator, appeals. Reversed.

Trippet & Neale and L. Gill, for appellant. Purington & Adair, for respondents.

VAN FLEET, J. The judgment in this case must be reversed for want of any averment that the note secured by the mortgage sought to be foreclosed has not been paid. The only allegation in this regard is: "That the interest on said note and mortgage has been paid in full up to the 11th day of September, 1894, and there is now due and owing to the plaintiff the sum of twelve hundred dollars ($1,200), with interest thereon at the rate of twelve per cent. per annum from the 11th day of September, 1894." This is not the equivalent of an averment of nonpayment. The language, "there is now due," etc., is but a conclusion of law, and not the averment of a fact. The breach of the contract to pay is of the essence of the cause of action, and must be alleged. Frisch v. Caler, 21 Cal. 71; Scroufe v. Clay, 71 Cal. 123, 11 Pac. 882; Roberts v. Treadwell, 50 Cal. 521; Barney v. Vigoreaux, 92 Cal. 631, 28 Pac. 678. The fact that no demurrer was interposed, and that judgment went by default, makes no essential difference, since the defect goes to the statement of a cause of action (Barney v. Vigoreaux, supra); and that defect is not waived by a failure to demur (Code Civ. Proc. § 434).

While we are reluctant, as suggested in Notman v. Green, 90 Cal. 173, 27 Pac. 157, to reverse a judgment upon such a technicality, and especially in favor of a defendant who has apparently stood by and permitted the court below to overlook an error susceptible of easy correction, and then takes advantage of such error on appeal, and while we would avoid the necessity, if possible, nevertheless, on the other hand, that consideration is largely neutralized by the further one that a party guilty of such an inexcusable breach of good pleading as is here exhibited is not entitled to have it lightly condoned, but should suffer the consequences. The objection that the complaint should have averred either a presentation of a claim against the estate of appellant's intestate or an express waiver of any recourse against the general estate, is not well taken. Section 1500 of the Code of Civil Procedure has no application to the facts of this case. The note and mortgage sued on were not in any sense a claim against the estate of said intestate. The latter was not the maker of the note or mortgage, nor did a demand of any character exist thereunder against the estate. The representative was made a party defendant solely by reason of the fact that subsequently to the making of the mortgage in suit the mortgaged land was purchased by said intestate in his lifetime, and the title thereto rested in his estate at his death, subject to the mortgage lien. It was necessary to make his representative a party for the purpose of foreclosing the rights of the estate in the land,—if such term may be employed under our system,—and for that purpose alone. The estate of said intestate was in no way holden for any deficiency that might arise out of a sale of the property, nor was any such relief asked or taken. There was, therefore, no claim to be presented against said estate. The section referred to applies only to instances where the note and mortgage constitute a claim against the estate of the deceased. There is nothing in the alleged defect in the summons. Bewick v. Muir, 83 Cal. 370, 23 Pac. 389, 390. The judgment is reversed, and the cause remanded, with directions to the court below to permit plaintiff to amend his complaint.

We concur: HARRISON, J.; GAROUTTE, J.

110 Cal. 401

BOYER v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 275.)

(Supreme Court of California. Dec. 10, 1895.)

APPEAL BOND—JUSTIFICATION—POWER OF JUDGE.

As Code Civ. Proc. § 948, provides that sureties on appeal bonds "shall justify before a judge of the court or county clerk," the judge has no authority to review the action of the clerk in passing on the sufficiency of the sureties.

In bank. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Application for writ of prohibition by J. D. Boyer against the superior court of the city and county of San Francisco. Writ issued.

J. D. Boyer, in pro. per. Tobin & Tobin, for respondent.

GAROUTTE, J. The present petitioner, J. D. Boyer, moved to vacate and set aside a judgment of foreclosure rendered against defendants in the case of Hibernia Savings & Loan Society v. Anna Lewis et al., and the motion was denied. Subsequently the court granted plaintiff's motion for a writ of assistance. Boyer appealed from the orders of the court made upon these motions, and the court fixed the amount of his undertaking to stay proceedings upon appeal from the order granting the writ of assistance in the sum of $1,500. Boyer filed a bond in due form, covering both appeals, and the sufficiency of the sureties was excepted to. Upon due notice to the respondent, and in the presence of its attorneys, the sureties justified before the county clerk. Some days thereafter respondent, upon notice, moved the court for permission to execute its judgment by aid of the writ of assistance, and further asked that an order be made striking the said undertaking from the files of the court. This action was prayed for upon the ground that the evidence taken before the county clerk at the time of justification showed the bond to be insufficient by reason of the poor financial standing of the sureties. Upon the hearing of these motions the court examined the testimony taken upon the justification before the county clerk, and thereupon made an order that said sureties on said undertaking appear before him (the judge) upon the ensuing day, at 10 a. m., to then and there justify, and stated to petitioner, Boyer, that if they did not so appear and justify the writ of assistance would be enforced by a further order. The present proceeding is an application for a writ of prohibition to restrain the threatened action of the trial court.

The petitioner, Boyer, perfected his appeal when he filed the undertaking heretofore referred to, and, the appeal having been perfected, all the proceedings upon the order for a writ of assistance were stayed. Code Civ. Proc. § 946. Still this stay of proceedings is not necessarily permanent and final pending the appeal, for by a failure to comply with the provisions of section 948 of said Code, in reference to the exception and justification of sureties, it becomes nugatory, and of no avail; but, if compliance is had with the demands of that section, the stay continues perfect and complete. By the section referred to, upon an exception to the sufficiency of the sureties, they are required to justify after notice to the respondent, "before a judge of the court or county clerk," and in this case the sureties justified before the county clerk, upon due notice to the other side, and in their presence. This would seem to end the matter, and make the stay bond permanent pending the appeal. In this regard the statute furnishes the measure of the power, and we see no authority in the statute authorizing the action of the trial court in ordering a second and summary justification. The county clerk and a judge of the superior court are vested by the statute with equal authority as to the justification of sureties; and there appears to be no provision of law for a review by the trial court of the action of the county clerk in passing upon the sufficiency of the sureties upon the bond.

It is further suggested that section 954, Code Civ. Proc., as amended by Statutes of 1895, p. 59, confers authority for the action of the court complained of in ordering a second justification; but that amendment is not broad enough to cover the facts of the present case, and this is apparent for many reasons, viz.: (1) It contemplates that a perfect bond had been prepared and filed in the first instance, and that the imperfections thereto subsequently arose. (2) It contemplates appeals from money judgments. (3) It gives the court or judge authority only to order a new bond. (4) It in no way provides for a further or second justification of the sureties upon the original bond.

Counsel for respondent also relies upon the case of Dobbins v. Dollarhide, 15 Cal. 374. The facts of that case are quite meager, indicated by the opinion, but, as we understand them, the sureties upon the bond, at the time set for their justification, were unable to justify upon the stay bond, but did justify upon the appeal bond; and the court said that in such case respondent should move the trial court for the execution of the judgment, and that undoubtedly would be the proper procedure, for the stay had lapsed by reason of the failure of justification.

In conclusion, we do not think the trial court had the power to order the second justification to take place before it or a judge thereof, any more than it had the power to make such an order as to the first justification; and clearly the statute gives the parties the option of going either before a judge of the superior court or the county clerk for that purpose. As to what the remedy is for a respondent where, after justification, he should discover that the sureties perjured themselves at the hearing, it is not necessary to decide. Possibly legislation is needed to meet the case. It is ordered that the writ issue as prayed for.

We concur: VAN FLEET, J.; HARRISON, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

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110 Cal. 332

WICKERSHAM v. CRITTENDEN. (No. 16,033.)

(Supreme Court of California. Dec. 10, 1895.)

CORPORATIONS—VOID RESOLUTION—RATIFICATION.

A resolution of a board of directors fixing the salary of the president, and which was spread upon the records, but was illegal because it required the president's vote to adopt it, could be ratified by a subsequent board, so as to justify the president for having drawn such salary.

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by I. G. Wickersham against James L. Crittenden to compel defendant to account for certain moneys received by him as president of a certain corporation. Defendant had judgment, and plaintiff appeals. Affirmed.

Lippitt & Lippitt, for appellant. Crittenden, Foote & Van Wyck and Graves & Graves, for respondent.

HARRISON, J. The plaintiff, as a stockholder in the Bank of San Luis Obispo. brings this action, on behalf of himself and other stockholders, for the benefit of the corporation, to compel the defendant to account for and pay over to the corporation certain moneys received by him, ostensibly for his salary as president, but which the plaintiff alleges were received without right. The facts out of which the cause of action is claimed to arise are stated in the opinion given in Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788, and in an action, similar to the present, which was brought May 16, 1892, with reference to the salary received by the defendant prior to that date, and which is reported in 106 Cal. 327, 39 Pac. 602. The present action was brought May 24, 1893, and it is alleged in the complaint that the defendant had received from the moneys of the corporation the sum of $400 per month, from May 16, 1892, until November 1, 1892, and that the only salary that he was authorized to receive was fixed by the directors at $200 per month, in October, 1890. The court found that the defendant had received the salary of $400 a month from May 16, 1892, up to and including the 30th day of June, 1892, but not subsequently, and that his taking of this salary was authorized by the corporation, and gave judgment for the defendant.

In the case reported in 93 Cal. 17, 28 Pac. 788, it was held that the original resolution, adopted at the meeting of the directors December 12, 1890, fixing the salary at $400, was illegal. The resolution was, however, adopted by the board of directors of the corporation, and was spread upon its records, and on its face purported to be an authentic and efficient act of the corporation. Its invalidity arose from the fact that Crittenden, whose vote was essential to its adoption, was personally interested in the subject-matter of the resolution, and, therefore, disqualified from voting thereon. The resolution was, however, within the power of the corporation to adopt, and, though invalid at the time it was adopted, could be subsequently ratified by a competent board of directors, or could be adopted anew, either by reference to it as it was spread upon the records, or by its introduction as an original resolution.

It is not necessary to consider the attempted ratification by the board of directors, which, in the former case (93 Cal. 17, 28 Pac. 788), was held to have been illegally constituted, and as the purported ratification at the annual meeting of the stockholders in October, 1891, was adopted only by counting the vote of Crittenden therefor, that also may be laid out of consideration. At this annual meeting another board of directors was chosen, which, at a meeting held June 17, 1892, passed a resolution by which they "ratified, approved, confirmed, and adopted" the resolution which had been adopted by the board of directors December 12, 1890, and at the same time fixed the salary of the president at $250 per month from and after the 1st day of July, 1892. This resolution had the effect to validate the original resolution, and, for the purpose of justifying the action of the defendant in taking the salary, is to be construed with the same effect as if the original resolution had been properly adopted. The present action by the plaintiff is brought for the account of the corporation, and not for his individual benefit, and whatever would estop the corporation from recovering a judgment against the defendant is equally a defense against the present action of the plaintiff. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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110 Cal. 369

PEOPLE v. WARD. (Cr. 50.)[1]

(Supreme Court of California. Dec. 10, 1895.)

BRIBERY—INDICTMENT.

Pen. Code, §§ 950, 952, provide that an indictment shall contain a statement of the acts constituting the offense, and must be direct as to the particular circumstances when necessary to constitute a complete offense. Section 7, subd. 6, defines the word "bribe" as anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote, or opinion in any public or official capacity. *Held*, that an indictment which charged that defendant did "give a bribe" to a certain supervisor, with intent to corruptly influence him in a certain matter, was not sufficient.

Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Charles W. Ward was convicted of giving a bribe, and appeals. Reversed.

W. M. Gibson and J. G. Swinnerton, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

McFARLAND, J. The appellant was convicted of the "crime of giving a bribe," and appeals from the judgment, and from an order denying a motion for a new trial. The appellant demurred to the indictment upon the ground that it does not substantially comply with the requirements of sections 950 and 952 of the Penal Code. His demurrer was overruled, and we think that the court erred in overruling it. The indictment charges that the appellant did willfully, feloniously, etc., "give a bribe," to a certain member of the board of supervisors, with intent to corruptly influence him in a certain matter; but it does not contain any averment of any act of appellant which brings his alleged conduct within the legal meaning of bribery. The indictment would be the same if it had merely charged generally that defendant "bribed" a certain person to do a certain thing. This would be the averment of a legal conclusion only, and as bad as a mere general averment that a defendant "murdered" somebody or "stole" something. Section 950 of the Penal Code provides that the indictment shall contain "a statement of the acts constituting the offense in ordinary and concise language"; and section 952 provides that "it must be direct and certain as it regards * * * (3) the particular circumstances of the offense charged when they are necessary to constitute a complete offense." Subdivision 6 of section 7 of the Penal Code provides as follows: "The word 'bribe' signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote, or opinion, in any public or official capacity;" and section 165 provides that "every person who gives or offers a bribe" to one of several officers named, with intent, etc., is punishable in a certain manner. And counsel for respondents contend that the indictment is good because, as they say, "it follows the language of the statute." This court has said several times, in general terms, than an indictment is sufficient if it substantially follows the language of the statute. This is true generally, but not universally. It is not true of a case where "the particular circumstances * * * are necessary to constitute a complete offense." The rule especially applies to purely statutory offenses. But what does the rule mean? It means simply this: that when the statute defines or describes the acts which shall constitute a particular offense, it is sufficient, in an indictment, to describe those acts in the language employed in the statute,—applying them, of course, concretely to the person charged. One of the earliest cases on the subject is People v. Parsons, 6 Cal. 487. In that case the indictment was for perjury and left out the word "feloniously"; and it was held good because, in the statutory definition of the crime of perjury, the word "feloniously" was not used. In its opinion the court said: "The indictment in this cause charged the offense in the words of the statute defining it. * * * Time, place and circumstance are stated with certainty, and every information is given to the defendant which is necessary to enable him to answer the charge." There the words of the statute defining the offense were used in the indictment. People v. Shaber, 32 Cal. 36, is another early case. There the court in sustaining the indictment said: "The indictment charges the offense in the very terms used in defining it in the fifty-eighth section of the crimes act." And even in that case Sanderson, J., dissented, saying that it was a familiar principle in all pleadings that "the facts are to be stated, to the exclusion of conclusions of law to be drawn therefrom." And in the cases following these earlier ones it will be found that the rule declared on the subject is simply that an indictment is good if it alleges all the facts or acts necessary to constitute the particular offense charged, in the language used by the legislature in defining it. For instance, the meaning of the rule is fully stated by Paterson, J., in People v. Fowler, 88 Cal. 138, 25 Pac. 1110, as follows: "The information follows the language of the statute, and is sufficient. It alleges all the acts and facts which the legislature has said shall constitute the offense."

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[1] Rehearing denied.

The only two cases cited where bribery was involved are People v. Edson, 68 Cal. 549, 10 Pac. 192, and People v. Markham, 64 Cal. 157, 30 Pac. 620. In the Edson Case the language of the indictment is not given, but the opinion refers to the Markham Case as authority; and in the Markham Case the indictment charged that the defendant, at a certain time and place, being a police officer, etc., did "agree to receive a bribe, to wit, fifteen standard dollars, lawful coin of the United States of America." Therefore, assuming the general rule, as above explained, to be that it is sufficient to allege an offense in the language of the statute, the offense charged in the case at bar is not alleged in the language of the statute in the indictment under review. It does not allege "the acts and facts which the legislature has said shall constitute the offense." The material acts or facts constituting the legislative definition of bribery are the giving to a public officer something "of value, or advantage, present, or prospective," or giving "any promise" or entering into any "undertaking" to give something of value or advantage. There is no averment that appellant gave the supervisor anything of value, or of advantage, or that he gave anything at all, or that the thing was of present or prospective advantage, or that it was a promise to do something, or an undertaking of some kind which was, or would be, beneficial to the supervisor. As said by counsel for appellant: "The defendant is not informed whether the people will prove that he gave money, a promise of employment, a promise of political influence, a contract, instruction, entertainment, or any other of the many things which might constitute a bribe." It is true that the rules of the common law with respect to criminal pleading have been greatly relaxed in this state by legislation and judicial decision, and many of the formalities and particularities formerly deemed necessary are not now required; but the fundamental rule that an indictment must state with reasonable certainty what the defendant is charged with, so as "to enable him to answer the charge," has not been abrogated either by legislature or court. People v. Lee (Cal.) 40 Pac. 754. An indictment for bribery should aver that the defendant gave something of value or advantage, present or prospective, or some promise or undertaking, or did some act, described by the statute as constituting the offense. A mere use of the language of section 165, which prescribes the punishment, is not charging the offense "in the words of the statute defining it."

The judgment and order appealed from are reversed, and the cause is remanded, with instructions to sustain the demurrer to the indictment.

We concur: TEMPLE, J.; HENSHAW, J.

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110 Cal. 374

BANCROFT v. BANCROFT. (No. 15,848.)

(Supreme Court of California. Dec. 10, 1895.)

UNDUE INFLUENCE—ACTION FOR DAMAGES.

An action for damages for procuring a sale by undue influence will not lie where plaintiff made no offer to rescind under Civ. Code, § 1566, when freed from the undue influence, and knew at the time of the sale the facts constituting the undue influence. Garoutte and Harrison, JJ., dissenting.

In bank. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action for damages for procuring a sale by undue influence. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed. For opinion in department, see 40 Pac. 488.

George Pearce and W. F. Russell, for appellant. A. B. Ware, for respondent.

McFARLAND, J. A demurrer to the amended complaint was sustained, and, plaintiff declining to further amend, judgment was rendered for defendant, from which plaintiff appeals. The complaint is substantially as follows: Defendant is the uncle of plaintiff, and, ever since the latter's boyhood, plaintiff was under the control and direction of defendant, and in his employ, and a part of the time resided with him. Defendant was accustomed, in a great measure, to guide and direct plaintiff's actions in business and other matters; was tyrannical and overbearing, and impatient of opposition; and thus had and retained great influence over plaintiff, who was accustomed to rely upon and be guided by defendant in matters of business. Defendant owned much more than a majority of the stock of a certain corporation, called the Bancroft Company, and entirely controlled and managed its affairs. Defendant was the president of said corporation, and plaintiff was employed as the manager of its business. In September, 1887, plaintiff became the owner of 1,345 shares of the stock of said corporation, and continued to own the same until the 13th day of February, 1891. In November, 1890, plaintiff borrowed $3,500 from the People's Home Savings Bank, and as security therefor pledged to said bank said 1,345 shares of stock. On February 12, 1891, defendant demanded of plaintiff that plaintiff should transfer and deliver to defendant the said 1,345 shares of stock, and all his interest in the assets and property of said corporation, for the sum of $5,000, and then and there "informed plaintiff that, unless he should forthwith transfer to him [defendant] the said stock and property on the terms aforesaid, he [defendant] would inform the said bank that plaintiff was not the owner of said stock, or any part thereof, and that plaintiff had pledged said stock without right or authority." He also said that he [defendant] would not pay more than $2,000 of said indebtedness of plaintiff to said bank, and would levy assessments on the stock of said corporation to the extent of closing out its business. "Thereupon plaintiff, solely through the influence possessed over him by defendant, and his habitual fear of defendant, and terrified by the threats aforesaid, and fully believing that defendant would carry said threats into execution, and would make to said bank and to others the statements so threatened, and that, by reason of such statements, plaintiff's character and reputation would be blasted and destroyed in the community in which he was residing and doing business, on the 13th day of February, 1891, acceded to said demand." Thereupon defendant directed plaintiff to deliver said stock to the said Bancroft Company, and to give to said company a bill of sale of all his interest in the property of said corporation, which plaintiff did on said day, "solely for the reasons aforesaid." The said company paid said indebtedness to said bank, and paid the balance of the $5,000 to plaintiff. It is averred that "plaintiff's consent to so transfer and deliver said stock to said corporation, and to execute the bill of sale aforesaid, was not freely given, but was obtained solely by the means aforesaid, and in consequence of the menace and the undue influence so exercised by defendant as aforesaid"; also, "that, as plaintiff is informed and believes, the value of said 1,345 shares of stock on the said 13th day of February, 1891, was the sum of fifty thousand dollars, as was then well known to defendant, and plaintiff has been damaged by the wrongful acts of defendant as aforesaid in the sum of forty-five thousand dollars." It is also averred, upon information and belief, that after said transaction defendant so mismanaged the affairs of said corporation that "the said shares of stock became and were at the commencement of this action greatly depreciated, and of little or no value." The prayer is for "judgment against defendant for the sum of forty-five thousand dollars, and for costs of suit." It does not appear when the action was commenced, but the present complaint was filed November 6, 1893, 19 months after the alleged cause of action accrued. No offer to rescind was ever made by appellant.

Waiving all questions as to the sufficiency of the complaint in other respects, we think that the learned judge of the court below was right in holding that it does not show any ground for avoiding the sale through want of the free consent of the appellant, unless that ground be "undue influence," and that in such a case the remedy is rescission. It is admitted that no case can be found in all the books where a general action for damages has been maintained upon the ground of undue influence in procuring a sale or other contract. In Le Caux v. Eden, 2 Doug. 594, the question was whether an action at common law could be maintained for an imprisonment on a capture at sea as prize, and Buller, J., said: "There is no case in which it has ever been holden that such an action would lie; and, if it could be maintained, there are, in every way, such frequent opportunities for it, that it must have happened in every day's practice, or some instances, at least, must have been in the memory of those who have had long experience in Westminster Hall, but there is not the smallest trace of such a determination, or even dictum, in any court in England. A universal silence in Westminster Hall on a subject which so frequently gives occasion for litigation is a strong argument to prove that no such action can be sustained." That case was decided in 1781, and dealt with litigation which could arise only out of the exceptional condition of war. How much stronger, therefore, is the authority of more than another hundred years of "silence," in the courts of both England and America, upon a subject which, both in peace and war, "so frequently gives occasion for litigation." But, in addition to this negative authority, it is clear upon principle that this present action should not be maintained, because to maintain it would be to violate the wholesome and fundamental doctrine that in such a case the party claiming to be aggrieved must promptly rescind, or offer to rescind, so as to put the other party in statu quo. He cannot wait to speculate on future contingencies. The sale from appellant to respondent was not void. It was only voidable upon restoration of the consideration paid. It has been held, it is true, that an action to recover damages for a deceit or fraud will lie, but that is on the ground that the party defrauded had no knowledge of the facts constituting the fraud. Even in that case great wrong is sometimes done when rescission is not required, but the rule should not be extended to other cases to which it has not been applied. The provisions of our Civil Code, all construed together, do not change the law on the subject. If it be said that a case could be imagined where the facts constituting the alleged undue influence were not known to the complaining party, and that there rescission should not be required, it is sufficient to reply that the case at bar is not such case. The judgment is affirmed.

BEATTY, C. J. I concur. "A contract which is not free is nevertheless not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on rescission." Civ. Code, § 1566. The contract by which plaintiff parted with his stock was not void, but merely voidable at his option. He had the choice to affirm it or to rescind it, and it appears that he affirmed it, by failing to rescind promptly when freed from the undue influence by which his consent was obtained. Civ. Code, § 1691. Having affirmed the contract, can he recover damages? He claims that he is entitled to recover the full value of the stock, upon the same grounds that sustain an action for deceit in case of a contract induced by fraud. But the analogy does not hold. When a contract induced by fraud is affirmed by the injured party, he affirms it (as he has the right to do) according to the terms upon which he was led to believe he was contracting; and what he recovers in an action for deceit is the value of that which he believed he was getting, and the other party knew he expected to get, but which he did not in fact get, or a value which he did not intend to part with, and the other party knew he did not intend to part with. In other words, he affirms the contract as he was induced by the other party to understand it, and he recovers what, according to such understanding, he ought to have or ought not to have parted with. In case of a contract the terms of which are perfectly understood, but are assented to only because of the exercise of duress, menace, or undue influence, the right of the injured party to rescind or affirm exists, the same as in cases of fraud. But, as in cases of fraud, an affirmance is necessarily of the terms of the contract as they were understood when the consent was given; and if those terms have been fully complied with, as in this case, there is nothing due upon the contract, and no cause of action. If the plaintiff had promptly given notice of his repudiation of the contract, and offered to pay back the $5,000 upon condition that the stock was returned, or, even without such offer, if the defendant had parted with the stock, or its value had depreciated, he might have maintained an action for the stock or its value, based upon the rescission; but he cannot recover, upon an affirmance of the contract, what he never expected to get under the contract.

We concur: TEMPLE, J.; HENSHAW, J.

GAROUTTE, J. I dissent. It is claimed that the conduct of defendant, practiced towards plaintiff, amounts in law to duress, menace, and undue influence. And, as to whether or not these acts are sufficient in law to constitute menace or duress, I will not discuss; for, in sustaining the demurrer to the complaint, the trial court conceded a case of undue influence to have been stated, and respondent, by his argument, substantially concurs in such views of the trial court. This being true, the contract is no better, and occupies no different position, than though menace and duress also entered as elements in its creation. It will be observed that the present action is not one for a rescission of the contract, but is an action at law for compensatory damages, and the trial court held against the sufficiency of the complaint upon the broad ground that an action at law for damages will not lie in a case like the one at bar, but that relief can alone be obtained by rescission in a court of equity; and the soundness of this ruling is the point involved. It may be said that no authority by either side has been cited in point, for or against the proposition of law under consideration, and my own research fails to recall a single precedent. Respondent, as a last resort, is forced to rely upon the case of Le Caux v. Eden, 2 Doug. 602, where Justice Buller made some very general observations, which are cited in the main opinion. But in view of the fact that for such wrongs as these a remedy by rescission has always been recognized, and that it would in almost every case be a much more adequate remedy than an action for damages, as the practicers of these frauds are generally financially irresponsible, we think, in this case, but little weight should be attached to the very general principle declared by the learned English judge. The necessity and advisability of bringing this character of action may seldom arise. But, beyond this, the only question here is the applicability of a certain principle of law to a given state of facts; and, even if the question has arisen for the first time, it is as much the duty of the court to now determine it upon principle and reason as if it had come before the court for the first determination a hundred years ago. There has been a time when there was no precedent for the decision of any case. New precedents are being made at the present, and will continue to be made in the future, and the day is long distant when a precedent may be found for every case arising within the vast domain of the law.

It is not disputed that an action for damages upon a contract secured by fraud will be sustained, and that a resort to a court of equity for relief is not necessary. Such doctrine is elementary, and cases everywhere, and without number, support it. But it is insisted that the rule of law is different as to menace, duress, and undue influence. In substance, the contention is that if A. deceives me by falsehood, and thereby secures from me a contract, to my great loss, I may recover from him in damages, for it is fraud. But if B., with pistol at my head, threatens to kill me, and thereby procures a similar contract, I may not recover from him in damages, because, forsooth, his acts do not constitute fraud, but menace. Or, if C. procures a similar contract from me by taking a grossly oppressive and unfair advantage of my necessities and distress, no action at law for damages will lie against him, for he has not practiced fraud, but has used undue influence. I am wholly unable to comprehend why a different rule of law is applicable to the two classes of cases furnished by the above illustrations. Certainly the fraud of A. is no more iniquitous than the menace of B. or the undue influence of C., and I think it illy becomes either one of these wrongdoers to say: "You have no choice of actions. Your only remedy is rescission. I will not pay the damage you have suffered from my unlawful acts, but demand that I be placed in my original position." I think that neither A., B., nor C. should be allowed to name the action which may be brought against him; and, if the party injured is able to secure adequate relief by damages, the road to that remedy should be open to him. Let us take the case of valuable securities, resting upon a fluctuating market, and before the aggrieved party could get into court for relief by rescission, using the diligence demanded by the law, the securities become valueless. Is there no remedy by damages? If not, the wrongdoer is a lucky rogue, for in the interim he may have realized upon these securities, and still be ready to return the worthless paper to the owner upon demand, or at the end of litigation. It would seem that such result should not be allowed under the guise of law, for it is gross injustice, and a premium upon fraud.

Taking a broad view of the question, we are justified in saying that this contract was procured through fraud. What is undue influence, menace, or duress, but fraud? "Fraud" is certainly a broader word than deceit. By deceit, fraud is accomplished, but it is likewise accomplished by many other practices. Mr. Bigelow, in his work upon Fraud (page 6), declares it may be an infringement of the legal rights of another by circumvention, and without deceit. Mr. Hilliard declares (Torts, 3d Ed., 138): "Fraud properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence reposed, and are injurious to another, or by which an undue, unconscientious advantage is taken of another." And Cooley, in his work upon Torts, says (*page 506), "Duress is a species of fraud, in which compulsion in some form takes the place of deception, in accomplishing the injury." It will thus be seen that deceit is but one of many kinds of fraud, and, while actions for damages arising from contracts procured by deceit alone are of common occurrence, we find no principle declared in those cases which limits the remedy by reason of some inherent quality found in the definition of the word "deceit"; but, rather, deceit is declared to be a fraud, and compensation in the nature of damages for fraud is but justice in its simplest form. Let us assume that contracts procured through menace, duress, or undue influence are made through agencies which may not technically come within the definition of "fraud." What matters it? All the parties stand upon the same plane. The practices in either case are equally forbidden by the law. They are all morally bad. They are violative of the same rights of the party injured. They are violative of the same duties incumbent upon the party doing the wrong. Again, the contract made is no better or worse in the one case than in the other; and I know of no reason why the remedies should not be as many and as full and complete in the one case as in the other. The wrongdoer accomplishes the same wrong in each, and does it with the same bad intent; and, as to the victim's remedy, it would seem to be wholly immaterial whether the means to the end be fraud, undue influence, or duress. The cases, upon principle, are analogous, and the law applicable to the one state of facts must of necessity control the other.

It is claimed that in the case of fraud the party injured does not know the facts, while the contrary conditions exist in a case of duress, menace, or undue influence. Conceding the claim, the principle involved is not changed thereby. In one case the act is induced by a want of knowledge, and in the other by overpowering influences. There is no more consent in the one than in the other, and there is the same wrongful interference with the party's rights in both. Neither does the principle of acquiescence in the contract occupy any different position in the two cases. In a case of fraud nothing is done and no remedy invoked until the fraud is discovered, and when discovered the party seeking relief is in exactly the same position, as to the contract and the facts leading up to it, as though it had been obtained by undue influence or duress. When the fraud is discovered the party is called upon to act, and may either elect to confirm the contract, and sue for damages at law for the detriment, or go into a court of equity for relief upon the rescission of the contract; and, upon analogous reason, a like choice of remedies must be open to him in a case similar to the one at bar.

The Civil Code of this state, in speaking of obligations imposed by law, declares (section 1708), "Every person is bound without contract to abstain from injuring the person or property of another, or infringing upon any of his rights." Section 1428 declares that obligations may arise by operation of law, and further provides, "An obligation arising from operation of law may be enforced in the manner provided by law, or by civil action or proceeding." Section 3281 declares, "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money which is called damages." These principles would seem to be but reiterations of elementary law; but, if not, and they take advanced ground, then, beyond question, they blaze a path through virgin forests, plainly leading to a court of law for relief. By unlawful means, defendant induced plaintiff to part with his property for an inadequate consideration. This was a violation of an obligation imposed upon him by law, for it was an infringement upon plaintiff's rights, and he was entitled to damages in an amount which would compensate him for the detriment directly caused thereby. It is contended by defendant that cases involving the principle here discussed form exceptions to the law as declared in section 3281, supra. The section states no exception, but, upon the contrary, is as broad as language can make it. Neither do I find any exception stated elsewhere in the Code. While it is true the Code provides for "specific and preventive relief," still there is nothing to indicate that the remedies there declared should be exclusive. Again, the contention, if sound, would likewise deny any remedy for damages in a case of a contract procured by fraud or deceit; and this, we have seen, is not the law of this state, or any other state. In the case of Wood v. Franks, 56 Cal. 217, the principle of law to which we hold is fairly illustrated and fully supported. In that case, after quoting the sections of the Civil Code to which reference has been made, the court said: "Thus it will be seen that wherever there is an obligation arising from operation of law, and a breach of that obligation, the party injured may by action recover the amount which will compensate him for all the detriment proximately caused by the breach."

To support the conclusion I have arrived at in this case, I do not hold that, in all cases of contract procured by "undue influence," the remedy of damages is open. Rescission is the only remedy in a case of "mistake," for no fraud has been practiced, there has been no wrongdoing, the transaction has been innocent, and the parties must be and should be satisfied to return to their original position. Such should also be the rule in many cases of undue influence, as where the relations of the contracting parties were such that the law, regardless of any question of bad and wicked intention, would declare the contract void. But the rule here declared is limited to those cases possessing the characteristics of torts, where an act has been done intentionally and knowingly for the very purpose of securing the undue advantage which results. There must be bad faith and a sense of wrongdoing, and such was certainly this case, as shown by the allegations of the complaint.

HARRISON, J. I concur in the foregoing opinion of Mr. Justice GAROUTTE.

VAN FLEET, J., being disqualified, did not participate in the decision of the foregoing cause.

110 Cal. 339

BUCKLEY v. GRAY. (No. 15,905.)

(Supreme Court of California. Dec. 10, 1895.)

NEGLIGENCE OF ATTORNEY—LIABILITY TO THIRD PERSON.

1. An attorney employed to draw a will is not liable to a person who, through the attorney's negligence and ignorance in the discharge of his professional duties, was deprived of the portion of the estate which testator instructed the attorney should be given such person by the will.

2. Civ. Code, § 1559, providing that a contract made expressly for a third person may be enforced by him, does not authorize a suit for damages against an attorney by a person who, through the attorney's negligence, was deprived of the portion of an estate which a testator, who employed the attorney to draw his will, desired to be given to him.

Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Vincent P. Buckley against Giles H. Gray for damages for defendant's negligence in drawing a will and supervising its execution. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

Blake, Williams & Harrison, for appellant. Haven & Haven, for respondent.

VAN FLEET, J. Action to recover for negligence of attorney in drafting and executing a will. The court below sustained a demurrer to the complaint, and, plaintiff failing to amend, judgment was entered against him, from which he appeals. The complaint alleges, in substance, that on October 5, 1895, defendant, an attorney at law, was employed by Mrs. C. M. A. Buckley, the mother of plaintiff, to draw her will, which she desired and directed to be so drawn as to leave all the residue of her estate, after certain specific legacies, to her two sons, then living, the plaintiff and one John P. Buckley, to the exclusion of the children of a deceased son of the testatrix; that in pursuance of such employment defendant on said day drew a will for said testatrix, and superintended and directed the execution thereof; that in the preparation of said will, and in directing the execution thereof, the defendant was guilty of gross carelessness and negligence in the performance of his professional duties, in this: that said will was so drawn as not to legally express the desires or direction of the testatrix as to the exclusion of said grandchildren, but in such manner that the latter were permitted under the will to take of her estate; and that in directing the execution of said will this plaintiff, although named in said will as one of the devisees thereunder, was caused by the defendant to become one of the subscribing witnesses thereto, thereby rendering the provisions of said will as to the plaintiff void. It is further alleged that said John P. Buckley died before the testatrix; that thereafter, in May, 1891, said testatrix died without having revoked or altered said will; that the will was admitted to probate, and the estate of said testatrix duly administered; and that under the decree of distribution said grandchildren received one-half of said estate, amounting to $85,000, in which amount plaintiff alleges himself damaged, and for which he asks judgment against defendant.

We think the demurrer was properly sustained. In our judgment the complaint clearly fails to state a cause of action against defendant in favor of the plaintiff. It is to be observed that the action is not by the client, but by a third party, her son. It is a general doctrine, sustained by an overwhelming weight of authority, that an attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care, to his client alone,—that is, to the one between whom and the attorney the contract of employment and service existed,—and not to third parties. The exceptions to this general rule, if they may be in strictness deemed such, are where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act. Responsibility for a fraudulent act is independent of any contractual relation between the guilty party and the one injured; and one committing a malicious or tortious act, to the injury of another, is liable therefor, without reference to any question of privity between himself and the wronged one. Where, however, neither of these elements enters into the transaction, the rule is universal that for an injury arising from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter. 2 Shear. & R. Neg. §§ 562, 574; Bank v. Ward, 100 U. S. 195, and cases therein cited; Roddy v. Railway Co., 104 Mo. 234, 15 S. W. 1112, and cases cited. In Bank v. Ward, supra, the general rule above adverted to is exhaustively discussed, and its limitations stated by Mr. Justice Clifford, for the court. That was a case where a third party sought to maintain an action against the attorney for damages resulting to him for relying upon the correctness of a defective certificate of title to a piece of real estate furnished by the attorney to a client, upon the faith of which the plaintiff had loaned money on the property. In holding that the plaintiff could not maintain the action, it is there said: "Beyond all doubt, the general rule is that the obligation of the attorney is to his client, and not to a third party, and, unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained. Shear. & R. Neg. § 215. Conclusive support to that rule is found in several cases of high authority. Fish v. Kelly, 17 C. B. (N. S.) 194." And, after commenting upon the case of Fish v. Kelly, and the case of Robertson v. Fleming, 4 Macq. H. L. Cas. 167, 209,—from the latter of which cases Lord Wensleydale is quoted as saying that "he, only, who, by himself or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue him for that neglect, and that that employment must be affirmed in the declaration of the suit in distinct terms,"—the learned justice proceeds: "Analogous cases involving the same principle are quite numerous, a few of which only will be noticed. They show to a demonstration that it is not every one who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, 'the limit of the doctrine relating to actionable negligence,' says Beasley, C. J., 'is that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect.' Kahl v. Love, 37 N. J. Law, 5, 8. * * * Cases where fraud and collusion are alleged and proved constitute exceptions to that rule, and Parke, B., very properly admits, in the following case, that other exceptions to it exist which are as sound in principle as the judgments which establish the rule. Longmeid v. Holliday, 6 Exch. 761–767. Examples of the kind are given in that case, two of which deserve to be noticed, as they have been urged in argument to disprove the rule; but they cannot have any such effect, for the plain reason that they stand in many respects upon a different footing. 'These cases,' say the court in that opinion, 'occur where there has been a wrong done to the person, for which he would have a right of action, though no such contract had been made;' and the court gives as an illustration the patient injured by improper medicines prepared by an apothecary, or one unskillfully treated by a surgeon, where both would be liable to the injured party, even if the father or friend of the patient contracted with the wrongdoer." In Roddy v. Railway Co., supra, it is said: "The right of a third party to maintain an action for injuries resulting from a breach of contract between two contracting parties has been denied by the overwhelming weight of authority of the state and federal courts of this country and the courts of England. To hold that such actions could be maintained would not only lead to endless complications in following out cause and effect, but would restrict and embarrass the right to make contracts by burdening them with obligations and liabilities to others, which parties would not voluntarily assume;" citing Winterbottom v. Wright, 10 Mees. & W. 109, and a large number of other cases. "The rule is put upon two grounds, either of which is unquestionably sound. One ground is given by the court in the opinion in Winterbottom v. Wright, 10 Mees. & W. 109, as follows: 'If we were to hold that plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract. If we go one step beyond that, there is no reason why we should not go fifty.' The other ground is thus stated in the New Jersey case above cited: 'The object of parties in inserting in their contracts specific undertakings, with respect to the work to be done, is to create an obligation inter esse. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in a contract, in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contracts. Plaintiff, not being a party to the contract, cannot maintain this action on account of injuries resulting from any breach of duty defendant owed Pickle, arising purely out of the terms of the contract between them.'"

No authority has been brought to our notice contravening the rule as stated in the foregoing citations. Some, which at first glance might be so taken, will be found upon analysis to fall within one or the other of the exceptions noted, and not to infringe upon the general doctrine. Within such class fall the cases relied upon by plaintiff to support his general right to maintain the action. This case comes strictly within the general doctrine as above stated. No fact is alleged bringing it within any of the exceptions thereto. It is not alleged that defendant did the act charged maliciously, or through any evil intent, or with any fraudulent purpose, or that he did it in any affirmative sense. The complaint proceeds solely upon the theory that it was through negligence arising either from ignorance or carelessness, or both; and this, although it may be conceded that the complaint discloses an instance of the grossest ignorance on the one hand, or unpardonable carelessness on the other, and shows very grievous injury to plaintiff as a result, does not, within the principles above announced, make a case entitling the plaintiff to maintain the action. It is claimed, however, that the action can be maintained under the rule, expressed in section 1559 of our Civil Code, that a contract made by one person with another for the benefit of a third person may be enforced by the latter, the argument being that the employment of defendant by plaintiff's mother to draw her will was clearly for plaintiff's benefit, inasmuch as the latter was one of the objects of her bounty, as expressed in her will; and a number of cases are cited which are supposed to bring the case within that rule. But, in our judgment, that provision has no application to this case. It is intended to apply to instances where the contract is made expressly for the benefit of the third person, not where the third person is or may be merely incidentally or remotely benefited as a result of such contract. Such is the language of the Code, and such will be found to be the application of the doctrine in all the cases cited by counsel, or which have come to our attention. The terms of section 1559 are: "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." This rule, we are told by Mr. Pomeroy (Rem. & Rem. Rights, § 139), was originally adopted prior to the reformed procedure, being based partly upon considerations of convenience and partly upon a liberal construction of the nature of the contract, and the purpose of which was to avoid circuity of action, and to enable the real party in interest to sue. That author proceeds to give us illustrations of its application, and each instance given is a case where the contract was in express terms made for the benefit of the third party, and by reason of which the latter became the real party in interest. No such application of the doctrine as is here contended for is even remotely hinted at. The contract between the plaintiff's mother and the defendant, which was the subject of the breach, cannot be said in any legal sense to have been expressly made for plaintiff's benefit. It was a contract for employment of defendant's services as an attorney, to draft the will of Mrs. Buckley, the immediate purpose of which was for the benefit of the latter, to enable her to make disposition of her estate in accordance with her desire. Remotely, it is true, she intended plaintiff to be benefited as a result of such contract, by providing for him in her will. Such provision, however, could create no vested right in plaintiff until the death of the testatrix. Until that event the will remained purely ambulatory, and the provision for plaintiff could be at any time changed or withdrawn. It therefore created a mere possibility in plaintiff; not a right which made him in law a privy to the contract. To hold that, by reason of the provision for plaintiff in the will, the contract is to be considered one made expressly for his benefit, is to confound the terms of the will with those of the contract. The latter alone was the subject of the breach, and by defendant's negligence in carrying out that contract the testatrix alone suffered legal injury. Although the ultimate consequential injury to plaintiff would appear to have been great, it was, so far as defendant is concerned, damnum absque injuria, against which the courts are powerless to relieve. In this view, it is not material to notice the other objections made to the complaint. The demurrer having been properly sustained, it follows that the judgment should be affirmed. It is so ordered.

We concur: GAROUTTE, J.; HARRISON, J.

110 Cal. 361

RAUER v. FAY. (No. 16,031.)

(Supreme Court of California. Dec. 10, 1895.)

ACTION ON CONTRACT—EVIDENCE—MECHANIC'S LIEN—ASSIGNMENT.

1. A written contract, reciting an agreement "between D. * * * and certain owners of property * * * fronting on Chestnut,—½ street"; that D. should furnish materials, "and perform the work of constructing in a workmanlike manner in front of the property here represented," and "grade to official line," etc.,—is too indefinite to be admitted in evidence under a complaint which counts on a contract to grade "the south half of Chestnut street."

2. A mere right to assert a mechanic's lien is not assignable.

3. In a suit to foreclose a lien for street work by one to whom the original contract with the property owner had been assigned, a writing, signed by the original contractor, releasing defendant from all claims under the contract, was admissible, though plaintiff was unaware of such release when he took the assignment.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by J. J. Rauer against David Fay to foreclose a lien for street work. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. H. Chapman, for appellant. Shadburne & Herrin, for respondent.

SEARLS, C. This is an action to foreclose a lien for street work performed under a private contract, and in which a lien was filed pursuant to section 1191 of the Code of Civil Procedure. Plaintiff had judgment, from which and from an order denying his motion for a new trial defendant appeals.

The complaint is in the usual form; pleads a contract between defendant and one J. G. Duffy, the assignment thereof to plaintiff by Duffy, the performance of the work by plaintiff, and the filing of the lien, etc. The contract and the contents of the lien are pleaded according to their legal tenor and effect, and not in hæc verba. The complaint counts upon a contract to grade the south half of Chestnut street, from Jones street to Leavenworth street, San Francisco. The answer, after denying a number of the allegations of the complaint, proceeds to aver that prior to April, 1892, defendant had procured to be graded all the portion of Chestnut street in front of his property by third parties, and had paid therefor; that portions of the street in front of property of other parties remained ungraded; that Duffy desired defendant to sign a contract with him for the grading of the whole of Chestnut street, from Jones to Leavenworth street, for the purpose of enabling him, the said Duffy, to procure a permit from the superintendent of public streets, etc., of said city and county, for doing said unfinished grading; that Duffy thereupon agreed that, if defendant would sign said contract for said purpose, he, the said defendant, should not be held liable for the payment of any portion of the price of such grading; that thereupon defendant signed the contract for said purpose only; and that said Duffy then and there made, executed, and delivered to defendant a full acquittance and discharge from any and all liability on said contract by reason of defendant's signing the same, etc., stating in terms that the grading on the south side of the street in front of defendant's property was already done, and that plaintiff was fully informed of all the above facts before he performed any work upon the street. The answer further alleges that the contract in terms required the grading of the whole of the street, but that prior thereto the entire north half thereof had been graded by third parties. Defendant further alleges that the assignment of the contract by Duffy to plaintiff was as collateral security for a loan, and that the former still has an interest therein; that no work was done under the contract in front of defendant's property, etc. The answer also avers that Duffy commenced the work of the unfinished grading, and finished one-half thereof, before the assignment of the contract to plaintiff. The record in the case bristles with irregularities, uncertainties, and errors, for which the judgment and order appealed from must be reversed.

1. The complaint and notice of lien, as filed, are predicated upon a contract for grading the south one-half of Chestnut street, between Jones and Leavenworth. There was a written contract entered into April 25, 1892, between J. G. Duffy, as a contractor, and the defendant and others, which contract was subsequently assigned to plaintiff. This contract was offered in evidence, and is as follows: "This agreement, made and entered into this 25th day of April, A. D. 1892, by and between J. G. Duffy, of the city and county of San Francisco, state of California, party of the first part, and certain owners of property, lots, and land fronting on Chestnut,—½ street, between Jones and Leavenworth streets, in the city and county above mentioned,—whose names are hereunto subscribed, each contracting severally, parties of the second part, witnesseth: That the said party of the first part, for and in consideration of the covenants of the said parties of the second part, hereinafter expressed, promise, covenant, and agree to and with the said parties of the second part that he will furnish all the materials and perform the work of constructing, in a good and workmanlike manner, in front of the property here represented, and to the satisfaction of the superintendent of public streets of said city and county. To grade to official line and grade, for the sum of five dollars ($5) per front foot. And the said parties of the second part, in consideration of the premises, each for himself or herself, and not for the others, promises, covenants, and agrees to and with the said party of the first part that he or she will pay to the said party of the first part, upon the completion of the work aforesaid, his or her pro rata share of the total cost of the above described work, together with the incidental expenses, according to the ratio that his or her frontage bears to the whole frontage here represented, and in accordance with the rule established by the street law. In witness whereof, the said parties to these presents have hereunto set their hands and seals, the day and year aforesaid. J. G. Duffy, [L. S.] Contractor.

"No. feet fronting on each street:

	Feet.	Inches.
Clara Finley, per John Finley...	137	6
Johanna H. Wright, per Selden S. Wright..................	46	0
Daniel Rogers and R. C. Bolton, executors of the last will and testament of James R. Bolton, deceased	49	6
David Fay	80	0
R. G. Welsh....................	100	0"

From the foregoing it will be observed that the only direct allusion to the street is in speaking of the "certain owners of property, lots, and land fronting on Chestnut,—½ street," etc. The only obligation of the contractor is to furnish the material and perform the work of constructing in a good and workmanlike manner in front of the property represented, and to "grade to official line and grade," to the satisfaction of the superintendent of streets. What is to be graded can only be inferred. If it is the street and one-half of it, what half? The contract is silent on this question. Possibly, had the contract been set out in the complaint, with proper averments of the intention and object of the parties, it might upon proof have been so reformed as to be available as a basis for a recovery. As it stands, it is too uncertain and indefinite to entitle it to be admitted in evidence under the allegations of the complaint, and appellant's objection to its admission should have been sustained.

2. It is established by the evidence without contradiction that a portion of the work of grading the south half of the street was performed by the contractor, Duffy, before the assignment to plaintiff. Defendant testifies that one-half of it was done by Duffy. Duffy himself testified that it was much less than half, and plaintiff testified that one-tenth part only was graded; yet his notice and claim of lien was for all the work of grading the south half of the street. This question was, by the pleadings, made an issue in the case; and, under the evidence, there should have been a finding thereon. It was a material issue, for the reason that while Duffy could assign his contract, and thereby entitle the plaintiff to a personal judgment for any amount due him, he could not assign his right to a lien as security for the payment of what might be due him. A perfected lien may be assigned, or rather it passes with an assignment of the demand for which it stands as security. The mere right to take a lien in the present or future is not assignable. Mills v. Land Co., 97 Cal. 254, 32 Pac. 169. If it be urged that the court below found that plaintiff performed all the work under the contract, the answer is that there is not a particle of evidence in support of such a finding, and the evidence is positive that he did not do it all. And as this finding is assailed, as well as the failure of the court to find the

share or proportion of the grading performed by Duffy and the proportion by his assignee, the plaintiff, the error is not cured. It is true that, when the court below came to pass upon defendant's application for a new trial, it denied the motion upon condition that plaintiff remit 10 per cent. of the amount of his recovery; and it is said by respondent that this deduction was on account of labor performed by the original contractor. The record is silent as to the cause of the remission; and in the face of the evidence, which showed that a small portion of the work was never completed, it may with equal propriety be inferred that the required remission was on the latter account.

3. At the trial, defendant, after proof of its execution simultaneously with the contract, offered in evidence the following paper, executed by Duffy, the contractor: "San Francisco, April 27, 1892. This is to certify that I have no claim on Mr. Fay for any work performed on Chestnut street by Mr. A. E. Buckman, myself, J. G. Duffy, or assigns, in doing the balance of grading on Chestnut street. J. G. Duffy,"—to the introduction of which plaintiff objected. The objection was sustained, and the ruling is assigned as error. We think that upon its face this document, which may be termed a "release," was admissible. It may have been executed because the street in front of defendant's premises had been graded by Buckman, the individual therein mentioned, and already paid for by defendant, or it may have been because such grading had been done, and that defendant was, as stated in the answer, only a nominal party to the contract, to enable the parties in interest to secure a sufficient number or proportion of the landowners on the block to obtain a permit from the superintendent of streets to make the improvement. This, if done with the knowledge and consent of the other contractors, was in no wise a fraud upon them. If it was a secret or side agreement between the contractor and defendant, made in fraud of the rights of the other contracting parties, that fact was open to investigation; and, upon a full inquiry, the court could have readily determined the question. The mere fact that the plaintiff was not aware of this release at the time he took an assignment of the contract is of no moment. He must be deemed to have taken such contract cum onere, subject only to the duty of defendant to notify him of any conditions not specified in the contract itself, such as its full execution, payment thereunder, etc.

4. The notice of lien as filed complied substantially with the requirements of the statute, and is deemed sufficient.

The judgment and order appealed from should be reversed, and the cause remanded, with leave to plaintiff to amend his complaint if he shall be so advised.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded, with leave to plaintiff to amend his complaint if he shall be so advised.

RAUER v. WELSH. (No. 16,030.)

(Supreme Court of California. Dec. 10, 1895.)

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by J. J. Rauer against E. G. Welsh to foreclose a lien for street work. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. H. Chapman, for appellant. Shadburne & Herrin, for respondent.

PER CURIAM. This cause grows out of grading the same street, under the same several contract, and depends for its solution upon most of the same questions, and is presented upon the same bill of exceptions, as the case of Rauer v. Fay (No. 16,031; this day decided) 42 Pac. 902. Upon the authority of that case, the judgment and order appealed from herein are reversed, and the cause remanded, with leave to plaintiff to amend his complaint if he shall be so advised.

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110 Cal. 418

BARNES v. BARNES. (No. 15,969.)

(Supreme Court of California. Dec. 13, 1895.)

CANCELLATION OF DEED—MARRIAGE AS A CONSIDERATION.

Where the consideration of a deed was that the grantee should marry the grantor, and live with him the rest of their joint lives, and they were married and lived as man and wife for a number of years, the husband is not entitled to a reconveyance because the wife refused to live longer with him, though, before the execution of the deed, the wife falsely represented to the husband that she was a woman of chaste character.

Department 2. Appeal from superior court, Sonoma county.

Action by Aaron Barnes, Sr., against Jessie Burk Barnes, to compel a reconveyance of land, and for damages. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

George Pearce and W. F. Russell, for appellant. A. B. Ware, for respondent.

McFARLAND, J. A demurrer to the amended complaint was sustained, and, plaintiff declining to further amend, judgment was rendered for defendant. Plaintiff appeals from the judgment.

The demurrer was properly sustained, and the judgment must be affirmed, because the complaint does not state facts sufficient to constitute a cause of action. There are two counts in the complaint. In the first it is averred that on July 18, 1885, plaintiff conveyed and transferred to defendant certain real and personal property, in consideration that defendant "should and would marry plaintiff, and live with him during the remainder of their joint lives"; that, in pursuance of said promise, defendant did the next day, July 19th, intermarry with plaintiff, and thenceforward lived with plaintiff as his wife continuously until some time in August, 1892, when she left plaintiff without his consent, and, as he alleges, without just cause, and has since refused to live with him. In the second count, after a restatement of the facts stated in the first count, it is also averred that, at and immediately preceding the time of said marriage, plaintiff was desirous of marrying "some virtuous, worthy, chaste, and moral woman, who would live with him during his life"; that the defendant personally, and by her friends and agents, represented and stated to him that she was such a woman; that relying upon and believing such representations and statements, and in consideration thereof, he made the said conveyance and transfer of said property; that said representations were false, and defendant was "a woman of unchaste, unworthy, and immoral character"; and that he did not discover that said representations were false until within three years next before the commencement of this action. The prayer is for a reconveyance of the property and $20,000 damages.

The consideration for the transfer was the promise of the respondent to marry the plaintiff, which promise she kept. The averment that she promised to live with him during their joint lives is of no consequence. It was included in the marriage contract itself, and its separate averment has no significance. Nor is there any legal value to the averments that respondent represented at the time of the marriage that she was a worthy and chaste woman, and that said representation was not true. Previous unchaste conduct, although concealed, does not invalidate a marriage. "Public policy pronounces otherwise, and opens marriage as the gateway to repentance and virtue." Caveat emptor governs. Schouler, Dom. Rel. § 23, and cases cited. An executed contract of marriage, accompanied by full consummation, differs in many respects from ordinary contracts. It creates a status which society is interested in maintaining. "In that contract of marriage which forms the gateway to the status of marriage, the parties take each other for better, for worse, for richer, for poorer, to cherish each other in sickness and in health. Consequently, a mistake, whether resulting from accident, or in general from fraudulent practices, in respect to character, fortune, health, or the like, does not render void what is done. * * * A man who means to act upon such representations should verify them by his own inquiries. The law presumes that he uses due caution in a matter in which his happiness for life is so materially involved, and it makes no provision for the relief of a blind credulity, however it may have been produced." 1 Bish. Mar. & Div. (6th Ed.) § 167, and cases there cited. It is true that when the woman is, at the time of the marriage, pregnant with child by another man, and the pregnancy is unknown to the husband, the marriage may be avoided; but that is because she is, at the time, incapable of bearing a child to her husband, and therefore unable to perform an important part of the marriage contract. Reynolds v. Reynolds, 3 Allen, 605; Baker v. Baker, 13 Cal. 87. But even that rule has been held not to obtain where the husband knew of the pregnancy, but had the mistaken belief that the woman had not been unchaste with any man other than himself. Foss v. Foss, 12 Allen, 26. Therefore, in the case at bar the marriage was neither void nor voidable, even if all the averments of the complaint are true; and as the marriage, which was the very highest kind of a consideration, was the consideration for the conveyance of the property, there is no ground for setting aside the conveyance, or for any other relief asked. The case put in the argument, of a woman merely going through the marriage ceremony, and then refusing to act further as a wife, has no pertinency to the case at bar. In such a case it might be held, perhaps, that the contract to marry was not actually performed; but here the marriage was fully consummated, and the relation of husband and wife maintained for years. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

110 Cal. 405

Ex parte CLARKE. (Cr. 114½.)

(Supreme Court of California. Dec. 13, 1895.)

CONTEMPT—REFUSAL TO OBEY ORDER—REVIEW ON HABEAS CORPUS PROCEEDINGS.

1. In habeas corpus proceedings by one imprisoned for contempt, the findings of fact recited in the order of commitment cannot be questioned.

2. Under the act requiring an insolvent to file an inventory containing an accurate description of all his estate, the court, if it finds that the insolvent, after the adjudication, sold certain property which he had concealed, and received the proceeds thereof, may order him to turn such sum over to the assignee, and, on disobedience, commit for contempt.

Department 1. Habeas corpus proceedings by Alfred Clarke, imprisoned for contempt. Writ discharged.

Alfred Clarke, in pro. per. Warren Olney, for respondent.

HARRISON, J. The petitioner herein was adjudicated an insolvent upon the application of certain of his creditors, and thereafter, under the order of the court, filed a schedule and inventory, as required by the insolvent act. Upon the application of the assignee of the insolvent, and after notice to him, the superior court found that certain personal property belonging to the insolvent's estate had been concealed by him from his assignee, and sold subsequent to his adjudication, and that he had received therefor the sum of $275, which he had appropriated to his own use, and on December 4, 1895, made an order that he pay the said sum of money to the assignee on or before the 6th day of December, 1895. A copy of this order was served upon him on the same day that it was made; and on the 6th day of December, and again on the 7th, a demand in writing was made upon him by the assignee that he pay to him the said sum of money. Upon his failure to make such payment, the assignee served him with written notice that on the 10th day of December he would move the court for an order adjudging him guilty of contempt for not obeying said order. The matter came up for hearing at the time fixed in said notice, the petitioner appearing in person and also by attorney; and, after hearing evidence and argument thereon, the court found that the petitioner herein had willfully and contumaciously refused to obey the order of December 4th, requiring him to pay said sum of money, and adjudged him guilty of contempt by reason of his willful disobedience and violation of said order, and directed that he be committed to the custody of the sheriff, and imprisoned in the county jail until he should pay the said sum of $275 to the assignee; and, being taken into custody by the sheriff, he sued out the present writ.

The findings of fact recited in the order of commitment must be held to have been authorized by the evidence before the court, and are not subject to controversy in this proceeding.

The insolvent act requires the insolvent to file in the court a schedule of his debts and liabilities, and an inventory containing an accurate description of all his estate. The condition upon which the discharge in insolvency is to be granted is that the petitioner has surrendered all his property, and his original petition to be adjudged an insolvent not only imposes the obligation, but also implies an agreement by him that he will make such surrender. There is no distinction in procedure between voluntary and involuntary insolvency after an adjudication has been made. By section 47 (Laws 1880, p. 94), the insolvent is at all times subject to an examination by the court in relation to his property or estate. If, upon such examination, the insolvent shall admit that he has omitted certain property from his inventory, and that he has it in his possession, the court has the same authority to direct him to deliver this property to the assignee as it had to direct him to file the inventory in the first place; and, for the purpose of this proceeding, a finding of the court that the petitioner concealed this property, and received the proceeds of its sale, is to be regarded with the same effect as would an admission of that fact by the insolvent. Ex parte Hollis, 59 Cal. 405, referred to at the argument, differs essentially from the present case, in that in that case Hollis was not the insolvent, but claimed to hold the property adverse to the insolvent and to all the world, by virtue of a title antedating the proceeding in insolvency; and it was held that, as he was not a party to the proceeding in insolvency, the court could not try the issue of his title in a summary proceeding to punish him for contempt for not delivering it up. In the present case, however, there was no claimant of property before the court, other than the insolvent himself; and a court would be powerless, indeed, if it could not compel the insolvent whose proceedings were before it for adjudication to deliver his property to the assignee, or to punish him for contempt for disobedience to its order.

The court was not deprived of authority to punish the petitioner for violating this order by reason of having on December 4th caused him to be imprisoned for contempt for 24 hours. The contempt for which he was then punished is distinct from that for which the present order was made, and was committed prior to that date; whereas the offense for which he is now under punishment is the violation of an order made on that day, and which, by its terms, could not be made the basis of a contempt until after December 6th. The writ is discharged, and the prisoner remanded.

We concur: VAN FLEET, J.; GAROUTTE, J.

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110 Cal. 408

In re CONNORS' ESTATE. (S. F. 4.)

(Supreme Court of California. Dec. 13, 1895.)

EXECUTORS AND ADMINISTRATORS—APPOINTMENT.

On a contest between the public administrator and the father of an intestate for letters of administration the public administrator and the wife of the father testified that the father's reputation for providence and sobriety was bad. The father denied that he drank to excess, and a number of witnesses testified that they had known the father for years, and considered him a sober and industrious man. *Held*, that an order granting letters of administration to the father would not be disturbed on the ground that the evidence showed that the father was "improvident." Code Civ. Proc. §§ 1365, 1369.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Contest between Philip Connors and J. K. Secord for letters of administration on the estate of James Connors, deceased. From an order granting letters to Connors, Secord appeals. Affirmed.

J. J. O'Toole, for appellant. William A. Bowden, for respondent.

BELCHER, C. James Connors died intestate in the county of Santa Clara, leaving as his heirs at law his father and mother and two sisters. In due time the father, Philip Connors, filed in the superior court of that county his petition, alleging that the estate of the decedent consisted of personal property, and the value of it did not exceed the sum of $1,500, and praying that letters of administration upon the estate be issued to him. Thereafter J. K. Secord, the public administrator of the county, filed his petition, alleging that the father of the decedent, by reason of his improvidence, was incompetent to serve as administrator, and that the mother of the decedent, by reason of the fact that she asserted a claim to all of said estate, was incompetent to serve as administratrix; that by reason of the disqualification of the father and mother of the decedent to administer the estate the petitioner was entitled to act as administrator thereof; and praying that letters of administration be issued to him. The two petitions came on regularly for hearing at the same time, and, "the court having heard the testimony of witnesses duly sworn and examined on the part of both said petitioners," it was ordered that the petition of J. K. Secord be denied, and that the petition of Philip Connors be granted, and that letters of administration be issued to him upon his giving a bond in the sum of $3,000. From this order petitioner Secord appealed.

Two points only are made for a reversal. They are: (1) That the order was not justified by the evidence, because it was shown thereby that Connors was incompetent to execute the trust, by reason of his improvidence; (2) that no findings were filed. Under our statute the father was entitled to be appointed administrator of the estate of his deceased son, unless he was "adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity." Code Civ. Proc. §§ 1365, 1369. In support of the first point appellant called two witnesses. P. A. Donavan testified: "I know Philip Connors, and have known him for a number of years. His general reputation for providence, industry, and sobriety is bad. I never saw him intoxicated but once. I never heard of his having any trouble except with me. * * * I am not friendly with Philip Connors, and have not been for some time." Mrs. Bridget Connors testified: That she had been married to Philip Connors 25 or 26 years, and had separated from him. That "Connors always squandered nearly all he earned for liquor. At one time I gave him a hundred dollars to pay the funeral expenses of his dead sister. He did not pay them, but squandered the money for liquor. He would work during the day, and at night go out to the saloons, and stay out nearly all night. When he would return home he would be intoxicated. He did most of his drinking and carousing at night. He has contributed nothing to the support of myself and family for the past five years. The general reputation of Philip Connors for providence, industry, and sobriety is bad." On the other hand, the respondent was called as a witness in his own behalf, and testified that he had resided in the city of San José for 20 years; that he bought a lot in that city nearly 20 years ago, and a few years later built a house on it, and that the purchase price was paid entirely by him; that for the past five years he has been engaged in the express business, and had a horse, wagon, and harness, which he purchased and paid for himself; that he resided alone in his house, and kept it in as good condition as he was able; that he always remained at home in the evenings; that he never was intoxicated in his life, and seldom drank intoxicating liquors; that while his wife and family resided with him he always supported them entirely with his earnings; and that "I am entirely out of debt, have paid for my house and lot, and do not owe a cent to anybody." And, on being recalled, he further testified: "I never squandered my money or my earnings in drink or in any other way. I never squandered the money paid for my dead sister's funeral expenses, or at all. I worked during the day, but never went to the saloons and stayed nearly all night, and never returned home intoxicated. I never drank excessively at night, or at all, and never caroused. My earnings were spent at home." Seven other witnesses were called for respondent. One of them testified that respondent purchased from him the lot, which he now owns, some 20 years ago, and that "I know his habits, and consider him a first-rate, industrious man." Four of them testified that they had known respondent for the past five years; that they had never seen him intoxicated; saw him about town on his wagon; had only business dealings with him; and that he seemed to be an honest, sober, and industrious man. And two of them testified that they had known respondent for five years; that he came to their store to buy provisions; that they did not think they had ever seen him intoxicated; that he seemed to be an honest, sober, and industrious man, and that he always paid his bills.

Improvidence is defined to be: "Want of care or foresight in the management of property." 10 Am. & Eng. Enc. Law, p. 321. And in Coope v. Lowerre, 1 Barb. Ch. 45, it is said: "The improvidence which the framers of the Revised Statutes had in contemplation as a ground of exclusion is that want of care or foresight in the management of property which would be likely to render the estate and effects of the intestate unsafe, and liable to be lost or diminished in value by improvidence, in case administration thereof should be committed to such improvident person." Whether the respondent was incompetent to serve as administrator by reason of his improvidence or not was a question of fact to be determined by the court below in view of all the evidence before it, and its determination cannot be disturbed on appeal upon mere technical grounds.

It is claimed for appellant that improvidence is an attribute of character, which can only be proved or disproved by evidence of general reputation; and that all the evidence introduced by respondent to disprove the charge of improvidence was inadmissible, and should be disregarded. We do not think this claim can be sustained. The general rule undoubtedly is, as stated, that "character is a fact, which is proved by another fact,—general reputation. It cannot be shown by evidence of particular and specific facts, but may be proved by negative testimony." 3 Am. & Eng. Enc. Law, p. 114. The evidence of respondent appears to have been offered and received without any objection, and, in our opinion, it was sufficient to meet and overcome that offered by appellant. It was not alone made up of particular and specific facts, but tended directly and strongly to negative the charge made by appellant.

As to the second point, conceding, without deciding, that in a case of this kind findings are necessary, still the appellant was in no way "aggrieved" by the failure of the court to make findings. The rule is that the failure to find on a material issue will not warrant a reversal of the judgment if the findings omitted must have been adverse to the appellant. People v. Center, 66 Cal. 551, 5 Pac. 263, and 6 Pac. 481; Murphy v. Bennett, 68 Cal. 528, 9 Pac. 738; Demartin v. Demartin, 85 Cal 75, 24 Pac. 594. Here it is apparent that the court must have believed the witnesses for respondent, and therefore, if findings had been made, they must have been adverse to appellant. It follows that the order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reason given in the foregoing opinion, the order appealed from is affirmed.

110 Cal. 423

PREY v. STANLEY. (S. F. 40.)[1]

(Supreme Court of California. Dec. 13, 1895.)

ACTION BY MARRIED WOMAN—SEPARATE PROPERTY—TRUSTS—RESTRAINT ON ALIENATION—ESTOPPEL.

1. As under Civ. Code, § 162, realty acquired as a gift by a married woman remains her separate property, the filing of a declaration of homestead for the benefit of herself and husband, even if it transmuted the title into a joint tenancy, did not preclude the wife from maintaining in her own name an action to quiet title; Code Civ. Proc. § 384, authorizing joint tenants to bring actions severally.

2. An agreement reciting that defendant furnished as a gift the purchase money for land which was conveyed to his mother, and that defendant was to be considered as the manager of said land for the benefit of his mother, did not operate to make defendant a trustee of the title for his mother.

3. An agreement reciting that defendant furnished as a gift the purchase money for land conveyed to his mother, and that his mother agreed that the land should not be conveyed without defendant's consent, is within Civ. Code, § 711, providing that conditions restraining alienation, when repugnant to the interest created, are void.

4. Though said agreement was signed by defendant's sister, she was not thereby estopped to question the validity of said agreement.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Sarah Prey against W. H. Stanley to quiet title. Plaintiff had judgment, and defendant appeals. Affirmed.

Nagle & Nagle, for appellant. Shadburne & Herrin, for respondent.

BRITT, C. Action to quiet title to a parcel of land in the city and county of San Francisco. Plaintiff is the wife of one Oscar Prey. Defendant is her brother. She claims title through Mary J. Stanley, the mother of herself and defendant, in virtue of a deed of the premises executed to her by said Mary J. Stanley, February 29, 1892, in consideration of love and affection. Judgment was for plaintiff.

1. On November 29, 1892, plaintiff filed in the recorder's office a declaration of homestead on the premises for the joint benefit of herself and her said husband. This action was begun June 15, 1893. It is alleged in the complaint that the land in question is plaintiff's separate property. Appellant maintains that there is a defect of parties, in that said Oscar Prey should have been joined with his wife as a plaintiff. Code Civ. Proc. 370. The ground assigned for this view is that upon the declaration of the homestead the land ceased to be her separate property, and became the joint property of herself and her husband. Conceding, for present purposes only, that the declaration of homestead transmuted the title into a joint tenancy, as claimed by appellant, it is yet not perceived that the result contended for would follow. Whatever interest the wife has in the land was acquired by gift, and is, therefore, her separate property. Civ. Code, § 162. For the enforcement or protection of such right, even if that of a joint tenant only, she is now permitted to sue alone (Code Civ. Proc. 370, 384); and as against one having no interest in the land her right, for the purposes of this action, extends to the whole thereof. The husband was not a necessary party.

2. On January 25, 1892, one Murphy conveyed certain land, including that in suit, to said Mary J. Stanley, in consideration of the sum of $2,500, which was paid by the defendant, W. H. Stanley; the transaction being intended as a gift from the latter to his mother. Thereafter, on February 23, 1892, a contract in writing was executed, naming as the parties thereto said Mary J. Stanley and W. H. Stanley, and reciting such acquisition of the land by her, and that the purchase money for the same was furnished as a gift by said W. H. Stanley. It then set forth a covenant on the part of said Mary J. that no part of such land "shall be sold or conveyed * * * without the consent" of said W. H. Stanley; that he was to be known and considered as the manager and superintendent of the land described for

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[1] Rehearing denied.

the interest and benefit of said Mary J., to whom was to be paid all the income thereof; and that, in case of her death, the property should be divided between her lawful heirs, "who are now at this time Sarah Prey and W. H. Stanley." This instrument was signed by the plaintiff as well as by Mary J. and W. H. Stanley, though plaintiff was not named a party in the body thereof. Mary J. Stanley made the deed of February 29, 1892, to the plaintiff, without defendant's consent. It is argued that the contract of February 23d operated to make W. H. Stanley a trustee of the title for his mother, but there is nothing in its language to warrant this contention. To say that he should be manager and superintendent for her benefit no more made him a trustee having an interest as such in the land than if he had been named her steward, collector, or attorney. The question, then, is whether the agreement of Mary J. Stanley not to convey the land without her son's consent was valid. If it was, plaintiff has no title; if it was not, her title is clear as against defendant. Conditions in restraint of alienation when repugnant to an interest created in property are void. Civ. Code, § 711. In consonance with this principle it was held in Murray v. Green, 64 Cal. 363, 28 Pac. 118, that a clause in a deed restraining the grantee from conveying without the grantor's consent, the title granted being the fee, was repugnant to the interest created by the deed, and void. In the present case the restriction is not contained as a condition in the instrument by which the estate passed to Mary J. Stanley, but occurs in the form of a covenant on her part in a separate contract, which, as appears from its recitals, was intended to operate as a qualification of the absolute conveyance from Murphy to her. But the rule does not depend upon the mere form in which the restraint is imposed. It avoids as well covenants of the grantee against alienation as conditions of like nature imposed by the grantor. Such covenants, if not within the letter of section 711, Civ. Code, are yet obnoxious to the policy of which that section is a partial expression. Greenh. Pub. Pol. 606, note 2 et seq.; Hunt v. Wright, 47 N. H. 400, and cases cited. The parties to the contract of February 23, 1892, seem to have made the mistake of leaving the absolute title in Mrs. Stanley, and at the same time attempting to destroy an inseparable incident of such title. They could not thus create a mongrel estate unknown to the law, and the attempt was abortive. Murray v. Green, 64 Cal. 367, 28 Pac. 118; Doebler's Appeal, 64 Pa. St. 9; Mandlebaum v. McDonell, 29 Mich. 92.

It follows also that the claim of appellant that plaintiff is estopped by reason of her signature to the contract of February 23, 1892, cannot be sustained. The restraint sought to be imposed on Mary J. Stanley's power of alienation being void as against the policy of the law, the plaintiff's assent thereto could not estop her to allege its invalidity. Greenh. Pub. Pol. 115; 2 Pars. Cont. p. 789, note i. No other points made require special notice. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

110 Cal. 414

VANCE v. RICHARDSON. (No. 16,016.)[1]

(Supreme Court of California. Dec. 13, 1895.)

JURORS—WAIVER OF CHALLENGE—ASSAULT AND BATTERY—EVIDENCE.

1. In a civil case it appeared that the parties, without objection, alternately exercised their peremptory challenges while the jurors were being examined, and before the panel was filled; that when it was afterwards filled, on being asked by the court if he was satisfied with the jury, plaintiff stated that he waived his right to challenge for the present; and that defendant then waived any challenge. *Held*, that the court properly refused to afterwards allow plaintiff a peremptory challenge.

2. In a civil action for assault and battery, evidence of the general reputation of defendant for peace and quietness is not admissible.

3. Where a party as a witness testifies at length to conversations with the opposite party, it is not error to sustain an objection when he is asked by his attorney to "state that whole conversation."

Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Emma Vance against Charles Richardson for assault and battery. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. Turner, for appellant. Frank McGowan and O. C. Gregor, for respondent.

McFARLAND, J. Appeal by defendant from a judgment rendered for plaintiff. The action is to recover damages for an alleged assault and battery committed by appellant upon the person of respondent. The jury gave damages in the sum of $450. The only questions involved relate to certain alleged errors of law.

Appellant contends that the court erred in a ruling concerning his right of peremptorily challenging jurors. It seems that during the examination of the jurors, and before the panel was filled, each party had alternately exercised peremptory challenges. When the panel was completed, it was appellant's turn to challenge, and his attorney said: "I will pass our peremptory for the present." The court asked him if he was satisfied with the jury. Counsel replied that it was his right then to challenge, but that he waived it for the present; that, if plaintiff exercised his right, the panel would be filled again; and that, if plaintiff did not exercise a challenge, then appellant would, nevertheless, have the right to challenge another juror. The court informed him that the court did not understand it that way; and that if he did not then exercise his peremptory challenge, and the plaintiff should express his satisfaction with the jury, appellant would not afterwards be allowed another peremptory challenge. Appellant excepted. The attorney for respondent then said: "I am satisfied with the jury." The attorney for appellant then said: "We now ask the court to permit us to exercise our right of peremptory challenge." And the court said: "I will deny the request." Appellant excepted. That was all that occurred. Appellant did not offer a challenge to any designated juror. Assuming that the above presents a definite ruling that can be reviewed, and not a mere abstraction, we see no error committed by the court, and certainly none of which appellant can justly complain. It has been said several times that it is the proper practice to have 12 jurors in the box before requiring the parties to exercise their peremptory challenges, and then to call another juror whenever a peremptory challenge shall have been exercised. People v. Scoggins, 37 Cal. 679; Taylor v. Railroad Co., 45 Cal. 323; Silcox v. Lang, 78 Cal. 118, 20 Pac. 297. Then the parties must challenge alternately, as provided by section 601, Code Civ. Proc. In the case at bar the parties, without objection by either, adopted the practice of alternately exercising their peremptory challenges while the jurors were being examined, and before the panel was filled. Under this method, when the panel was filled, it was appellant's turn, as he admits, to challenge; and, if he desired to do so, he ought to have exercised his right then. He does not complain that the court forced him to challenge before the panel was full. He could not have made such a complaint, because the panel was full. We do not see, therefore, how he was prejudiced, or that he has any just right to complain. He merely sought an advantage to which he was not entitled. There is nothing in this view inconsistent with any of the authorities cited.

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[1] Rehearing denied.

The court did not err in refusing to allow testimony of the general reputation of appellant for peace and quiet. The general rule is that in civil actions evidence of the good character of the defendant is not admissible. Wharton, having stated that good character may be shown in criminal cases where life or liberty is at stake, says: "But whether it be because in a civil case, between two private parties, both parties stand in this respect on the same footing, or whether it be because most civil suits grow out of, or may be supposed to grow out of, honest misconceptions of rights, English and American courts have agreed in holding that, so far as it concerns the proofs in civil issues, the character of either party is, as a rule, irrelevant." 1 Whart. Ev. § 47. The author then notes the few exceptions to the rule, which consist mostly of cases where the character of some person is the very issue involved; as, for instance, the character of the employé where the employer is sued for the former's negligence. Character for chastity in certain actions is admissible. Some courts have held that in a libel suit the plaintiff may prove his good character, and also in actions for certain kinds of fraud; and there are other exceptions to the rule not necessary to be here mentioned. Greenleaf states the rule in this language: "In civil cases such evidence is not admitted, unless the nature of the action involves the general character of the party, or goes directly to affect it." 1 Greenl. Ev. § 54. But an action for assault and battery is not one of the exceptions; and both Wharton (section 47, supra) and Greenleaf (volume 1, § 55) say, affirmatively, that evidence of character is not admissible in such action. The following are a few of the many adjudicated cases in which it has been so held: Elliott v. Russell, 92 Ind. 526; Gebhard v. Burkett, 57 Ind. 378; Porter v. Seiler, 23 Pa. St. 424; Soule v. Bruce, 67 Me. 584; Givens v. Bradley. 3 Bibb, 192. Section 2053, Code Civ. Proc., is merely a concise statement of the rule as it is to be found in the text-books and judicial decisions.

When appellant was on the witness stand, and after he had testified at length to many things, including conversations with respondent, his counsel said to him at a certain point in the examination: "State that whole conversation." And to this an objection by respondent was sustained. Appellant contends that this ruling was error; but the only argument he makes on the point is founded on sections 1854 and 2048, Code Civ. Proc., which sections refer entirely to cross-examinations, and have no relevancy to this point. The conversation might have involved a mass of matter not relevant; and the ruling was not prejudicial, for, if appellant's counsel had anything further to prove that was relevant with respect to any declaration of respondent, he could have called the attention of his witness to it. He continued to testify to further occurrences and conversations between respondent and himself.

There are no other points which need special notice. We do not think that the court erred in any ruling upon instructions asked by the parties, or in the instructions given on its own motion. Other minor points are of no importance. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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110 Cal. 443

CURTISS v. BACHMAN et al. (No. 15,769.)

(Supreme Court of California. Dec. 14, 1895.)

INJUNCTION—BOND—COUNSEL FEES.

Counsel fees and costs incurred upon an order to show cause why a restraining order should not be continued, and upon a subsequent unsuccessful motion to dissolve the injunction, and for the preparation and defense of the main action, cannot be recovered in an action on a bond conditioned to pay such damages as might be sustained by reason of the injunction, though the action was eventually dismissed. McFarland, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Gilbert L. Curtiss against one Bachman and others on a bond. Defendants had judgment, and plaintiff appeals. Affirmed.

For opinion in department, see 40 Pac. 801.

Chas. F. Hanlon, for appellant. W. B. Sharp, for respondents

HARRISON, J. In an action brought in the superior court of San Francisco against the appellant by one Nettie Gilman, a preliminary injunction was issued by the court, and the respondents herein were the sureties in an undertaking given on her behalf upon the issuing of said injunction. The condition of the undertaking is: "In case said injunction shall issue and remain in full force and effect, the said plaintiff will pay to the said parties enjoined such damages, not exceeding the sum of $5,000, as such parties may by reason of the said injunction sustain, if said superior court finally decide that the said plaintiff was not entitled thereto." The present action was brought to recover from the respondents the damage sustained by reason of the issuance of the said injunction. Upon a former appeal in this cause (84 Cal. 216, 24 Pac. 379), a judgment that had been rendered in favor of the plaintiff was reversed, with directions to sustain the defendants' demurrer to the complaint. Upon the going down of the remittitur the plaintiff amended his complaint, and the cause was tried by the court without a jury, who found that the plaintiff had not sustained any damage by reason of the issuance or continuance of the injunction, and rendered judgment for the defendants. The plaintiff moved for a new trial upon the ground that this finding was not sustained by the evidence, and upon the denial of his motion has appealed therefrom, and also from the judgment.

The action of Gilman v. Curtis was for the purpose of determining the ownership of a certain policy of life insurance, and was commenced March 26, 1880. On the next day the court granted a restraining order by which the plaintiff herein was enjoined from collecting the money due upon the policy, and from transferring or delivering the policy or the money due thereon to any other person, and was directed to show cause on a succeeding day why the order should not be continued in full force until the final judgment and decree in the case. An undertaking in the sum of $500 was executed by the respondents herein upon the issuance of the said restraining order. On April 16th this order to show cause came on for hearing, and the court on that day ordered that the said restraining order be continued in full force and effect until the termination of the suit. Subsequently the defendant, appellant herein, moved to dissolve the injunction, and on July 30th his motion was denied. On the same day the court ordered that the plaintiff file a bond in the sum of $5,000, and thereupon the undertaking sued on herein was executed by the sureties to the original undertaking. The cause was tried in April, 1881, and judgment rendered in favor of the plaintiff. That judgment was afterwards reversed by this court (66 Cal. 116, 4 Pac. 1094), and upon a new trial a judgment was rendered by the court dismissing the action.

The damages for which the plaintiff seeks to recover herein, and of which he gave evidence at the trial, consisted of moneys which he had paid to his attorneys, the costs incurred in the action of Gilman v. Curtis, and the loss of time and injury to his business necessitated by the suit. We are of the opinion, however, that neither of these elements of damage is within the terms of the obligation of the defendants, and that the plaintiff failed to establish any right of action against them. The liability of the defendants is measured by the terms of their contract, and in the present action is limited to the damages that the plaintiff might sustain "by reason of the said injunction." Whatever expenses he was subjected to by reason of the suit, as distinguished from those sustained by reason of the injunction, are not damages within this contract of the defendants; and, as it rested upon the plaintiff to establish a cause of action against them, it was necessary for him to show, not only that he had sustained damage, but that the damage which he had sustained was caused solely by reason of the injunction.

Counsel fees incurred by a defendant by reason of a preliminary injunction are recognized as a part of the damages for which he has a right to indemnity, and are within the undertaking which the plaintiff is required to give as a condition of procuring the injunction; but only such counsel fees as may be incurred after the injunction has been issued, and prior to the determination of the action, can be considered as within the rule. If the defendant, instead of attempting to remove the temporary injunction, seeks rather to prevent the issuance of a permanent injunction, or directs his efforts to defeating the action of the plaintiff, the expense of counsel fees thus incurred is an incident of the suit, and is not recoverable as damages sustained by reason of the injunction. "The allowance of counsel fees in suits on injunction bonds is exceptional, and should not be carried beyond the point to which former decisions have taken it." Mitchell v. Hawley, 79 Cal. 301, 21 Pac. 833; San Diego Water Co. v. Pacific Coast Steamship Co., 101 Cal. 216, 35 Pac. 651. Counsel fees rendered in resisting a motion for a preliminary injunction are not within the terms of the undertaking, since they are not expenses made necessary "by reason of the injunction" (Sweet v. Mowry, 71 Hun, 381, 25 N. Y. Supp. 32; Whiteside v. Noyac Cottage Association, 84 Hun, 555, 32 N. Y. Supp. 724), but are expenses incurred in the action as much as are counsel fees rendered in attempting to prevent the issuance of a permanent injunction (Thurston v. Haskell, 81 Me. 303, 17 Atl. 73); and an unsuccessful motion to dissolve an injunction does not authorize a recovery for the expense of counsel fees in making the motion (Langdon v. Gray, 22 Hun, 511; Randall v. Carpenter, 88 N. Y. 293). An exception to this rule is recognized when the court itself suspends its decision upon the motion until the hearing of the cause. Andrews v. Woolen Co., 50 N. Y. 282.

The counsel fees of which evidence was offered at the trial herein, other than those rendered in preparation for the trial or in defense of the action, were those rendered for the plaintiff upon the order to show cause why the restraining order should not be continued until the termination of the suit, and those rendered upon a subsequent unsuccessful motion on his part to dissolve the injunction. It is well settled that the services of counsel rendered in the trial of the cause are not a portion of the damage sustained by reason of the injunction. Bustamente v. Stewart, 55 Cal. 115. When the plaintiff at the commencement of the action applied for the injunction, the court deemed it proper that the defendant should be heard before granting the writ, and made an order to that effect. Upon this application the judge was authorized to restrain the defendant "in the meantime." Code Civ. Proc. § 530. The provision in the order restraining the defendant "until the further order of the court" had no other meaning than "in the meantime," or until the decision upon the order to show cause. Sweet v. Mowry, supra. When this order to show cause was made upon the defendant, it was at his option to appear upon the day fixed for the hearing and resist the motion at that time, or to allow an injunction pendente lite to be granted, and seek at the trial to defeat a recovery by the plaintiff, and prevent a permanent injunction. The services of counsel that were employed by him to resist the motion were rendered by virtue of the order to show cause why the injunction should not be granted, and not by reason of the injunction. Sweet v. Mowry, supra. The restraining order made at the commencement of the action would expire by its own terms at the hearing of this motion, and, although it was then continued until the termination of the suit, the order so continuing it was in fact a new and distinct restraint, and itself constituted the preliminary injunction asked by the plaintiff (San Diego Water Co. v. Pacific Coast Steamship Co., supra), and for which the undertaking sued on was given.

It is not shown by the record upon what grounds the subsequent motion to dissolve the injunction was made, or was denied by the court; but as the preliminary injunction was granted upon notice to the defendant, and after hearing thereon, the proper course for the defendant to take was to appeal from the order (Mining Co. v. Parker, 16 Cal. 83), and the court in all probability denied the motion upon the ground that the defendant was not authorized to make it. "Costs and counsel fees on a successful motion to dissolve an injunction are considered the natural consequences of its existence, and are properly damages; but there is no reason why the party obtaining the injunction should pay the expenses of ill-directed experiments to get rid of it. To allow such a charge would be a premium for the employment of unskillful counsel." Childs v. Lyons, 3 Rob. (N. Y.) 704. Especially is this rule applicable if the services were rendered upon a motion unauthorized either in practice or by statute. It does not follow that, because the plaintiff failed to sustain his action at the trial, the preliminary injunction was not properly issued. It is one of the provisional remedies authorized by the Code of Civil Procedure, and the right of a party to such remedy is the same as is the right to a permanent injunction; but, if he is to be mulcted in damages for every unsuccessful attempt to secure its dissolution, the privilege would be a barren one. If the plaintiff obtains an injunction ex parte, and before the hearing of the cause the defendant can secure its dissolution, either by reason of a defect in the original application, or upon a counter showing on his part, he thereby obtains a decision of the court that the plaintiff was not entitled to this provisional remedy, even as a matter of discretion (see Hicks v. Michael, 15 Cal. 107); but if, instead of seeking such decision of the court, he prefers to defeat the plaintiff in the action, he waives his right to recover from the sureties any damages that he may sustain by reason of its issuance.

It does not appear that any portion of the expenses contained in the cost bills offered in evidence was incurred except upon the trial of the action; and the costs incurred upon the appeal and subsequent to the rendition of the judgment in the superior court are not within the terms of the undertaking. Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327. The loss of time and injury to the business of the appellant were clearly outside of the undertaking of the sureties.

Certain exceptions to rulings excluding evidence were taken by the appellant, but, as the evidence offered related only to such damages as were not recoverable from the respondents, the exclusion was proper. The judgment and order are affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN FLEET, J.; HENSHAW, J.; TEMPLE, J.

I dissent: McFARLAND, J.

110 Cal. 431

WESTERN GRANITE & MARBLE CO. v. SOUC. (No. 16,002.)

(Supreme Court of California. Dec. 14, 1895.)

PRINCIPAL AND AGENT—POWERS.

Defendant instructed her agent to have a coping constructed around a lot in a cemetery similar to one constructed around another lot. The agent drew specifications for such coping, which called for a different stone than that used on the other coping, to get bids for the work. Defendant subsequently told the agent to proceed with it as he would do for himself. *Held*, that the agent had authority to authorize the contractor to construct the coping of the same kind of stone used in the other coping, instead of that called for by the specifications.

Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by the Western Granite & Marble Company against M. F. Souc. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Bull & Cleary (A. W. Crandall, of counsel), for appellant. D. W. Burchard, for respondent.

McFARLAND, J. This is an action to recover $470, the alleged price agreed to be paid by defendant to plaintiff for the construction by the latter of a granite coping around the burial lot of the former. The jury rendered a verdict in favor of plaintiff for said amount of money, for which judgment was entered. Defendant appeals.

We do not think it necessary to notice separately the various rulings and instructions of the court, for the errors assigned all turn upon one proposition of appellant, which cannot be maintained, namely, that the scope of the agency of the appellant's agent, Lenzen, extended only to the drawing of plans and specifications for the coping, making a contract in accordance therewith, and seeing that such contract was complied with. The evidence shows that there was coping in the cemetery around a lot of one Cooney which pleased the appellant, and that she authorized Lenzen to have one constructed around her lot similar to and of the same quality of material as the Cooney coping. In order to get bids for the work, Lenzen prepared "a sketch" of some "kind of specifications," upon which the contractors bid. The respondent was the lowest bidder, for $470, of which bid appellant was informed, and with which she was satisfied. That was in May, and she said that she was not in a hurry to have the work done; but two or three months afterwards she told him to have the work done, saying to him: "You go on and do as you would for yourself." The work was done, and the coping was like the Cooney coping, and of the same quality of material; and she saw it just before it was completed, and expressed herself satisfied. Her subsequent refusal to pay for it seems to have been the result of a suggestion of a discharged employé of respondent; and the only objection then made to the sufficiency of the work that needs notice was that the rock used was not what is called "Penryn granite." When Lenzen drew up his sketch of specifications for the convenience of bidders, he erroneously supposed that Penryn granite had been used in the Cooney coping, and he therefore put "Penryn" into that sketch. The contract with the respondent was a verbal contract, by which respondent was to "duplicate the Cooney job." The Cooney coping was made of rock called "Loomis granite"; and respondent informed Lenzen that he would use the Loomis rock, and Lenzen agreed to it. The evidence shows that there is no special difference between the Penryn and the Loomis granite, both being on the same ledge. Moreover, the appellant, as her own witness testifies, was told that the stone used in her coping was not Penryn before it was set up. At all events, even assuming that the sketch of specifications and the bid thereon were a contract, and that the use of the rock called "Loomis" was not a compliance with it, we are satisfied, from the evidence, that Lenzen had full authority from appellant to make or change any contract, provided he kept in view the construction of a coping similar to and of the same quality of material as the said Cooney coping. The judgment and order denying a motion for a new trial are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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115 Cal. 555

SYMONS et al. v. CITY AND COUNTY OF SAN FRANCISCO et al. (No. 15,968.)[1]

(Supreme Court of California. Dec. 17, 1895.)

MUNICIPAL CORPORATIONS—VACATING STREETS—PROCEEDINGS OF BOARD OF SUPERVISORS—REVIEW BY COURT.

1. Act March 6, 1889 (St. 1889, p. 70), confers on the board of supervisors of the city and county of San Francisco power to open and close streets "whenever the public convenience or interest may require." *Held*, that the determination by such board whether the public interest or convenience may require certain streets to be opened or closed cannot be reviewed by the courts.

2. Landowners cannot maintain an action to review the action of the board of supervisors of a city and county in vacating certain streets, none of which are adjacent to any of the petitioners' lands, where they do not show that they have sustained any injury special to themselves, or which is different, except in degree, from that sustained by other owners of land in the vicinity of such streets.

Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by one Symons and others against the city and county of San Francisco and the board of supervisors of such city and county to review the proceedings of such board, and declaring certain streets vacated

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[1] Rehearing granted.

and closed. From a judgment for defendants, plaintiffs appeal. Affirmed.

J. C. Bates, for appellants. H. T. Creswell, for respondents.

HARRISON, J. The board of supervisors of the city and county of San Francisco, purporting to act under the authority conferred by the act of March 6, 1889 (St. 1889, p. 70), passed an order December 28, 1892, by which certain streets lying between Channel and Fourth streets on the north, and Mariposa street on the south, were "declared to be closed up and vacated." In April, 1894, the plaintiffs herein filed a petition in the superior court of San Francisco, making the city and county and its board of supervisors respondents therein, praying that the proceedings of the board of supervisors be reviewed, and that the order aforesaid be annulled, upon the ground that said order was without and in excess of the jurisdiction of said body to pass. The respondents filed a demurrer to the petition, which was sustained, and from the judgment entered thereon the plaintiffs have appealed.

In support of their right to ask the court to review the action of the board of supervisors, the plaintiffs allege in their petition that they are the owners of seven distinct parcels of land in San Francisco (designating them by boundaries), upon which they have paid taxes, and that, as such taxpayers, they "have a right to use in common all the public streets in that vicinity in said city and county"; and that by the passing of the aforesaid order "there is forever closed up from public use one of the main streets and means of convenient approach from the central part of the city to the Potrero, where your petitioners' said lands are situate, with various other streets and avenues heretofore opened and duly dedicated to public use, and named and laid down on various official maps of said city and county as public streets." It does not appear from the complaint that any of the streets included in the order have been in fact closed to travel, or that there is any obstruction to as free use as was had prior to the passage of the order; the only averment in this respect being that the supervisors in form passed an order "whereby there is forever closed up from public use one of the main streets." If it be assumed, however, that the streets are closed, we are of the opinion that the averments of the petition do not show that the plaintiffs have such an interest in the matter complained of as to entitle them to be heard in a proceeding of this nature. None of the streets which are included in the order are adjacent to any of the lands of the petitioners. Six of the parcels of land which they have set out in their petition as the basis of their right to be heard abut upon Pennsylvania street, and the other upon Iowa street. The order does not purport to affect Pennsylvania street, and that portion of Iowa street included in the order is more than two blocks distant from the land of the plaintiff fronting on that street. The plaintiffs do not show that they have sustained any injury special to themselves, or which is different, except in degree, from that sustained by other owners of land in the vicinity of the streets included in the order. It does not appear that by the closing of these streets they are deprived of access to their lands, and the averment in this respect that "one of the main streets and means of convenient approach from the central part of the city to the Potrero" is closed by reason of the order, implies that there are other means of convenient approach to their lands; and, although they also aver that the effect of the order is to close "various other streets and avenues heretofore opened and duly dedicated to public use," they do not claim that any of these streets are even serviceable to them in approaching their lands. Owners of lands who are only remotely affected by the proceeding, and who sustain no special injury different from that sustained by others in that vicinity, are not authorized to call upon the officers of the city to justify their acts, or to invoke the judgment of the court upon the legality of the steps taken by the municipality in passing the order. Whether the order will have the effect to diminish the value of the plaintiffs' land, or to cause them damage, is not a ground for annulling the act of the board of supervisors, and cannot be considered in this proceeding. If the board of supervisors had the authority to pass the order, and the plaintiffs have sustained any legal damage by reason thereof, they must seek relief in a direct proceeding therefor. Neither is it competent for the plaintiffs in this proceeding to review the decision of the board of supervisors that the public interest and convenience require that the streets be closed. The legislature has, by the statute referred to, conferred upon that body the power to open and close streets, "whenever the public interest or convenience may require," and the determination of this question by that body is not open for review by the courts. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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110 Cal. 320

BAILEY v. MARKET STREET CABLE RY. CO. (No. 16,004.)[1]

(Supreme Court of California. Dec. 10, 1895.)

STREET-RAILWAY ACCIDENT — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — EVIDENCE.

1. Where plaintiff was standing between street-railway tracks, awaiting an approaching car, and, without looking, stepped backward upon the other track, within 10 or 15 feet of a car going in the opposite direction, she was guilty of contributory negligence, as a matter of law.

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[1] Rehearing denied.

2. Plaintiff having been guilty of contributory negligence by stepping upon a street-car track, defendant's servants were not guilty of such willful negligence as entitled plaintiff to recover notwithstanding her own contributory negligence, where an attempt was made in good faith to stop the car, and the car was stopped within one foot of the point of collision with plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Sarah A. Bailey against the Market Street Cable Railway Company for personal injuries. From an order granting a new trial, defendant appeals. Reversed.

Frank Shay and Geo. W. Baker, for appellant. C. M. Jennings, for respondent.

SEARLS, C. This is an appeal by the defendant from an order of the court granting a new trial. The action is brought to recover damages for personal injuries received by plaintiff by coming in contact with a moving cable car upon the Market street cable road of the defendant. At the trial in the court below the court granted a nonsuit upon motion of the defendant, and the propriety of this action was the question involved in the motion for a new trial.

The plaintiff, a woman at the age of 66 years, in the possession of all her natural faculties, but apparently unfamiliar with cable cars, being at the Russ House, in San Francisco, was invited on the afternoon of July 19, 1892, by her friend Dr. George L. Fitch, to take a ride upon the Castro street cars. Pursuant to this invitation the plaintiff, in company with the doctor, proceeded to Market street, up the northerly side of that street, to or near a crossing which crosses the street at right angles from the northerly entrance of the Palace Hotel. Plaintiff desired to ride upon the outside. A west-bound Castro street cable car of defendant was approaching, and as the seats thereof on the northerly side seemed occupied, while the front seat on the southerly side was vacant, they crossed over the north track, upon which their car was approaching, and stood in the space between the two tracks, to do which there was sufficient room. Plaintiff's escort faced the east, and signaled the Castro street car to stop, which it did. Plaintiff, in the meantime, intent upon the approaching west-bound car, failed to see an east-bound car upon the other or southern track, and unconsciously, and without looking, stepped back upon that track, and was struck by an east-bound street cable car, knocked down, and severely injured.

That plaintiff was guilty of negligence in stepping backward upon the track without noticing an approaching car upon that track, some 10 feet distant, and in plain view, must, we think, be conceded. Whether it was such contributory negligence as in law will preclude a recovery, and whether it warranted a nonsuit, we will consider later. The question arises, was the defendant guilty of such negligence, through the failure of its servants to stop the car which produced the injury, as to render it liable; or, rather, was the evidence of defendant's negligence such that the question ought to have been submitted to the jury for its determination? When plaintiff stepped upon the track of the approaching car, and stood with her back to it, as the evidence shows her to have done, and apparently unconscious of danger, and the servants of defendant in charge of such car saw her, and became aware of her danger, as is shown to have been the case by their warning cries to her, it became and was their duty to exercise all reasonable care to protect her from injury. Defendant's cars on the Market street system are provided with two brakes,—one a wooden shoe, which is pressed upon the track by a foot lever, and the other is operated by a hand lever, and acts upon the wheels of the car. H. Stewart, a witness for plaintiff, was gripman upon the west-bound Castro car, upon which plaintiff was about to take passage. His opportunity for observation seems to have been good. He saw plaintiff step upon the south track, and judged the east-bound car was from 10 to 15 feet away, and not running at over half speed,—"not that, I think; about one-quarter, I should think." In answer to a question by the court, he said: "I cannot measure exactly how far the front of the dummy was from plaintiff when she stepped upon the track. I judge about ten feet, maybe. I cannot say exactly." The maximum speed of the Market street cable cars is eight miles an hour. Hence, if the car was moving at half speed, it moved four miles per hour, and, if at one-quarter speed, at the rate of two miles per hour. The grip and brakes of the car doing the injury were managed by a "student"; that is, by a man who was, and for eight days had been, learning the business. Behind him stood his instructor, an experienced gripman, who directed and aided him when deemed necessary. The brakes were applied and the car was stopped just as it struck the plaintiff. "It did not run much over a foot after it struck her." This witness was of opinion that at that point, and at the given rate of speed of the car, 15 feet was as short a distance as a car could be reasonably stopped in. He added: "They did stop this car, at the speed at which it was going, within one or two feet after it struck plaintiff. I don't know whether they could have stopped it within that space just before it struck her or not, if they had time, and knew that she would step backward on the track. I suppose they could." Another witness for plaintiff, Thomas Moran, a gripman of nine years' experience, seven years of which was spent on the Market street system, thought that a car going east at full speed in front of the Palace Hotel, under favorable circumstances, could be stopped in 4 or 5 feet, and, when at half speed, in about 3 feet. Still another witness, a gripman formerly employed on Market street, testified that on a dry track, and car in perfect order, he had stopped a car going east in front of the Palace Hotel in 6 feet; at other times it takes 10 to 15 feet, depending upon the track. This was when running at full speed. At half speed, could stop in 6 feet. He thought it would take a second or more to let the grip off and put on the brake. The foregoing is believed to contain a fair statement of the substance of the evidence upon the points of negligence. The experts speak either from memory or from their judgment, and do not profess to be mathematically correct. That they are not precisely correct is apparent when we realize that a car, in running 8 miles to the hour, covers $11^{11}/_{25}$ feet per second, and, if it takes one second to throw off the grip and apply the brakes, that distance must be traversed before they act in checking the momentum of the car. The fact probably is that a prudent gripman, upon seeing, say, a vehicle upon his track, while he expects it to leave his course, yet handles his brakes, as a matter of precaution, and almost imperceptibly loosens his grip and slows down. If the obstruction does not vacate the track, forewarned and forearmed, he stops in a brief space, while, if the same obstacle had unexpectedly dropped upon the track a car's length away, a collision would have been probable. The record shows that in granting a nonsuit the court gave the following reasons for its action: "Conceding that the gripman might have stopped the car in six feet, that the plaintiff was standing only ten or fifteen feet away, and that he was only going two miles an hour; assuming all that, still the plaintiff did not exercise ordinary care to prevent it. Therefore the motion for nonsuit is granted." The solution of two questions is essential to a decision of the case: (1) Was the plaintiff guilty of such contributory negligence as in law will defeat her recovery? (2) If the first question be answered in the affirmative, then was the defendant guilty of such willful and wanton negligence as entitled her to recover notwithstanding her own contributory negligence.

Market street is an open public street of the city and county of San Francisco, over which vehicles of great variety, and pedestrians, are accustomed to pass and repass in great numbers and at all times; and the vicinity of the Palace Hotel is one of its most frequented portions. In the earlier cases touching the relative rights of street cars, private vehicles, and foot passengers upon the public streets, a great diversity of opinion was expressed. Sometimes it was held that upon that portion of the streets covered by the tracks their rights were equal, and that drivers of ordinary vehicles might with impunity, and from mere convenience, drive across and along the track at any rate of speed they chose, while in other cases it was held that the right of way of the street car was practically exclusive, and that any use of the tracks, not actually necessary or for the purpose of a crossing, was a trespass, and, in case of a collision, was such negligence on the part of a private driver as would absolve the street-car company from liability for the consequences of a resulting accident, unless it was attributable to malice or sheer recklessness. Out of this medley of decisions the courts, profiting by time and experience, and in some instances aided by legislation, have gradually evolved the theory: (1) That the street car has, and from the necessities of the case must have, a right of way upon that portion of the street upon which alone it can travel, and which it cannot leave, paramount to that of persons and ordinary vehicles. (2) That this superior right is not exclusive, and does not prevent others from driving or passing across or along its tracks at any place or time, when by so doing it will not materially interfere with the progress of its cars. In other words, the better right is not an exclusive right, and can only be enforced against those who needlessly impose obstacles to its free and unrestricted exercise. Shea v. Railroad Co., 44 Cal. 414; Railway Co. v. Ingraham, 131 Ill. 659, 23 N. E. 350; Rend v. Railway Co., 8 Ill. App. 517; Booth, St. Ry. Law, § 303, and cases there cited. In the case of ordinary steam railroads, the companies are usually the exclusive owners of their rights of way, and have, except at crossings, the exclusive right to the use of their tracks at all times and places. He who without permission, express or implied, intrudes thereon, is a trespasser, to whom they owe no duty beyond refraining from doing him a willful injury. Not so with the citizen who enters upon the track of a street railway. These last are used in common by their cars and the traveling public. The mere fact that an individual is upon a street-car track in the heart of a city, where men are wont to come and go, in itself, and divested of all other circumstances, raises no presumption of law, and is not even evidence of negligence. It is the time, place, and surrounding circumstances which afford the evidence of negligence in the case of footmen upon the track. The common use is necessary in cities. True, the railway companies have certain superior rights. Their cars have the right of way, and it is the duty of the citizen, whether on foot or in vehicles, to give unobstructed passage to the cars. This results from two reasons: (1) That the car cannot turn out or leave the track, while the vehicle or passenger can. (2) These companies are chartered, nominally at least, for the convenience of the public. Their duties to that public require them to move with regularity and with all reasonable celerity. Manifestly, this cannot be accomplished if they must pause or give way to every foot passenger or vehicle whose convenience or pleasure may prompt an obstruction of the way. The latter can cross and pass elsewhere. The former cannot. The duties of the car companies and of the public are each enhanced by the peculiar conditions. The former must see to it that their servants are on the alert, not only at street crossings, but everywhere upon the tracks, to see that citizens are not run down and injured. The citizen, if upon the track, must leave it when the car approaches. If about to cross it, he must use his senses of sight and hearing before stepping on the track, to ascertain whether a car is approaching, and, in the absence of some well-known custom or regulation at crossings which renders such a precaution on his part unnecessary, he is guilty of negligence if he fails to look before he passes upon the track; and if all the facts plainly and inevitably point to such negligence, leaving no room for argument or doubt, it is negligence in law. The plaintiff was standing between the tracks, with ample space to insure her safety. With an approaching car upon the other track, in plain view, but 10 to 15 feet away, and without, so far as appears, any circumstances of excitement to render her unjudging, and without looking, as it was her duty to do, she stepped in front of the approaching car, and was injured. This was contributory negligence. If it was not negligence in law, we can conceive no case that is, short of a willful performance of the same or a similar act. Davenport v. Railroad Co., 100 N. Y. 632, 3 N. E. 305; Kelly v. Hendrie, 26 Mich. 255; Scott v. Railroad Co., 59 Hun, 456, 13 N. Y. Supp. 344; Harnett v. Railroad, 49 N. Y. Super. Ct. 185; Fenton v. Railroad Co., 126 N. Y. 625, 26 N. E. 967; Buzby v. Traction Co., 126 Pa. St. 559, 17 Atl. 895. Booth on Street-Railway Law, after discussing the doctrine and the cases touching the duty of persons to look before passing upon or over the tracks of street railways, at section 315, uses the following language: "Although the law on this point awaits further elucidation and development by the courts, the decisions thus far rendered, both in the United States and Canada, tend to establish the rule, at least with reference to electric and cable railways, that the failure to look or listen before attempting to cross, where such precautions would prevent collision, is in law such negligence as will defeat a recovery in an action for damages by the person so injured." That the negligence of plaintiff directly contributed to, and was the proximate cause of, her injury, is too plain to call for discussion.

Upon the proposition as to the defendant's having been guilty of willful negligence, it is only necessary to say that the evidence shows that the servants of defendant tried in good faith to stop the car, and did stop it within one foot of the point of collision with plaintiff. We are of opinion the motion for a nonsuit was properly granted, and as the question presented was one of law, and not one in which the court below was clothed with a discretion which we are called upon to treat with latitude, we think the order granting a new trial was erroneous. It is said that the motion for a new trial was granted upon the authority of Esrey v. Southern Pac. Co., 103 Cal. 541, 37 Pac. 500, and Cross v. Railway Co., 102 Cal. 313, 36 Pac. 673,—cases which were reported subsequently to the nonsuit herein. We fail to recognize in those cases any conflict with the theory upon which the nonsuit was granted. In Esrey v. Southern Pac. Co. the plaintiff was clearly guilty of contributory negligence, in placing herself in a dangerous position between the track of defendant and a platform five feet high. With full knowledge of her perilous situation, defendant's train was backed down in part past her, an additional and wider car attached, and the train signaled to go forward, which it did, crushing her against the platform; and when, thus crushed, she had fallen to the ground, the servant of defendant again signaled the train to go ahead. All the circumstances showed such wanton recklessness on the part of defendant's servants, such an utter disregard of the safety and life of the plaintiff, as to constitute willful and wanton injury, which entitled a party injured to recover notwithstanding his own previous contributory negligence. Cross v. Railway Co., 102 Cal. 313, 36 Pac. 673, was an action to recover damages against a street-railway company. It appeared that plaintiff, a teamster, was engaged in hauling a heavy load of lumber down a steep grade on California street, and had secured his wheel with a lock chain, which broke; and, without fixing it, plaintiff drove on zigzagging down the hill, walking beside the wagon, when defendant's car came down the hill, struck the hind wheel of plaintiff's wagon, swung it around, and squeezed plaintiff between his wagon and the dummy, to his injury. It was insisted by appellant that plaintiff was guilty of contributory negligence, and that a nonsuit should have been granted in the court below, (1) in continuing down the steep grade with a heavy load after his lock chain broke; and (2) that plaintiff had placed himself upon defendant's car track without first looking to see if a car was coming upon him. This court held that the nonsuit was properly denied, and, among other things, said, "It cannot be said it was negligence in law to attempt to descend the hill without a lock chain." The propriety of this conclusion becomes apparent when we reflect that it depended upon the strength of the team, the weight of the load, and the angle of the grade,—factors upon which no court could base a conclusion of law, but which presented a compound question of law and fact, to be presented to the jury under proper instructions. This, again, was supplemented with evidence that the team could and did safely convey the load down the hill, after the collision, without a lock chain. It further appeared that plaintiff could see the track of defendant for 100 feet, and it was unobstructed, etc. The case is not analogous to the one at bar. See Beach, Contrib. Neg. § 452, where, after discussing the rule requiring one who crosses a railroad track to be on his guard, etc., it is said: "But, as the law now stands, the standard is fixed. One must look up and down the track. Anything short of that is negligence." Hager v. Southern Pac. Co., 98 Cal. 310, 33 Pac. 119. We recommend that the order granting a new trial be reversed, and that the court below be directed to enter judgment in favor of defendant upon the order granting a nonsuit.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order granting a new trial is reversed, and the court below directed to enter judgment in favor of defendant upon the order granting a nonsuit.

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110 Cal. 428

GILETTI v. SARACCO. (No. 15,950.)

(Supreme Court of California. Dec. 13, 1895.)

TRIAL—FINDINGS OF COURT—NECESSITY FOR.

A failure to find on some issue a finding on which would invalidate a judgment fully supported by the findings made, is not ground for reversal, unless it is shown that evidence was submitted in relation to such issue.

Department 2. Appeal from superior court, city and county of San Francisco; James M. Trout, Judge.

Action by Secondo Giletti against Carlo Saracco. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Henry E. Highton, for appellant. Francis A. Rossi, for respondent.

McFARLAND, J. This is an appeal by defendant upon the judgment roll alone from a judgment in favor of plaintiff. The action was upon three certain written obligations in the nature of promissory notes for the payment of money, made by appellant to respondent, payable to the latter on demand, and delivered to him by appellant. In the answer the execution by appellant of the said obligations is not denied, but it is averred that as to one of the obligations appellant was, by agreement, not to be obliged to pay the same until he "should be able to pay the same," and that it is not due, although he does not deny that he is able to pay it. As to another of the obligations, it is averred that respondent could have recovered the amount of it from one Vandagna, who signed it jointly with appellant, but that respondent never demanded payment of said Vandagna; that appellant has no knowledge of said obligation; "and that, if defendant's name is signed to said note, he never received any consideration therefor, and denies the same, or any part thereof." As to the third obligation it is averred that it "was given with the understanding that Giovanni Vandagna was the person who had to pay said note," that he was able to pay it, and that respondent had not demanded payment of said Vandagna. There is also a general denial that the obligations were due or payable from appellant to respondent. And the only point made for a reversal is that the court did not find upon these averments in the answer. The court found that each of these obligations—called by court and counsel "promissory notes"—was executed by appellant to respondent, and delivered to him on the respective days alleged in the complaint; that they were executed in consideration of a certain named sum of money, United States gold coin, "loaned by plaintiff to defendant at the respective dates thereof"; and "that no part of the principal or interest due on said promissory notes has ever been paid, but that the whole thereof remains now due, owing and unpaid." Assuming that these matters set up in the answer constitute a defense at all, then, if they were not affirmative matter, but merely denials, as counsel for appellant seems to regard them in his final brief, they are fully covered by the findings. But, under any view of their character, as appellant introduced no evidence to support them, and as the findings are sufficient to support the judgment, no finding in relation to them was necessary; for "a failure to find upon some issue, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal, unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue." Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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110 Cal. 348

CAVALLARO v. TEXAS & P. RY. CO. (No. 15,992.)

(Supreme Court of California. Dec. 10, 1895.)

CARRIERS—MISDELIVERY OF FREIGHT—LIABILITY OF CONNECTING LINES—NOTICE TO CONSIGNEE—FOREIGN STATUTES.

1. Where goods consigned on commission are received by a railroad company to be carried beyond its own route, under an agreement between the connecting companies by which each company is entitled to a proportion of the freight, the company which carries the goods to their destination is liable to the consignor for a delivery to a person not authorized to receive them.

2. Civ. Code, § 2120, provides that a carrier may reduct his liability to that of a warehouseman as to goods which have arrived at the place of consignment by giving notice to the consignee of the arrival. *Held*, that a notice served at the building in which the consignee does business, on a person other than the consignee, does not affect the carrier's liability,

though the person who received the notice represented that he was the consignee.

3. It will be presumed that the statutes of another state are the same as those of the former state.

4. An exception to "each, every, and all the instructions given by the court of its own motion" is not sufficiently specific to warrant the review of such instructions.

5. Under St. 1877–78, p. 949, providing that an indorsement of a negotiable warehouse receipt operates as a transfer of the property represented thereby, a carrier whose liability has been reduced to that of a warehouseman, who delivers goods to a person other than the consignee on an unindorsed bill of lading, is liable for the value of the goods.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by L. S. Cavallaro against the Texas & Pacific Railway Company for damages for failure to deliver goods to the consignee. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

H. V. Morehouse, for appellant. W. P. Veuve, for respondent.

SEARLS, C. This is an appeal from a final judgment in favor of plaintiff for $1,255.96 and costs, and from an order denying a motion of defendant for a new trial. Defendant is a railroad corporation organized and existing under and by virtue of the laws of the United States, and is a common carrier of freight and passengers from El Paso, in the state of Texas, by the way of Ft. Worth, to New Orleans, in the state of Louisiana. Plaintiff is a citizen and resident of the state of California. On the 24th day of October, 1894, the plaintiff shipped from Oakland, Cal., 40 barrels of white wine, by the Atlantic & Pacific Railroad Company, and on the 25th day of October he shipped from San José, Cal., by the same company, 41 barrels of red wine, all consigned to "V. Lo Secco, New Orleans, La.," for which two shipments plaintiff received from the said Atlantic & Pacific Railroad Company separate duplicate bills of lading, in the usual form. One set of these duplicate bills of lading was forwarded by the plaintiff per registered letters addressed, "V. Lo Secco, 29 Hospital Street, New Orleans"; and United States registered return receipts were in due time returned to him at San José, Cal., signed, "V. Lo Secco, J. Lo Secco." The goods were forwarded, under some regulations among the several companies, over the Southern Pacific Coast line, to Mojave; Atlantic & Pacific, to Albuquerque; thence, by Atchison, Topeka & Santa Fé, to Purcel; by Gulf, Colorado & Santa Fé, to Ft. Worth; and thence, by the Texas & Pacific, the defendant herein, to New Orleans, La. There was evidence touching the proportion of freight received by each of these connecting companies, and as to their traffic association. The goods were received by the defendant at Ft. Worth, and shipped thence to New Orleans, where the freight was collected by said defendant, and the goods delivered. There is no dispute as to these facts, and the crucial question is, were they delivered to the consignee, and, if not, was the defendant guilty of such negligence as renders it liable in damages for the value of the property?

There was testimony tending to establish the following facts: V. Lo Secco, the consignee, was, and for many years had been, a commission merchant in New Orleans, whose principal business was receiving consignments of oranges and other fruit, which he sold on commission, and usually at public auction. He owned the premises at 29 Hospital street, and had his office in the rear of the building. The front part of the building was occupied by D. Lo Secco, a nephew of V. Lo Secco, as a grocery and saloon. V. Lo Secco was a man of wealth and reputation, say, 60 years of age, 6 feet high, weighing from 200 to 250 pounds, with gray hair. D. Lo Secco was a rather small man; say, 25 to 30 years of age, with black hair, etc. V. Lo Secco could not write, and never ordered the wine or had any communication with plaintiff; but the latter knew the former by reputation, and shipped the goods to him, to be sold on commission for account of plaintiff. One consignment reached New Orleans November 9, 1892, and was delivered November 25, 1892. The other arrived November 4, 1892, and was delivered December 6, 1892. When the first consignment reached its destination, defendant sent its messenger to 29 Hospital street, to notify the consignee; and, in answer to interrogatories, a man whom the messenger describes, and who was doubtless D. Lo Secco, professed to be such consignee, and, in the name of V. Lo Secco, signed an acknowledgment of notice of the arrival of the consignment. The same thing was repeated in the same manner upon the arrival of the second consignment. A man answering to the description of D. Lo Secco, and not answering to the description of V. Lo Secco, called at the office of defendant with one of the bills of lading November 25th, claimed to be the consignee, paid the freight, receipted for the goods in the name of V. Lo Secco, and took them away. The same thing was repeated with the other consignment December 6th, except that the bill of lading was not presented to defendant. There was evidence that the signature "V. Lo Secco" was in the handwriting of D. Lo Secco. D. Lo Secco disappeared from New Orleans soon after this transaction, and has never returned. The consignee, V. Lo Secco, knew nothing whatever of the shipments to him; never received the bills of lading, or any notice of the shipment; and appears to have had no knowledge whatever of the transaction until after the goods disappeared. The witnesses for the defense spoke of knowing one V. Lo Secco in connection with the shipment and delivery of the wine, but in every instance in describing him they gave a description of D. Lo Secco, and not one applying to V. Lo Secco. The evidence is clearly to the effect that D. Lo Secco personated the consignee of the goods, V. Lo Secco; received, receipted for, and paid the freight thereon; and then disappeared. The evidence was amply sufficient on the head indicated to warrant the jury in finding a verdict in favor of plaintiff.

A number of contentions of appellant, without taking them up seriatim, may be answered in this wise: It is established law of England: (1) That, when the carrier accepts for carriage goods directed to a destination beyond its own route, it assumes by the very act of acceptance, in the absence of any express contract on the subject, the obligation to transport them to the place to which they may be directed. This was first decided in what is known as the "Muschamp Case" (Muschamp v. Railway Co., 8 Mees. & W. 421), and has been ever since steadily adhered to. (2) As an apparent corollary of the first proposition, the English courts have also held that in all cases included therein the first carrier becomes exclusively responsible for the carriage and safety of the goods to their destination, and, no matter by whom injured or lost, the first carrier alone can be sued by the aggrieved party, and any attempt to hold the subsequent or connecting carrier liable must, notwithstanding the loss may have occurred through its negligence, fail for want of privity of contract between such carrier and the injured party. Hutch. Carr. §§ 146, 147.

Upon the first of the foregoing propositions the American courts are divided. The majority of them, however, hold against the English doctrine, as unjust to the carrier, and as unnecessary upon grounds of public policy, and assert the true rule to be that in the absence of any contract, except such as is implied from the acceptance of the goods for carriage, the obligation of the carrier extends only to the end of his route, and a proper delivery there to the next succeeding carrier to further or complete the carriage; and, in order to be bound further, a positive agreement, either express or implied, is necessary. And this is called the "American rule." Hutch. Carr. § 149, and cases cited. Upon the second proposition the courts of the United States, both federal and state, are believed to be, with a single exception, a unit in holding that, either with or without a contract under which the first carrier becomes liable for loss or injury to goods until they reach their destination, the owner may seek redress from any intermediate carrier who is in fault. The exception alluded to is the state of Georgia, and in that state the English rule is now mainly abrogated by statute. The theory upon which the connecting carrier is held liable for his own default or misfeasance to the owner is based upon the ground that the receiving carrier is the agent of the owner to forward and deliver to the next succeeding or connecting carrier, who, in turn, becomes the agent of the principal, and not the subagent of the first agent, and hence liable. Whatever may be the basis of the doctrine, it is one of well-nigh universal application in this country; and as is said by Hutchinson, at section 150: "The rule which allows the action against the carrier in fault, as well as against the one who is primarily responsible, certainly commends itself upon grounds of both justice and convenience, and, with the above exception [Georgia], is the universal law of this country."

The complaint in this case avers, among other things, the delivery of the property to defendant as such common carrier, and its receipt upon the agreement aforesaid (that is to say, to carry the same to New Orleans, and there deliver it to V. Lo Secco), and its misdelivery, whereby it was lost to plaintiff. If the defendant, as a common carrier, received property consigned to a person in New Orleans to be carried over its road terminating in that city, it became liable to the owner for negligence or misfeasance in doing so, under its common-law liability, whether there was an express contract or only such agreement as the law implies. In Church v. Railroad Co. (Okl.) 29 Pac. 530, relied upon by appellant, there was no allegation in the complaint that the goods were ever delivered to or received by the defendant. The last duty required of the common carrier is that of delivery. This is a duty imposed upon him by law. As soon as he accepts the goods, and whether so expressed or not, it becomes a part of his contract. He must not only deliver goods intrusted to him to carry, but becomes also responsible for their proper delivery. Hutch. Carr. § 338. The same author, at section 344, says: "No circumstances of fraud, imposition, or mistake will excuse the common carrier from responsibility for a delivery to the wrong person. The law exacts of him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods, and puts upon him the entire risk of mistakes in this respect, no matter from what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of identity may have been to his mind; and no excuse has ever been allowed for a delivery to a person for whom the goods were not directed or consigned. * * * If, however, the delivery be made to the wrong person, whether by an innocent mistake, or through fraud practiced upon the carrier, such wrongful delivery will be a conversion." Adams v. Blankenstein, 2 Cal. 413.

The contention of appellant that its liability as a common carrier had ceased before the delivery, and that it became and was at the date of such delivery only liable as a warehouseman, cannot be maintained. Under section 2120 of our Civil Code, a common carrier may reduce his liability to that of a warehouseman, as to goods which have arrived at the place of consignment, by giving notice to the consignee of the arrival; and, if the place of residence or business of such consignee is not known, the notice may be given by letter dropped in the nearest postoffice. Appellant sought to serve notice in the present case upon the consignee in person; but by mistake, and through the fraud of D. Lo Secco, the notice was served upon him, and not upon V. Lo Secco, the consignee. This was no notice to the consignee, and did not have the effect of changing the liability of the carrier to that of a warehouseman. Wilson v. Railroad Co., 94 Cal. 166, 29 Pac. 861.

If it be claimed that the determination in this case turns upon the law of the state of Louisiana, and not upon that of California, the answer must be: (1) In the absence of proof to the contrary, the laws of another state will be presumed to be the same as our own, and this presumption extends to statutory as well as to the common law. Hickman v. Alpaugh, 21 Cal. 225; Shumway v. Leakey, 67 Cal. 460, 8 Pac. 12; Marsters v. Lash, 61 Cal. 624; Mortimer v. Marder, 93 Cal. 172, 28 Pac. 814. (2) The rule requiring notice to be given is but a declaration of the law as it existed prior to the statute in a majority of the states and in England. Wilson v. Railroad Co., supra; Hutch. Carr. §§ 373, 374, and notes. This is not a case of the delivery of goods at the residence or place of business of the consignee. The freight was consigned to V. Lo Secco, New Orleans, La., and hence the station or depot of the defendant was the place of delivery; and the fact that D. Lo Secco, to whom the goods were delivered, had procured and presented a duplicate of the bill of lading to defendant, which was not assigned or indorsed by either the consignor or consignee, was no excuse or justification to defendant for delivering the goods to him without further identification. "A carrier is exonerated from liability for freight by delivery thereof, in good faith, to any holder of a bill of lading therefor, properly indorsed, or made in favor of the bearer." Civ. Code, § 2131. This section of the Code has no application to the case in hand, because the bill of lading was not made to bearer, and was not indorsed by the recipient to whom it was issued. Numerous questions arise, and some of them difficult ones, in relation to assignments, mortgages, hypothecation, etc., of bills of lading. None of these questions are involved here, as there is no evidence in the record upon which to predicate them, except the mere fact that D. Lo Secco possessed and presented the defendant an unindorsed bill of lading, which did not and could not, under our law, give him any title to the freight therein described. Civ. Code, § 2127.

The uncontradicted evidence of the witnesses Leland and Sterne, supplemented by the deposition of Toomey and by the bills of lading introduced by consent, and the way bills, was sufficient to authorize the jury to conclude that the through bills of lading were authorized by the defendant.

The court, upon its own motion, instructed the jury at considerable length. The only objection or exception to the instructions thus given is as follows: Counsel for defendant said: "We desire, if your honor please, to save an exception to each, every, and all of the instructions given by the court of its own motion." It is objected on the part of respondent that this exception is not sufficiently specific to warrant this court in scrutinizing the instructions given by the court upon its own motion. The current of authority seems to render it imperative that we sustain the objection of respondent, and decline to examine and pass upon the legality of the court's instructions. The theory of the rulings is that exceptions to the charge of a court to the jury ought to point out specifically the portions excepted to, and be made at the time of trial, in order that the judge may have an opportunity, before the jury retires, to correct any error he may have inadvertently fallen into in drawing up the charge in the hurry and perplexities of the trial. Hicks v. Coleman, 25 Cal. 122; Sill v. Reese, 47 Cal. 294; Rider v. Edgar, 54 Cal. 127; Shea v. Railroad Co., 44 Cal. 414; Brown v. Kentfield, 50 Cal. 129; Robinson v. Railroad Co., 48 Cal. 409; Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497. The doctrine of these cases and of others of like import has established a rule of practice in this state from which we do not feel at liberty to depart. This rule, of course, has no application to the special instructions asked by the parties, and given or refused by the court, concerning which a general exception has always been held sufficient.

There was no error in the refusal of the court to give the instructions asked on behalf of the defendant, numbered from 1 to 7, both inclusive.

The first of these instructions involved the proposition that if the two shipments of wine reached New Orleans on the 9th and 15th days of November, 1892, respectively, and were not called for or demanded until the 21st day of November and 6th day of December, respectively, then the defendant's liability, if any, was not that of a common carrier, but that of a warehouseman, and that plaintiff could not recover. The answer to this proposition is twofold: (1) The evidence showed clearly that V. Lo Secco, the consignee, had no notice whatever, either in fact or such as is provided by statute, of the arrival of the goods, and, until notice thereof, defendant held the same as a common carrier, and subject to its liability as such. (2) Even as a warehouseman, defendant was not authorized to deliver the goods to a stranger who presented a bill of lading not indorsed, and who was not identified in any way as the consignee, or as having any right to the bill of lading, or the goods of which it was a symbol. Warehouse receipts are negotiable unless they have the word "nonnegotiable" printed in red ink across their face, and, when negotiable, an indorsement of the receipt operates as a valid transfer of the property represented by such receipt. St. 1877–78, p. 949. A transfer of a warehouse receipt in good faith, etc., passes the title to the goods covered by the receipt. Davis v. Russell, 52 Cal. 611. There is no difference between a warehouse receipt and a bill of lading in this respect. Id.; Bishop v. Fulkerth, 68 Cal. 607, 10 Pac. 122; Civ. Code, §§ 2127–2131.

The second instruction is to the effect that the defendant, in the absence of other instructions, had a right to deliver the first shipment of wine to the person who presented the bill of lading and surrendered it; and the third is to the effect that if the same person who delivered the bill of lading presented himself as the true consignee of the second shipment of wine, and in both instances claimed to be the true consignee, and so receipted for the wine, and paid the freightage thereon, and that the bills of lading had been sent by the consignor to V. Lo Secco, and the person who claimed and received the wine lived and carried on business, including the selling of wines, at 29 Hospital street, New Orleans, and that defendant notified him there of its arrival, then the jury should find for the defendant. In the absence of some act or conduct on the part of the consignor whereby he is estopped, of which there is no evidence, these instructions are not an embodiment of the law, unless an unindorsed bill of lading, in the hands of a stranger thereto, is sufficient evidence of ownership to warrant the delivery by a common carrier to the person so holding such bill of lading. We have hereinbefore stated that such a delivery does not excuse the carrier.

The fifth instruction is covered by what has been said of the third and fourth.

The sixth instruction is covered by the instructions given by the court, and it was not necessary to repeat it.

The seventh instruction goes upon the false theory that the goods were consigned to 29 Hospital street, New Orleans, when they were not in fact so consigned, and then seeks to gauge the duty of the defendant on that hypothesis. This was not proper to be done. Different considerations frequently arise in cases where goods are consigned to a given number and street, and are there delivered to a person apparently the person to whom they are consigned, but in this case questions of that character are not properly involved.

We are of opinion that the defendant, whether regarded as a common carrier or as a warehouseman, is liable for the misdelivery of the goods in question, and that the plaintiff, who has counted upon the liability of defendant as a common carrier, may, in every proper case, recover against such carrier as a warehouseman. Hoyt v. Railroad Co., 68 Cal. 644, 10 Pac. 187; Wilson v. Railroad Co., 94 Cal. 166, 29 Pac. 861. The judgment and order appealed from should be affirmed.

We concur: **HAYNES, C.; BRITT, C.**

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

FORD v. CAUHAPE. (No. 15,900.)

(Supreme Court of California. Dec. 14, 1895.)

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Ejectment by Edward Ford against Victor Cauhape. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

John H. Yoell, for appellant. W. B. Hardy, for respondent.

PER CURIAM. Action of ejection to recover from defendant possession of a small lot of land (40x72 feet) situate in the city of San José. The judgment was in favor of the plaintiff, and defendant appeals from it and from an order denying his motion for a new trial. There is no apparent merit in either of these appeals, and none of the points made by counsel for appellant is sufficiently plausible to require special consideration. The judgment and order are affirmed.

110 Cal. 524

In re PEARSONS' ESTATE. (S. F. 168.)[1]

(Supreme Court of California. Dec. 19, 1895.)

DESCENT OF PROPERTY—NEXT OF KIN.

Civ. Code, § 1386, subd. 6, provides that, if decedent leave neither issue, wife, father, mother, brother, or sister, the estate shall go to the next of kin in equal degrees. Section 1394 provides that kindred of the half blood shall inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by devise of one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance. *Held* that, where decedent inherited his estate from his father, the sisters and brothers of his deceased mother shared equally with those of his father.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Proceeding for the distribution of the estate of Hiram Arthur Pearsons, deceased. From an order of partial distribution, Ira Mathewson and others appeal. Reversed.

Isaac N. Thorne and Oliver P. Evans, for appellants. John B. Mhoon and J. D. Sullivan, for respondents.

McFARLAND, J. This is an appeal by Ira Mathewson, Daniel Mathewson, Henry Mathewson, Rhoda Smith, and Lucy A. Angell from parts of an order of partial distribution of the estate of Hiram Arthur Pearsons, deceased. Although said deceased left a will, the part of his estate here in question is, for reasons not necessary to be stated, to be distributed as though he had died intestate. His next of kin of equal degree are aunts and uncles, and are the appellants, who are sisters and brothers of the decedent's mother, Ann Charity Pearsons, and Clarissa P. Wheeler and Lucy A. Valentine, who are sisters of the decedent's father, Hiram Pearsons. Lucy A. Valentine being now dead, her estate and interests are represented by her administrator, Joseph W. Reay. The greater part of the estate to be distributed came to the deceased, Hiram Arthur Pearsons, by gift and devise of his father, Hiram Pearsons, deceased; while a lesser part came to him from his mother, Ann Charity Pearsons. The probate court

[1] Rehearing denied.

held that all of said estate which came from the father should be distributed to said Clarissa P. Wheeler and the administrator of said Lucy A. Valentine, and that the appellants should share only in that part of the estate which came to the deceased from his mother. Appellants contend that the whole of the estate of the deceased should be distributed equally to all the aunts and uncles. This contention presents the only question to be determined on this appeal, and it appears to us quite clear that it must be sustained. The rule which governs here is the one declared in subdivision 6 of section 1386 of the Civil Code, and is as follows: "If the decedent leave neither issue, husband, wife, father, mother, brother nor sister, the estate must go to the next of kin in equal degree." In the case at bar "the next of kin" were the seven aunts and uncles of the decedent, and they were "in equal degree"; therefore, the estate goes to them in seven equal parts. Next of kin means, of course, next of kin of the decedent. Our Code has no allusion to "the blood of the first purchaser," and makes no attempt at any distinction founded upon the sources from which the estate of a decedent may have been derived, except in the single instance of kindred of the "half blood." But no question of the rights of kindred of the half blood arises in this case, for all the aunts and uncles were the decedent's kindred of the whole blood, of equal degree.

Respondents' whole contention rests upon the theory that section 1394 changes the rule of section 1386 above quoted. But to see the mistake of that theory it is only necessary to observe that section 1394 deals entirely with the case of kindred of "the half blood," not with kindred of the whole blood, whose rights had already been fixed by section 1386. Section 1394 is as follows: "Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance." Here the words "all those" clearly refer to their antecedents in the sentence "kindred of the half blood." "Kindred of the half blood" being the subject of the main proposition of the section, is necessarily the subject of the exception which follows the word "unless." The section simply means that kindred of the half blood shall inherit equally with those of the whole blood, except in a certain case, and in that case kindred of the half blood shall not inherit. And who are kindred of the half blood? Why, of course, kindred of the half blood of the decedent. There were none such in the case at bar. If the next of kin of equal degree of the intestate be some of the whole blood and some of the half blood of the intestate, the half bloods shall not inherit if they are not of the blood of the person from whom the intestate inherited the property to be distributed; but, if all be kin of the whole blood of the intestate, or if the half bloods be of the blood of the ancestor, then all share alike. Kindred of the whole blood, if next of kin, share in all of the estate of the decedent, no matter from what source it came.

Respondents present no case arising under a statute like ours which at all conflicts with the foregoing views. On the other hand, they are clearly stated in Estate of Kirkendall, 43 Wis. 167, which respondents cite. In that case the intestate, Mary Jane Kirkendall, had inherited her estate from her mother. She left no kin except uncles, who were brothers of her mother, and a paternal grandmother. The grandmother was the next of kin, but it was contended that she did not inherit, because she was not of the blood of the intestate's mother, and that the estate should go to the uncles who were of that blood. But it was held otherwise in the lower court, and the decree was affirmed in the appellate court. The clause of the statute there invoked was exactly like ours. The whole section (section 4) was as follows: "The degrees of kindred shall be computed according to the rules of the civil law; and kindred of the half blood shall inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance." The discussion of the subject by Lyon, J., who delivered the main opinion, and by Ryan, C. J., who delivered a concurring opinion, is very full and interesting; but we have space to give only a few sentences of their opinions. Lyon, J., said: "Mary Jane Kirkendall, and not her mother, is the person from whom the succession to the estate in controversy is to be traced." Having stated that it was not the principle of the statute "to confine the descent of an ancestral estate to those who are of the blood of the ancestor from whom the estate descended," he proceeds to discuss the clause in question, as follows: "The first clause of the section, which contains the rule for computing the degrees of kindred, does not aid the construction of the balance of the section. For that purpose it might as well have constituted a section by itself. The remainder of the section treats only of kindred of the half blood. Their rights, and theirs alone, are therein defined and limited; and we find nothing in the language of the section which authorizes us to say that any other class of kindred is within its purview. We think the plain grammatical construction of the clauses under consideration is that the kindred of the intestate of the half blood shall inherit equally with those of the whole blood, except that, if the estate is ancestral, only such kindred of the half blood as are of the blood of the ancestor from whom the estate came shall inherit. We find here no limitation of the rule of subdivision 6, § 1, that, 'if the intestate shall leave no issue, nor widow, and no father, mother, brother or sister, his estate shall descend to his next of kin in equal degree.'" From the able opinion of Ryan, C. J., we will quote only the following: "I think that, by all rules of construction, this clause is confined to the provision which it limits, and cannot otherwise affect the general rule of inheritance. It can have no application except in cases of next of kin of the half blood and the whole blood in equal degree, when it operates to exclude, in the particular case, the general right extended to the half blood. 'Unless' is equivalent to 'except,' and is here used to introduce an exception to the right of the half blood. All that follows it in the section is dependent on it, and qualified by it, and goes to define the exception which it declares. In the particular case 'all persons' are not excluded, but 'all those'; the relative pronoun relating back, and clearly signifying all those of the half blood." See, also, Rowley v. Stray, 32 Mich. 70; Ryan v. Andrews, 21 Mich. 229; Robertson v. Burrell, 40 Ind. 328. Speer v. Miller, 37 N. J. Eq. 492, cited by respondents, was under a statute which expressly provides that ancestral estates shall go only to those who are of the blood of the ancestor from whom the estate came.

(It is said incidentally in the brief of appellants that, perhaps, the administrator of Mrs. Valentine should not share in that part of the estate which came from the decedent's mother; but we do not understand that the record presents that point.)

The parts of the order of distribution appealed from are reversed, and the cause is remanded, with directions to the probate court to make distribution of all the estate of said Hiram Pearsons, deceased, now ready for distribution, in equal shares to the said seven aunts and uncles of said deceased.

We concur: HENSHAW, J.; TEMPLE, J.

110 Cal. 490

BAILEY LOAN CO. v. HALL et al. (L. A. 64.)

(Supreme Court of California. Dec. 18, 1895.)

JUDGMENT BY DEFAULT.

Where three persons are sued as partners, and judgment is asked "against said defendants," and two of them suffer default, and the other answers denying that he was a member of the firm, judgment may be entered against those in default, though it is rendered in favor of the other, under Code Civ. Proc. § 578, providing that judgment may be given for or against one or more of several defendants.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the Bailey Loan Company against Henry G. Hall and others on promissory notes. Judgment for plaintiff, and Henry G. Hall and another appeal. Affirmed.

J. S. Chapman, for appellants. Finlayson & Finlayson, for respondent.

HARRISON, J. The complaint in this action sets forth certain promissory notes, purporting to have been made to the plaintiff by "H. G. Hall & Sons," and the plaintiff brought the action against three defendants, who are alleged by it to have constituted a partnership by that name, and to have executed the notes to it. Two of the defendants, appellants herein, suffered default, and the other defendant answered the complaint, denying that he was a member of the firm at the time the notes were executed. The cause was tried by the court without a jury, and a judgment rendered in favor of the plaintiff, and against the appellants, and in favor of the defendant who had answered the complaint. The defendants against whom judgment was rendered have appealed, upon the ground that, as the action was brought upon a partnership obligation against three defendants, the court was not authorized to enter a judgment by default against two only. The record is presented here upon the judgment roll alone.

Section 578, Code Civ. Proc., provides: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants." In Lewis v. Clarkin, 18 Cal. 399, it was held that by this section the rule at common law, that in an action upon a joint contract the plaintiff must recover against all or none, was abrogated, and that in such action the plaintiff was entitled to a judgment against those defendants merely who were shown to be liable upon the obligation. See, also, People v. Frisbie, 18 Cal. 402; Shain v. Forbes, 82 Cal. 583, 23 Pac. 198; Harrington v. Higham, 15 Barb. 524; McIntosh v. Ensign, 28 N. Y. 169. The terms of this section do not limit the rule to actions in which the defendants have appeared and answered, but include as well those in which some of the defendants have made default, the only limitation in such case being that found in section 580, that the relief shall not exceed that which the plaintiff shall have demanded in his complaint. In Randall v. Hunter, 69 Cal. 80, 10 Pac. 130, an action was brought against the defendants as partners upon a promissory note, signed "Gill & Hunter." Gill suffered default, and Hunter defended upon the ground that the note was an individual obligation of Gill. Upon the trial this defense was not sustained, and judgment was entered against both. Hunter appealed, and a motion by the plaintiff to dismiss the appeal for failure of Hunter to serve his codefendant was denied upon the ground that Gill would not be affected by a reversal of the judgment; and to the argument that another trial might result in a several judgment against Gill, whereas he was then interested in preserving the joint judgment and preventing a several judgment, the court said: "His default admits that he is bound severally as well as jointly. If on the trial which has taken place the verdict had passed in Hunter's favor, a judgment by default might have been entered against Gill severally."

The appellants herein made default to the plaintiff's complaint, and thereby admitted the truth of its allegations, and consented to a judgment giving to the plaintiff all the relief it had prayed for. They admitted that they were members of the partnership of "H. G. Hall & Sons," and that the notes set out in the complaint had been executed to the plaintiff by that partnership. These facts, whether admitted by their default or established by evidence at the trial, entitled the plaintiff to a judgment against them. It is immaterial to them that their codefendant was able to show at the trial that he was not a member of the partnership, and thus to defeat the plaintiff's right of recovery. It was not necessary that the judgment should run against the appellants as copartners. The notes upon which the action is brought are several as well as joint, and the prayer of the complaint is for a judgment "against said defendants" for the amount of said notes. The court was thus authorized to enter a several judgment against the appellants, and the judgment entered is in accordance with the prayer of the complaint. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

110 Cal. 447

PEOPLE ex rel. MENZIES v. GUNST.

(S. F. 56.)[1]

(Supreme Court of California. Dec. 16, 1895.)

REMOVAL OF POLICE COMMISSIONERS—AUTHORITY OF GOVERNOR.

Act April 1, 1878, provides that certain district judges shall appoint police commissioners of the city and county of San Francisco, but fixes no term of office, and gives the judges no authority, after making the appointments, except to fill vacancies. By Const. 1879 the judges of the district courts were superseded, but the powers given them regarding the commissioners were not vested in any person. *Held*, that the governor has no power to remove a commissioner and appoint another person in his place. People v. Hammond, 6 Pac. 741, 66 Cal. 655, followed.

In bank. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Quo warranto on the relation of Menzies against M. A. Gunst to test relator's title to the office of police commissioner of the city and county of San Francisco. Judgment for defendant, and plaintiff appeals. Affirmed.

Clement, Cannon, Kline & Stradley, for appellant. Rothchild & Ach, E. W. McKinstry, and E. R. Garber, for respondent.

HENSHAW, J. This is an action in quo warranto to test relator's title to the office of police commissioner of the city and county of San Francisco against the claims of defendant thereto. Judgment passed for defendant, and plaintiff appeals.

The facts about which there is no controversy are that R. P. Hammond was a member of the original board of police commissioners of the city and county of San Francisco, appointed under the provisions of the act of the legislature approved April 1, 1878, and commonly known as the "McCoppin Act."[1] Hammond continued in office until his death, which occurred in the year 1891. At and after the time of his death H. H. Markham was the governor of the state, and he appointed D. M. Burns to fill the vacancy thus arising. Burns qualified, became and acted as a member of the board until January 5, 1895. Upon that day a vacancy occurred in the office by the resignation of said Burns. The governor, H. H. Markham, upon said last-named day appointed defendant, Gunst, to fill this vacant office. Upon the 7th day of January Gunst qualified, and entered upon the discharge of his duties. Thereafter, on said day, the said Markham was succeeded as governor of the state by James H. Budd. Upon January 13, 1895, Gov. Budd gave notice in writing to the said police commission, and to the individual members thereof, including the defendant herein, that he had removed said defendant from office, and he likewise caused formal declaration of removal to be filed in the office of secretary of state. Upon January 21, 1895, Gov. Budd appointed relator herein police commissioner of the city and county of San Francisco, "vice M. A. Gunst, removed." Menzies duly qualified, and, upon Gunst's refusal to surrender the office, this proceeding was instituted.

There is no distinction in principle between the contention of appellant in this case and that made in People v. Hammond, 66 Cal. 655, 6 Pac. 741, and there is likewise no important distinction in fact. The main difference is that in the Hammond Case Hinton was appointed *to succeed* Hammond, while here Menzies was appointed after the declared *removal* of Gunst. But, as "the mere appointment of a successor would per se be a removal of the prior incumbent" (Ex parte Heenan, 13 Pet. 261; Blake v. U. S., 103 U. S. 237), the distinction becomes immaterial. But, while the present case cannot be distinguished in principle from that of Hammond, it is earnestly insisted that the court erred in that decision, and in others in which the interpretation of the Hammond Case is adopted and followed. The claim made is that the governor has the power to remove and appoint the police commissioners at pleasure, and it is insisted that this claim finds support in sections 4 and 16 of article 20 of the constitution, together with section 875 of the Political Code. By the Hammond Case it was decided that no term of office of police commissioner was fixed by the McCoppin act; that no authority was given to the appointing power after making the original appointments, except to fill vacancies; and that the governor could not appoint in the absence of a vacancy, or create and fill a vacancy by appointing some one to succeed an incumbent. It cannot be assumed that the constitutional and code provisions upon which appellant relies were overlooked by the court in deciding that and kindred cases. An examination of their records discloses not only that they were cited in the briefs of counsel and in the petition for rehearing, but that the claim of the power of the governor to appoint at pleasure was strongly pressed upon the attention of the court.

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[1] Rehearing denied.

[1] Act April 1, 1878, provides that certain district judges shall appoint police commissioners of the city and county of San Francisco, but fixes no term of office, and gives the judges no authority, after making the appointments, except to fill vacancies.

But, as has been intimated, People v. Hammond is not a solitary case among the decisions of this court. It has formed the basis of other judicial determinations, and its principles, both in department and bank, have been repeatedly affirmed. In People v. Pond, 89 Cal. 140, 26 Pac. 648, sections 4 and 16 of article 20 of the constitution were cited to the court in bank, and it is said: "The questions argued by counsel for petitioners are not new. They may not have been presented so forcibly or with as great perspicuity before, but they have been determined adversely to the contentions of the petitioners after careful consideration of the constitutional and statutory provisions germane to the subject, and we feel constrained to adhere to the construction heretofore adopted. The contention of petitioners who claim to have been elected as members of the first board of supervisors has been settled adversely to them by the decisions in Desmond v. Dunn, 55 Cal. 248, 249, and People v. Board of Election Commissioners (Cal.) 3 Pac. 412; and the claim of the others by the decisions in Staude v. Board, 61 Cal. 313; Heinlen v. Sullivan, 64 Cal. 378, 1 Pac. 158; and People v. Hammond, 66 Cal. 655, 6 Pac. 741. The effect which a decision overruling those cases would have upon municipal proceedings for over 10 years past is so apparent that it is unnecessary for us to point out the reason why we should adhere to the decisions referred to,—at least so far as the board of supervisors is concerned,—even though we should believe that they were based upon an erroneous construction of the provisions involved. And, although the rule applies with less force to the case of the police commissioners, no good reason has been shown why the decisions heretofore rendered should be departed from. If the principle is wrong, or the system works unsatisfactorily, the remedy remains with the people." In People v. Edwards, 93 Cal. 153, 28 Pac. 831, the power of the governor to appoint a fire commissioner was under consideration. The circumstances were substantially the same as in the Hammond Case, the present constitution there, as in the Hammond Case, having abolished the original appointing power. The court said: "Questions involving the same principles as those under discussion were decided in People v. Hammond, 66 Cal. 654, 6 Pac. 741. Under the act of April 1, 1878, the respondent in that case and two others were appointed by certain district court judges, named in the act, police commissioners for the city and county of San Francisco. By the constitution of 1879 the judges of the court named were superseded, but the powers given to them by the act referred to were not vested in any other person or tribunal. It was claimed by the relator in that case, as it is by the relator here, that under section 8, art. 5, and section 16, art. 20, of the constitution, the office became vacant at the expiration of four years from the date of the defendant's appointment, and that the governor had the power to fill such vacancy. These contentions did not receive the sanction of the court. It was held that there was no vacancy which the governor was authorized to fill. Unless that case is to be overthrown, it is an authoritative adjudication against the claim of the relator herein, and entitles the defendant to hold the office until his successor has been appointed or elected, and has qualified, or until the office has been abolished by the power which created it. It would be sufficient to rest the decision herein upon a reference to that and other cases involving similar questions. * * * It is claimed that section 16 of article 20 of the constitution makes it unlawful to occupy an office created by the legislature for a longer period than four years. The section provides 'when the term of any officer or commissioner is not provided for in this constitution, the term of such officer or commissioner may be declared by law; * * * but in no case shall such term exceed four years.' This question also was passed upon in People v. Hammond, 66 Cal. 654, 6 Pac. 741, and requires no further notice." In People v. Newman, 96 Cal. 605, 31 Pac. 564, the Hammond Case being again cited and discussed, it is said: "This contention was fully presented by eminent counsel in People v. Hammond, 66 Cal. 654, 6 Pac. 741, and a petition for rehearing was filed and denied. After such consideration and determination by the court, we think the point should be treated as finally settled."

It is thus apparent that the principle of the Hammond Case has not only been reaffirmed, but has formed the basis of judicial determinations involving the existence and mode of filling other offices. As was said in People v. Pond, supra: "The effect which a decision overruling these cases would have upon municipal proceedings for over ten years past is so apparent that it is unnecessary for us to point out the reasons why we should adhere to the decision referred to." And, to quote People v. Freese, 83 Cal. 453, 23 Pac. 378: "We see no good reason why the rule of stare decisis should not govern this case; and looking ahead, we see good reason why it should. It is not a matter of much importance who should temporarily have the office struggled for here. But it is a matter of considerable importance, in order to avoid uncertainty and disorder in the future, that those exercising power in the premises may have a settled rule to go by." The judgment appealed from is affirmed.

We concur: BEATTY, C. J.; TEMPLE, J.; VAN FLEET, J.; HARRISON, J.; McFARLAND, J.; GAROUTTE, J.

110 Cal. 441

RICHARDSON v. CITY OF EUREKA.

(S. F. 75.)

(Supreme Court of California. Dec. 16, 1895.)

FORMER DECISION—ISSUES INVOLVED—OBSTRUCTION OF WATER COURSE—INJUNCTION—EQUITY—INSTRUCTIONS—WAIVER OF FINDINGS.

1. Where a landowner recovered damages from a city in an action wherein the complaint alleged that defendant created a nuisance by obstructing a natural water course which ran across plaintiff's lot, on which there was a building, and the answer denied the existence of the water course, the creating of a nuisance, and that plaintiff was damaged, and thereafter plaintiff again sued for damages to the same property from a continuance of the same obstruction, which caused the building on plaintiff's lot to settle and the walls to crack, and rendered it untenantable, defendant was not precluded by the judgment in the former suit from showing that the injuries complained of in the latter were due to defects in the construction of plaintiff's building, or to its situation on marshy ground, and not to the obstruction of the water course.

2. In an action by a lot owner to restrain a city from maintaining street improvements which obstructed a stream, and set water back on his land, where it appeared that plaintiff refused defendant's offer to flow the water from his premises by connecting with a sewer, injunction was properly denied.

3. A judgment in equity will not be reversed because of erroneous instructions to the jury.

4. In an equitable action, a motion by plaintiff to disregard the verdict and render findings and decision for him is not a request for express findings, and hence does not show that express findings were not waived.

5. A judgment in equity will not be reversed because the court failed to make express findings, where it does not affirmatively appear that such findings were not waived.

Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Charles Richardson against the city of Eureka for damages resulting from the maintenance of a nuisance, and for an injunction. Judgment for defendant, and plaintiff appeals. Affirmed.

J. W. Turner, for appellant. J. N. Gillett and A. J. Monroe, for respondent.

PER CURIAM. This action, begun January 6, 1894, is a sequel of the case between the same parties reported in 96 Cal. 443, 31 Pac. 458. In that case Richardson obtained a judgment, which was affirmed in this court, for damages accruing to him by reason of a nuisance consisting in the obstruction of a natural water course on his land, and caused by certain street improvements made under the direction of defendant. In this action plaintiff seeks to recover for damage caused by the alleged continued maintenance of the same nuisance, and an injunction to restrain the further continuance thereof. We are informed by the present record that in the said former action it was alleged by plaintiff, among other things, that he was the owner of a lot of land situated at the corner of Fourth and E streets, in the city of Eureka, and of certain buildings thereon; that a natural waterway ran across said lot, by which a great quantity of surface water was collected, and that such water escaped through a culvert crossing said Fourth street in front of plaintiff's property; that in grading said streets adjacent to plaintiff's lot the defendant moved said culvert, and negligently failed to replace the same with any means for the escape of such water. The record here discloses further that the answer in that case denied the existence of said natural waterway, "denied the creating of any nuisance, and denied any damage resulting therefrom," and that judgment on the verdict of a jury was entered for plaintiff therein, August 28, 1890, for $1,000 damages. Nothing more appears of the material issues made and determined there. The complaint in the present action repeated substantially the allegations above mentioned of the former complaint; stated also that as a consequence of said nuisance the water was, for two years next before the commencement of this suit, confined upon plaintiff's land, and under the buildings thereon, rendering the same uninhabitable, and causing various injuries thereto, such as the settling of the foundations, the cracking of the walls, etc., as well as preventing any income to plaintiff from the rents thereof; that the nuisance was continuing, threatening irreparable injury, etc. Issue was joined upon these averments. The case was tried by a jury, and the judgment roll in the first action was placed in evidence by plaintiff, together with the testimony of several witnesses concerning the alleged injuries. Such testimony related almost entirely to a large building on the lowest part of plaintiff's lot, at the corner of said streets, and there was no dispute that water stood under such building to the depth of 16 inches and more. On the part of defendant there was evidence tending to prove that the building was constructed on marshy and boggy land, and would have settled of its own weight; that, by reason of embankments and drains made in said natural water course, no water has descended therein to plaintiff's property since the time of the trial of the first action, August 28, 1890, except such as collected from the half block including his lot; that the foundation of his building is so constructed as to form a water-tight bulkhead, rendering the escape of water therefrom impossible without cutting an orifice through such foundation; that in December, 1892, the city constructed a sewer in said Fourth street for the purpose of draining plaintiff's lot, and that, upon inquiry being made to him as to where connection should be made with his premises, he said "he wouldn't recognize that sewer at all, and didn't want to connect"; that about a year later the city attempted to connect such sewer with the pond under plaintiff's building by making an aperture through the foundation, when he forbade the work, and said he would not have the foundation cut into, and that such sewer, if so connected, would drain his lot dry. Plaintiff's alleged reason for refusing a connection with the new sewer was that the same was not as low as the former culvert. There was no evidence that any substantial injury to his property could result from such connection. No special issues were submitted to the jury, and a general verdict was returned for the defendant. Plaintiff then moved the court to "make and render its findings and decision in favor of the plaintiff; the verdict of the jury being contrary to the evidence, and contrary to the instructions of the court." The motion was denied, and judgment was entered that plaintiff take nothing.

1. The former judgment establishes that a natural water course existed on plaintiff's premises, and that defendant obstructed the same to the nuisance of plaintiff; but, so far as can be discerned from the record here, it was not then determined that any injury was or would be caused thereby to plaintiff's buildings, or the rental value of his premises, and it is only by inference that we can conclude from that judgment that the water was dammed on his land at all. For anything appearing, the injury there may have arisen from giving the flowing water a new direction,—cutting away plaintiff's land, or carrying off his buildings. Application of the doctrine of res judicata cannot be made by inference or surmise upon the effect of a judgment. Code Civ. Proc. § 1911; Lillis v. Ditch Co., 95 Cal. 553, 30 Pac. 1108. Suppose plaintiff had sued the city for damage arising from the destruction of his building; it would be preposterous to say that the defendant could not prove that it was destroyed by fire, if such was the fact, merely because he had established in a former action the creation by the city of a nuisance which might have destroyed the building by the agency of water. So we think it was open to defendant to show that the injuries complained of in this case were the result of defects in the construction of the building, or of its situation, uninfluenced by the nuisance created by defendant, and the decision founded on evidence tending to prove those facts cannot be disturbed as being in conflict with the prior adjudication.

2. It is claimed, however, that the nuisance found by the verdict of August 28, 1890, being shown yet to exist, the plaintiff was entitled to an injunction against its continuance. But admitting that the water course was still obstructed, by reason of defendant's acts and omissions, yet the evidence tended strongly to show that the city had endeavored in a proper manner to redress the injury, and that its efforts were thwarted by the conduct of plaintiff. Injunctions issue to prevent wrongs otherwise irremediable. Here the remedy seems to have been plain, speedy, adequate, and proffered to plaintiff, and no sufficient reason appears why he did not accept it. Under such circumstances an injunction is rightly refused.

3. The case was in equity. Sullivan v. Royer, 72 Cal. 248, 13 Pac. 655. The verdict of the jury was merely advisory to the court, and if the instructions given to the jury were erroneous in any particular, as appellant insists they were, such error is not ground for reversing the judgment. The correctness of the decision of the court, and not the propositions of law it laid down for the guidance of the jury, is the question for determination in such instances. Schneider v. Brown, 86 Cal. 205, 24 Pac. 715; Sullivan v. Royer, supra; Sweetser v. Dobbins, 65 Cal. 529, 4 Pac. 540. Compare Lamb v. Harbaugh, 105 Cal. 692, 39 Pac. 56.

4. Express findings by the court, however, were necessary, unless they were waived. Brandt v. Wheaton, 52 Cal. 430; McLaughlin v. Del Re, 64 Cal. 472, 2 Pac. 244. But absence of such findings in the record is not a fatal defect, unless it affirmatively appears that they were not waived. Campbell v. Coburn, 77 Cal. 36, 18 Pac. 860. We think there is no such affirmative showing here. The plaintiff moved the court to disregard the verdict, and render its findings and decision in favor of the plaintiff. This was not a request for findings generally, but for findings of specified import, viz. in favor of plaintiff, and was not such a motion as counsel was authorized to make. Edgar v. Stevenson, 70 Cal. 286, 11 Pac. 704, and cases cited. Non constat that there was not a waiver of findings differing from those asked for. The judgment and order are affirmed.

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110 Cal. 463

MEHERIN v. SAUNDERS, Constable, et al.
(L. A. 9.)

(Supreme Court of California. Dec. 17, 1895.)

CONSTABLE—LIABILITY FOR PROCEEDS OF PROPERTY SOLD.

Where a constable sells property under execution, issues his certificate of purchase, and fails to collect a portion of the price, he and his sureties are liable for the entire amount for which the property was sold.

Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Mark Meherin, assignee in insolvency of the California Steamship Company, against J. N. Saunders, constable, and W. H. Schuyler and F. G. Fisk, sureties on his official bond. From a judgment for plaintiff, and from an order denying their motion for a new trial, defendants appeal. Affirmed.

W. I. Nichols, for appellants. Grant Jackson and Mich. Mullany, for respondent.

GAROUTTE, J. This is an action by the assignee of the California Steamship Company, an insolvent corporation, against defendant Saunders, as constable of judicial township No. 5, of Santa Barbara county, and the sureties upon his official bond. Defendants appealed from a judgment rendered against them, and also from an order denying their motion for a new trial. Saunders, as constable, held certain executions running against the California Steamship Company, prior to insolvency proceedings. One of these executions he levied upon its real estate, and proceeded to sell the same. At the sale one Ambrose bid $10,000 for the property, and it was knocked down to him as the highest bidder. Thereupon, in payment of the purchase price, he gave the constable $855 in money and his personal check for the balance, amounting to $9,145. Ambrose was well known to the officer, and of sound financial standing. The constable issued to him a certificate of sale in proper form, and satisfied the executions, including accruing costs, with the money received. At this stage of the proceedings Ambrose stopped payment upon the check, and the money therefor has never come into the hands of the constable. This action is brought to recover from the constable the amount of the check, as money in his hands received at the sale.

There are a great many matters set out in the answer which are purely surplusage, and no defense to the allegations of the complaint. The only statement found therein which would seem to possess the semblance of a defense to the action is the allegation that the defendant constable executed the certificate of purchase set out in the complaint "without consideration, and through misapprehension, mistake, surprise, and excusable neglect"; but we find nothing in the evidence to support this allegation, conceding such an issue to be a material one. Under the evidence, we are bound to hold that the entire $10,000 was received by Saunders, the constable. It is settled law that a sheriff cannot impeach his return as to the amount of money received by him at execution sale, and, certainly, this could not be done as to the judgment debtor. Harvey v. Foster, 64 Cal. 296, 30 Pac. 849. But, conceding that the certificate of purchase here issued is not the equivalent of the sheriff's return, and that there is no paper in this record such equivalent, still the evidence as to the character of the transaction is indisputable, and by the constable's own words his liability is fixed. He says: "I did collect in coin from Ambrose $855. The reason I did not collect the balance of that $10,000 from him was because Mr. Ambrose didn't have the money with him, and I supposed the check was good. Knowing he was good, I took it in lieu of that much money, and gave him the certificate of sale for that $10,000, and acknowledged receipt of the $10,000 in that certificate of sale. I never tried to collect that money from Donahoe, Kelly & Co. I have not, up to this time, demanded of Ambrose to pay that check in money. I gave him the certificate of sale because I supposed that I had received the money, counting the check. I suppose—well, I knew he was good for it, and I put it in as that much money, supposing it would be paid." This principle of law, as to the conclusiveness of the sheriff's return as against him, equally applies where he attempts to show that he received notes or other property in lieu of money in satisfaction of the judgment or execution. Harper v. Fox, 7 Watts & S. 142; Fitch's Appeal, 10 Pa. St. 461. Reduced to its simplest form, the case is this: The constable sold the property for a certain sum, issued his certificate of purchase, and failed to collect a portion of the purchase price. Upon such a state of facts, he is clearly liable for the entire amount. He cannot be allowed to say, "I never collected the money from the purchaser, or I took his check for the purchase price, thinking it was as good as the money, or he beguiled me into giving a certificate of purchase, and then refused to pay the amount he owed me upon the purchase, and, consequently, I am not liable." While the purchaser, Ambrose, was upon the witness stand, in answer to a question of counsel as to why he did not pay the balance of the purchase price of the property, he said, in effect, that, as between him and the California Steamship Company, it was never intended to be paid; that he was acting for the corporation in making the bid, and only intended to advance sufficient money to pay off the executions held by the constable. This evidence came in under objection that it was outside of the issues made, and such is probably the fact; but, if defendants in the first instance, by their answer, had made an issue in line with such evidence, or had asked the court for the privilege of amending their answer when the evidence was given, and had been refused such privilege, it would seem the result of this litigation might have been entirely different. For such an agreement between Ambrose and the corporation, under proper pleadings, would have formed a material as well as interesting branch of the case.

We perceive no error in the action of the court in correcting the unsubstantial defects in the constable's bond. The case appears to be one of hardship upon the defendant constable, but we find no path marked out in the law by which he may escape the serious results to him following his own negligence. Probably he has his remedy over against Ambrose for the balance of the purchase price, for by the record Ambrose appears to be financially responsible. For the foregoing reasons the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

110 Cal. 471

MAHONEY et al. v. SAN FRANCISCO & S. M. RY. CO. (No. 15,944.)[1]

(Supreme Court of California. Dec. 17, 1895.)

STREET RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY—ACTION FOR WRONGFUL DEATH—EVIDENCE—DISCHARGE OF JUROR DURING TRIAL—WAIVER OF OBJECTIONS—INSTRUCTIONS.

1. Where an electric street car runs against a vehicle moving in the same direction, down hill, on a road bordered by a gulch, on a foggy night, the question of contributory negligence is for the jury, though there was sufficient space to enable the persons in the vehicle to keep clear of the track, and they took no pains to do so.

2. In an action by widow and children for death of their husband and father, it is error to allow plaintiffs to prove that the children are without means.

3. In an action against a street-railroad company for death by wrongful act, after much evidence was taken, a juror stated to the judge, in the presence of counsel, that he was familiar with the country in which the accident occurred, and did not believe the statements of three of plaintiffs' witnesses in regard to its description. *Held*, that it was error to discharge the juror on account thereof.

4. After much evidence was taken, a juror was improperly, and against defendant's objection, discharged by the court, because he stated that he did not believe the statements of certain witnesses, and defendant afterwards consented to proceed with the remaining 11 jurors, instead of commencing the trial anew. *Held*, that defendant did not thereby waive his objection to the discharge of the juror.

5. The jury in a personal injury suit having returned into court without agreement, the court, after learning that they stood eight to three, stated that, in case of disagreement, all the expense would fall on plaintiffs, who, he said, were not well off; asked if he should not re-read the charge to the three who could not agree; and stated that plaintiffs required but nine jurors; and finally sent them out "to agree." Twenty minutes later, a verdict for plaintiffs for $10,000 was returned. *Held*, that the instruction was erroneous, as insisting that one of the three should yield to the eight.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Mary Mahoney and others against the San Francisco & San Mateo Railway Company to recover for the death of the husband and father of plaintiffs. From a judgment for plaintiffs, and an order denying a motion for a new trial, defendant appeals. Reversed.

Henley & Costello, for appellant. Thornton & Merzbach and Garber, Boalt & Bishop, and T. F. Riley, for respondents.

TEMPLE, J. This action was brought by the widow and six children of Florence Mahoney, deceased, to recover damages for his death, which they allege was caused by the negligence of the defendant. A verdict of $10,000 was rendered, and this appeal is taken by the defendant from the judgment, and from an order refusing a new trial.

The defendant was engaged in operating a street railway on which cars were propelled by electricity, by the overhead or trolley system. The accident occurred on the Old Mission road (a public highway), within the city and county of San Francisco, at about 10 o'clock, upon a dark and foggy night. Deceased and three companions were driving along on the highway, and took no pains to keep clear of the track, although there was sufficient space to enable them to do so. The driver testified at the trial: "The road was plenty wide there. There was plenty of room to keep away from the track. I kept closer to the track than the gulch, to be sure. I could not tell when I would strike a bowlder in the road. I did not drive far enough from the track to clear the car. My intent was to clear the ditch on the right-hand side, without reference to the track. I did not aim to keep clear of the track at all. I depended upon the lights coming along, so we could see it or hear something, and then turn out of the way. I intended to rely upon hearing or seeing. I did not stop at any time to look or listen, for the reason I had people behind, and depended upon them. The noise of the vehicle and of the wind might to some extent interfere with my hearing an approaching car, but still we did not stop." The road at that point was descending at the rate of about 290 feet to the mile in the direction in which the party was traveling. Defendant's car coming up behind was proceeding by gravitation down the grade at a rate variously estimated as from 10 to 20 miles per hour. It struck the wagon in which deceased and his companions were, killed the deceased, and very seriously wounded two others.

Appellant contends that the judgment should be reversed, because it was not shown that the deceased was without fault, and because it is so clear from the evidence that there was contributory negligence that no other rational conclusion can be drawn from it. This contention cannot be maintained. The defendant had no exclusive use of any portion of the highway. Its right was to a use in common with the public, being peculiar only so far as its inability to move from its track made it so. Travelers upon the highway had a right to presume that it would use its franchise in view of the rights of others. If the light of the car was liable to go out because the trolley frequently jumps the wire, other lights should have been employed; and, if an obstruction cannot be seen by its light in time to stop the car, it should move at less velocity. Other travelers should use reasonable diligence to avoid obstructing the track, and it may be that, under some circumstances, a jury would be justified in finding it negligent for one to travel along the track; but it certainly is not negligence per se, and I see nothing in this case which would justify our reversing the verdict; on the contrary, I do not see how the jury could have found otherwise. The law applicable to the matter is correctly stated in Shea v. Railroad Co., 44 Cal. 414.

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[1] Rehearing denied and modified. See 110 Cal. 471, 43 Pac. 518.

There was no error in giving or refusing instructions to the prejudice of appellant.

Appellant claims a great many errors of law committed by the court at the trial. Most of them seem to be trivial. It was, however, in my opinion, clear error to allow plaintiffs to prove that the children of the deceased (plaintiffs here) had no means of their own. Such testimony could have been offered for no other purpose than to create prejudice, and should have been excluded.

I think the court also erred in discharging the juror Cooper from the panel. The jury had been passed upon, sworn, and much evidence had been taken. A juror then stated to the judge, in the presence of counsel, that he was familiar with the country in which the accident occurred, and did not believe the statements of three of plaintiff's witnesses in regard to their description of the country. If the juror had personal knowledge of facts material to the case, it was proper for him to announce the fact. He should then have been sworn as a witness, and subjected to cross-examination, and then the court could have exercised its discretion, under section 1883, Code Civ. Proc., in regard to discharging the jury. The statement that he did not believe plaintiff's witnesses was no ground for discharging him from the panel. Perhaps all the jurors had already made up their minds that they did or did not believe the witnesses. They ought not to do this until they have heard both sides. But to do so does not justify the court in discharging the jury. If a juror improperly expresses his opinion, it may constitute such misconduct as will necessitate a new trial. But it must be considered in a formal motion for a new trial. If a juror could be discharged upon such a statement, he could have been put off the panel upon proof that he had such knowledge or had made statements. This practice would open the door to great abuses, as each party might conclude, as the trial progressed, that a juror was unfavorable. The fitness of jurors should be determined before the trial begins.

Defendant's counsel objected to the discharge of the juror, and took their exception. The record then discloses that under the ruling of the court, and after argument, counsel consented to proceed with the remaining 11. It is contended that this was a waiver of the objection. It does not seem so to me. Counsel did not consent to the discharge of Cooper. They insisted upon their right to have him serve as a juror. But after he had been discharged, and when the question was whether they should proceed with the remaining 11 or commence anew, they consented to proceed. The question was not then whether Cooper should be excused or not, for that had already been done. The ruling wrongfully forced upon them the alternative of proceeding with the 11 or of commencing the trial anew. Which course they elected to pursue had no bearing upon the wrong done. In neither case could they regain their rights, and in either case they would retain their exception. There was therefore no speculating on the result of the trial, for, if a new panel had been taken, they could still insist upon their exception.

I think, too, the judgment must be reversed for irregularity on the part of the court. As appears from affidavits filed on the motion for a new trial, after the jury had been out for about 4½ hours, they were brought into court, when the following occurred: "The Foreman: I think it is impossible for the jury to agree. One juror seems to be a little doubtful about some points of law. The Court: If there is anything that I can give you, instructions as to any question of law, to help you to arrive at a verdict, I will be pleased to give them. If the juror who desires to ask a question will ask it, I will endeavor to answer it. A Juror: For my part I do not require any more or further information in regard to the law, because the others do not seem to agree with me. The Court: If it is about the testimony of any witness, it can be read to you. A Juror: No, sir. The Court: Is there any difference in your understanding of the instructions? A Juror: That is it. The Court: If there is, I will give it to you over again. A Juror: It don't make any difference about the instructions. That would not alter the case. The Court (to the foreman): Mr. Bent, without telling me in whose favor you stand, whether for plaintiff or defendant, how do you stand numerically, six to six, or four to eight, or how? A Juror: We stand eight to three, and it has been so since we went into the room. The Court: This trial is a very expensive one, indeed, for both parties, particularly to the plaintiff, who is not well off, I believe; and, if you disagree, all of the time we have spent is absolutely lost, and the plaintiff has to pay all of the fees of this trial and expenses, and go at it again. If the jurors who cannot agree upon a verdict differ in their notions of what witness has testified to, I will be most pleased to help you out. I do not want to try the case again, and counsel do not want to try it again, and the parties do not care to provide expenses again. If you differ as to what you regard as the result of the evidence, as to what you consider the proofs, then I cannot give you any instruction on the subject. I want to ask you if that is the difference between you. A Juror: It is not a matter of instructions. We understand it. The Court: It is a matter of what conclusions you reach from the evidence? A Juror: Yes, sir. The Court: O. Three of your number believe a certain state of facts, and the other eight believe another state of facts? A Juror: Yes, sir. If you were to have your charge re-read, or rather your instructions. The

Court: I will do that, or if you will tell me the particular point of law troubling you— A Juror: We do not understand what this gentleman wants to get at. He wanted to have your charge re-read. The Court: What do the other two say about it? A Juror: The other two perfectly understand the evidence, I think. The Court: The plaintiff requires nine men, the same as if he had twelve on the panel. If it is possible for one of these three to arrive at a conclusion, anything I can do I will cheerfully do. There were delays in this case which make the expenses quite heavy. They will be paid to you the same whether you give a verdict or not. If any of these gentlemen who entertain these views desire to hear me give any portion of that charge and any instructions, and will indicate about what they want, I will be pleased to do it. I do not want to read them all unless you want to hear them all. They are very long, but if you will let me know upon what point— Do you understand the last instruction, which just before dinner you asked me to have read to you? Jurors: Yes, sir; we understood that. A Juror: I think this gentleman wanted to know whether they had any right upon that track or not. I think he is doubtful about that. The Court: I have told you that the street is a public highway, and that persons have the right to be upon the street, and to use the street either as pedestrians or riding. They had a right to be upon the highway, in law. Mr. Thornton: Can I request an instruction upon that point? The Court: Not at present. Mr. Costello: I think that it is a point for the jury to decide. The Court: As a matter of law, they had a lawful right to be upon that highway. The deceased and parties in the wagon had a lawful right to be upon that highway. The fact that they may have been actually driving upon the railroad track would not make them trespassers unless they did it in view of imminent danger, because the public as well as the railroad company have an equal right to the use of that public highway. It is admitted here that it is a public highway, which means a street or place open to the public for use either as pedestrian in walking or vehicles driving. If that is the question of law you want to ask, I will say that they did have the right to be there driving. Is there any other question of law that you would like to ask me? Because I am going to send you out once more, and give you a chance to try to agree. I think that, when you appreciate the circumstances and situation of the parties, you will make one more effort to do it. A Juror: Does the law compel transportation companies to maintain a permanent light at night? The Court: In my opinion, it is the duty of a corporation using a public street or highway at night to provide lights sufficient to apprise people lawfully upon the highway of the coming or approach of a car. As a matter of law, I will state to you that a street-railway car company using the public highway, and using it by night, it is their duty to provide lights sufficient to apprise people upon that highway—traveling upon that highway—of their approach. And if, without any fault upon the part of the persons thus traveling, without fault upon their part directly contributing to the injury, they are injured in consequence of the failure of the company to provide light, then I say that such a party is entitled to recover. Do you understand that? Jurors: Yes, sir. Mr. Costello: We except to that portion of your honor's charge. The jury then again retired, and, after further deliberation, returned into court with a verdict for the plaintiff and against the defendant, assessing the damages at $10,000."

It will be seen that, after finding out that the jury stood eight to three, the court called attention to the fact that all the expense would fall on the plaintiff, who was not well off. The judge then said: "If the jurors who cannot agree upon a verdict differ," etc. Who were these jurors? For, evidently, certain jurors were meant, and not all. But the judge made this matter evident, for when a juror said: "We do not understand what this gentleman wants to get at. He wanted to have your charge re-read,"—the court asked: "What do the other two say about it?" Why did he not say "the other nine," for they were as much failing to agree as the two? Evidently, it must have appeared to the jury that the court was insisting that the three, or one of them, should yield to the eight, for he proceeds to say that plaintiff requires nine jurors. He only had eight, it seems; for why did he say plaintiff requires nine? Why not the defendant, or why specify either party? He finally said: "I am going to send you out once more, and give you a chance to try to agree. I think that, when you appreciate the circumstances and situation of the parties, you will make one more effort to do it." The affidavit shows that the jury then returned a verdict of $10,000 for plaintiff in from 10 to 20 minutes.

The judgment and order are reversed, and the cause remanded.

We concur: HENSHAW, J.; McFARLAND, J.

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110 Cal. 488

In re RAMAZZINA et al. (L. A. 87.)

(Supreme Court of California. Dec. 18, 1895.)

INSOLVENCY—PETITION—ALLEGATION OF PARTNERSHIP.

1. It is enough that a petition in insolvency fairly shows that petitioners are partners; a direct allegation thereof is not necessary to give jurisdiction.

2. One is an insolvent, though his assets in value exceed the amount of his liabilities, when he is unable to pay his debts as they become due from his own means.

Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

In re Sam. Ramazzina and another, individually and as copartners under the firm name and style of Ramazzina Bros., as insolvent debtors. From a decree declaring such parties insolvent, a creditor appeals. Affirmed.

W. I. Nichols and C. A. Storke, for appellant. Slade & Armstrong, for respondents.

GAROUTTE, J. This is an appeal by a creditor from an order of the superior court adjudicating the above-named parties insolvent debtors. It is claimed that the court had no jurisdiction to make the order, by reason of fatal defects appearing upon the face of the petition. It is first insisted that the petition does not show that petitioners are partners, but we think that fact sufficiently appears when the entire petition is considered. While a direct allegation to that effect would have been good pleading, yet its absence is not jurisdictional, if the fact fairly appears, taking the petition as a whole. Further complaint is made that the petition is ambiguous, indefinite, and unintelligible. While it may well be said to be somewhat crude in many respects, still crudities are not fatal to jurisdiction, and bad grammar used by a pleader does not vitiate a pleading. It is also insisted that the copartnership of Ramazzina Bros. was not insolvent at the time of the filing of said petition, as shown by a comparison of its assets and liabilities appearing therein. While it does appear therefrom that the valuation of the partnership assets exceeds considerably the liabilities of the partnership, yet the petition further discloses that the partners individually are hopelessly insolvent. The petitioners further allege, directly, that they are insolvent, and the mere fact that the assets in value exceed their liabilities does not prove solvency. Such fact might exist, and often does exist, and still a debtor be entirely insolvent within the purview of the insolvent act. A debtor, when he is unable to pay his debts from his own means as they became due, is insolvent. Washburn v. Huntington, 78 Cal. 573, 21 Pac. 305; Sacry v. Lobree, 84 Cal. 41, 23 Pac. 1088. The order appealed from is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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110 Cal. 494

In re CLOS' ESTATE. (L. A. 32.)

(Supreme Court of California. Dec. 18, 1895.)

ACCOUNTING BY EXECUTRIX—EXPENSE OF REPAIRS—ALLOWANCE OF CLAIM—CONDITION PRECEDENT.

1. An executrix of an estate, part of the buildings on which had been used for years as stables, on complaint as to their unsafe condition, consulted architects in regard to repairing the same, but was informed that, since the buildings were within the fire limits of a city, an ordinance required fireproof roofs and walls. It appeared that the premises were practically untenantable, because of the condition of the stables. *Held*, that the erection of new buildings at a reasonable cost on the site of the old for the same purposes, and in compliance with the ordinance, were "repairs," within Code Civ. Proc. § 1452, requiring executors to "keep in good, tenantable repair all houses, buildings, and fixtures" on the estate, so that the executrix was entitled to credit for the expense thereof on her accounting.

2. The right of an executrix to credits for expenses incurred in administering the trust should be determined on equitable principles.

3. An executrix need not show, as a condition precedent to the allowance of a claim for the expense of repairs on the estate, that the repairs were ordered by the probate court, where the expense was reasonable, and for the benefit of the estate.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Accounting by Mrs. Escallier, as executrix of the estate of Pierre Clos, deceased. From an order disallowing a claim for repairing buildings on the estate, the executrix appeals. Reversed.

McKeeby & Appel and J. Brousseau, for appellant. Geo. D. Blake, for respondents.

VAN FLEET, J. Among the items of the account filed by the executrix of the estate were these:

By payment to Frank J. Capitan for architectural services, general contract, brickwork, plumbing, etc., for repairing and rebuilding stables at No. 24 Aliso street.......	$2,611 74
By services of said Capitan for preparing plans for said building....	130 53

Upon the settlement of the account the court below rejected and disallowed these items, upon the ground, as stated in the bill of exceptions, "that the said items were not a proper charge of the said executrix against the said estate"; and the only question involved in the appeal which is taken by the executrix is the propriety of the action of the court in that regard. The evidence in support of the rejected items was wholly uncontroverted, and was, in substance, this:

The executrix testified: "The estate is the owner of an undivided one-half of certain premises, situate at Nos. 24 and 26 Aliso street. I am the owner of the other undivided one-half in my own right. At the time of the death of Pierre Clos, and long prior thereto, on a part of the premises, to wit, the yard immediately back of the front of the said building, which front part is used as a lodging house and saloon and restaurant, there were some structures used as stables, which had been built a great many years before the death of Pierre Clos, my husband; and the structures were old and decayed, and had been repaired from time to time. The stalls for horses and the sheds for carriages had no flooring. The roofs were of poor material. There were no brick walls inclosing the stable, and there was an adobe wall on the east side, which had been built there for years, and had been broken down, and was nearly tumbling over. The stables were inclosed by an adobe wall, and partly by a picket fence. The picket fence was old and rotten, and the adobe wall had been partly torn down by the water which had accumulated in the yard, and forced itself into the premises of the occupants of the surrounding property. There was no sewerage on the premises, and when it rained the water accumulated there and rendered the place very muddy, and almost unfit for the occupation of the premises as a stable. The roofs over the stalls were in such condition that whenever it rained the horses would get wet, and the stalls rendered unfit for occupation. From time to time there were a great many complaints made to me by the neighbors, and the authorities of the city of Los Angeles also made complaint to me that the premises were a nuisance, and that they had to be repaired, or the stables abandoned and removed. The stench was of such character that it made all the neighbors complain, and was almost unbearable. I had been paying considerable money for repairing the premises from time to time, but every year they had to be repaired over and over again, and my tenants who occupied the lodging house and the saloon immediately above and in front of the stables threatened to leave the place unless I repaired it in such a way that the water would have an outlet, and the stables were fixed in such a condition that they would keep perfectly free and clean from unbearable smells or odors. Mr. Valdez, who was then occupying the premises for stables, complained to me from time to time, and finally, in 1890, during the rainy season, he notified me that he would leave the premises unless I repaired them. I consulted a number of architects and builders, who gave me estimates in reference to the cost and expense of repairing the stables, and Mr. Capitan gave me the lowest bid. I wanted simply to repair the stables with lumber, and to put on shingle roofs; but that part of the city where the stables are situated was included within the exterior limits fixed by the fire ordinance of the city of Los Angeles, and by that ordinance I could not put up a frame building or frame structure, or any repairs built of lumber, without the permission of the city authorities, and they absolutely refused to allow me to make the repairs in any other manner than as I repaired them. I was required to build fire walls, and to put on fireproof roofs over the stables. The stalls had to be built over again, as well as flooring put into them, so that they could be kept clean and free from odors or bad smells, The carriage repository had also to be rebuilt, and that was built of metal and iron, as well as the hay barn. The whole work was done well and skillfully, and was cheap at the price I paid. The two items, to wit, the sums of $2,611.74 and of $130.53, appearing in my account as having been paid to Mr. Capitan, were paid for one-half the work done in repairing and constructing the stables; the total sum being $5,484.54; the other half being paid by me. The work I considered absolutely necessary so as to keep up the premises as a stable. The front part of the lot is only about thirty-eight feet, and this space is taken up with an entrance to the back yard of the lot, which is used as a stable, and a small portion as an entrance to the saloon, which is built running into the lot from the front of the building, so that the lot is very wide at the rear, with a very narrow frontage, and could not have been kept for any purpose except a stable. The premises had been occupied as a stable for years back, as far as I can remember, and it was a well-known stand as a stable, and could not have been rented for any other purpose. If I had not repaired the stable, and had left the old sheds and old, rotten lumber upon the premises, the saloon, restaurant, and lodging house could not have been kept rented, by reason of the bad condition of the premises. Since I repaired the stables they have been constantly rented, and have produced good rents. So has the saloon and the lodging house. The insurance on the premises has been reduced considerably; and the property is of far greater value by reason of the building of the stables as they are now than it was before. I could not have received any rent from the premises, except by doing the work that I did do."

The architect testified: "I was the architect, and supervised the building of the stables at No. 24 Aliso street for the executrix. I saw the stables as they stood there before I did the work. They were totally unfit to be occupied as a stable, both from a sanitary point of view, and from a financial point of view. I do not believe the stables, as they stood there before my work was done, should have been kept for stable purposes. The stalls were old and rotten. The roofs were tumbling down and were decayed. The floors were all of mud, and were in such a condition that a person could not retain his health and work on the premises. When it came to figuring how the stable should be rebuilt, we were confronted by the city ordinance of the city of Los Angeles, which would compel us to put on fireproof roofs and fireproof walls, and extend them up on three sides, to conform to the requirements of the city ordinance. I figured on the work, and put it down as low as possible. The work had to be done, or else the stables had to be abandoned. I consider the expenditure an absolutely necessary one, and very reasonable. The work is fully worth the money. The stable could not be built in any other manner than as we built it. I have heard the statement by the executrix here in court, and I consider it a fair, full, and true statement of the circumstances under which these stables were built. The work renders the place a pure, healthy, clean business place, and I consider that the value of the premises has been greatly added to by the work. The work was the erection and construction of an absolutely new building or structure, and not in any sense the repair of an old one."

Mr. Valdez testified: "I was occupying the premises for a number of years. I was there when the repairs were made. I considered that the stables could not have been repaired in any other manner than they were repaired. The work was absolutely necessary, and the price paid for repairing the stables is reasonable. I never saw the premises kept for any other purpose than for stable, saloon, lodging house, and restaurant. The front part of the lot is narrow, and the back part is very wide. Aliso street is not fit for anything else than stables, lodging houses, saloons, and restaurants. It is in that part of the city which is next to wholesale houses, and is not a residence portion of the city. The lodging houses are occupied by workingmen generally. Aliso street is a thoroughfare for people residing east of the city, out in the country, and these premises were occupied as a stable for a great many years. Before the repairs were made the property was absolutely in a totally unfit condition for use. The roofs were old and decayed, were tumbling down, and it was dangerous to leave horses at night in the stables whenever it was rainy, or when it was windy, for fear they would be killed. There was no place to keep carriages, for fear the water would pour on them and damage them. The floors were in a muddy condition, and a person would have to wade through the mud and water to get to the stalls and carriages, and carriages and horses could not be kept clean. I made several complaints to Mrs. Escallier that the premises had to be repaired, or I should move. The neighbors were complaining of the bad odors and smells arising from the premises. I was threatened with suits for maintaining nuisances. The stables were repaired from time to time, until in 1890 I made up my mind to leave the premises, or have them repaired. So I notified Mrs. Escallier."

Mr. Sabichi, the agent of the executrix for the buildings, testified: "I know the premises in question. I know when the repairs were made. I was her agent at the time. I consulted with a number of architects and builders as to the proper manner of repairing the stables. The repairs were absolutely needed, and, after consulting with them all, I thought that the bid put in by Mr. Capitan was the lowest and most reasonable. I have examined the work done, and I consider it very good, and the value of the property greatly added to by the work done."

It does not clearly appear from the record upon what ground the learned judge of the court below based his action in the premises, as no specific findings were made, and the only reason stated is the general one found in the order settling the account,—that the rejected items were not proper charges against the estate. From expressions in the brief of respondent, however, we infer that the items were disallowed because the court adopted the view now taken by the respondent, that the alterations made in the building in question were deemed to be more in the nature of the erection of a new building than the repair or improvement of an old one, and that such expenditure was not, for that reason, the subject-matter of a proper charge against the estate. It is perfectly true, as a general proposition, that executors and administrators are not required nor permitted to make permanent improvements upon the property of the estate in their charge, in the way of erecting new buildings or structures, and that expenditures made for such purposes will not be allowed; and the only question is whether that rule, in its strictness, should be applied to the facts of this case. We are constrained to think that it should not. If the case were one where the executrix had proceeded to erect buildings or other permanent improvements upon a vacant lot or unoccupied piece of land of the estate, it would, no doubt, fall strictly within the rule contended for. But such is not this case. Here the intention and purpose of the executrix were to improve and put in repair premises for many years devoted to a particular use, and from which the estate was deriving an income, for the purpose of keeping those premises from being abandoned, and the income being lost to the estate. The statute made it her duty to "keep in good, tenantable repair all houses, buildings and fixtures" upon the real estate belonging to the estate. Code Civ. Proc. § 1452. The repairs in this instance, it is true, involved practically a rebuilding of the structure, rather than a repair thereof, in its strict sense, and perhaps in a purely legal sense, and for other purposes, would be so considered. But the extensive character of the work done would seem to have been largely rendered necessary by the requirements of the city ordinance,—a matter over which the executrix had no control. No question is made of her perfect good faith in the premises, and it appears that by the repairs and improvements made the property has been largely enhanced in value, and has been bringing in a steady income since the completion of the alterations made, of all which the estate has had the benefit. The work appears to have been done only after taking the advice of competent builders as to the best method to pursue in making the repairs rendered necessary; and that the work was well done, and the cost a reasonable one for the character of such work, no question is made. Under these circumstances, and it appearing that the estate has received the full benefit of the expenditure, we think it would be very inequitable indeed to hold the executrix not entitled to a reimbursement. And it is according to the rules and principles of equity that the acts of an executor had in the administration of his trust are to be adjudged. In re Moore, 96 Cal. 528, 31 Pac. 584. In that case, quoting from In re Niles, 113 N. Y. 536, 21 N. E. 687, the court say: "This matter of the administration of assets of the estate is peculiarly within the cognizance of equity, and the surrogate's court, in adjusting the accounts of executors and administrators, is governed by principles of equity as well as law. Upson v. Badeau, 3 Brad. 15. In the exercise of the statutory powers conferred upon him to direct and control the conduct and settle the accounts of administrators and executors, the surrogate is not fettered, nor is he prevented by any rule of law from doing exact justice to the parties. He is supposed to administer justice in each case within his jurisdiction according as the equities of the case demand, within the confines only of statutory provisions." Judged by these principles, we think the work done in this instance should be held to be a repairing of the premises, within the requirements of the statute, the expenditure for which appellant should have been allowed in her account. It would have been better, perhaps, as it would in any case, had the executrix first procured the permission of the probate court to make the contemplated improvement, before proceeding thereto; but this is not an indispensable condition to the allowance of the demand in her account, where it appears that the expenditures were just and reasonable, and have been made in the interests of the estate. Estate of Moore, 88 Cal. 1, 25 Pac. 915. It follows that the order should be reversed, and the cause remanded, with directions to the court below to modify its order by allowing the rejected items. It is so ordered.

We concur: HARRISON, J.; GAROUTTE, J.

110 Cal. 457

WILLIAMS v. SOUTHERN PAC. R. CO.

(No. 15,986.)

(Supreme Court of California. Dec. 17, 1895.)

PARTNERSHIP DEMAND—ACTION BY PARTNER INDIVIDUALLY—DEFECT OF PARTIES—WAIVER—NONSUIT—OBJECTIONS WAIVED—HARMLESS ERROR—TRIAL—INSTRUCTIONS.

1. Code Civ. Proc. § 382, requires parties in interest to be joined as plaintiffs or defendants. Section 434 provides that defect of parties plaintiff, not apparent on the face of the complaint, is waived if not taken by answer, as required by section 433. *Held*, that when the objection of absence of partners as parties plaintiff, not apparent on the face of the complaint, in an action by a partner individually on a partnership demand, is waived by failure to make it by answer, a motion for nonsuit, on the ground that he could not maintain the action individually, is properly denied.

2. Failure to except to instructions, on the ground that they contradict an instruction already given, is a waiver of the objection.

3. To instruct on a point not in issue is error.

4. The objection that instructions contradict a previous instruction is not reversible error, where it appears that such previous instruction was erroneous, and in favor of appellant.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by C. B. Williams against the Southern Pacific Railroad Company for labor performed under contract. From a judgment for plaintiff, and an order denying a new trial, plaintiff appeals. Affirmed.

Maxwell, Dorsey & Soto and Maxwell McEnerney, for appellant. J. C. Bates, for respondent.

BRITT, C. Action to recover compensation for certain paving and other street work which plaintiff alleges was done by him at defendant's request. The answer consisted of denials of the material averments of the complaint. The trial was before a jury, and the verdict and judgment were in plaintiff's favor for the amount of the alleged value of the work.

1. It was disclosed in the course of the evidence for plaintiff at the trial that the contract for the work was made orally between one Haley, the agent of defendant, and the plaintiff, Williams; the latter acting, however, as was known to defendant, on behalf of a copartnership composed of Williams and two others, having no firm name, but carrying on business together, and sharing its profits. The work in question was done by the firm at the joint expense. Thereupon defendant moved the court for judgment of nonsuit, on the ground that plaintiff could not individually maintain the action upon a contract made with and performed by the partnership, which motion was denied.

There is no doubt that at common law all the members of a partnership, except dormant or merely nominal partners, must be joined as plaintiffs in an action of this character, and that, before the Code, a motion for nonsuit made as in this instance would have been sustained. Cushing v. Marston, 12 Cush. 431; Colly. Partn. §§ 649, 667; Story, Partn. § 241; Wilson v. Wallace, 8 Serg. & R. 53. In the case last cited, decided more than 70 years ago, the supreme court of Pennsylvania, while sustaining the precise objection made by defendant here, yet ventured this reflection: "Perhaps, weighing the conveniences and inconveniences, it would be more convenient that the parties should, after issue joined, proceed on the merits, than that the defendant should be allowed to nonsuit the plaintiff on a mere matter of form." There may be some room for debate whether the objection is matter of form only; but our legislation provides that, of the parties to an action, those who are united in interest must be joined as plaintiffs or defendants (Code Civ. Proc. § 382); that the defendant may demur to a complaint for defect of parties plaintiff (Id. § 430); that, if the defect does not appear on the face of the complaint, the objection may be taken by answer (Id. § 433); and that, if objection on that ground be not taken by demurrer or answer, the defendant is deemed to have waived the same (Id. § 434). These provisions are substantially the same as the statutes of New York pertaining to the same subject; and under them it seems to be settled there that in actions upon contract, as well as in tort, one partner may recover the whole amount due his firm, unless the defendant plead the nonjoinder. Among the reasons assigned is that the interest of a single partner extends to the entire demand; that, as payment to him would discharge defendant's liability to the firm, a recovery of the whole in the action by him has the like effect. Zabriskie v. Smith, 13 N. Y. 322; Patchin v. Peck, 38 N. Y. 39; Dickinson v. Vanderpoel, 2 Hun, 626. See, also, Sullivan v. Cement Co., 119 N. Y. 348, 23 N. E. 820; Chapin v. Clemitson, 1 Barb. 311. In the view of the Minnesota court, the change in this behalf introduced by the Code accords with the suggestion above quoted from 8 Serg. & R.; and it held that the ground here taken by appellant is untenable, unless the objection is specially pleaded. Choteau v. Davis, 32 Minn. 548, 21 N. W. 748. To similar effect is Dunn v. Railroad Co., 68 Mo. 268. And in England, since the judicature acts of 1873–75, and the orders promulgated under them, the failure to join all the partners as plaintiffs is no longer fatal to an action. "If all the members of a firm sue when one only ought to do so, or one only sues when all ought to do so, and the defendant can show that he is thereby prejudiced, he can apply to have the improper parties struck out, or the proper parties joined, as the case may be." Lindl. Partn. 278.

The question being not wholly clear on the cases in this state, it has seemed proper to refer thus briefly to the practice prevailing in other jurisdictions. In Andrews v. Hill Co., 7 Cal. 330, the plaintiff sued for his proportion of a joint debt, alleging that the residue had been paid to his co-contractor. The defendant pleaded in its answer that the debt sued on was due, if at all, to plaintiff and such other as partners, and denied the right of plaintiff to recover any portion thereof as his separate demand. The court held on a rehearing (affirming the judgment for plaintiff) that the objection, if any, appeared on the face of the plaintiff's complaint, and that, by failing to demur, the defendant had, in virtue of the statute, waived the point. There are, however, some later cases from which may be argued, as appellant has done, with considerable plausibility, that proof of a partnership claim only, under the issues here, presents an instance of failure of proof. McCord v. Seale, 56 Cal. 262; Weinreich v. Johnston, 78 Cal. 254, 20 Pac. 556; Webb v. Trescony, 76 Cal. 621, 18 Pac. 796. See, also, Baxter v. Hart, 104 Cal. 344, 37 Pac. 941.

But the question now raised was not involved in any of these cases; and, on the other hand, it has been often decided that defect of parties having a joint interest with plaintiff in the contract or other subject of the action must be pleaded. Trenor v. Railroad Co., 50 Cal. 222; Wendt v. Ross, 33 Cal. 650; Dunn v. Tozer, 10 Cal. 167. Thus, in Foley v. Bullard, 99 Cal. 516, 33 Pac. 1081, a judgment in favor of plaintiff enforcing the lien of a street assessment, he being one of two owners of the demand in suit, was sustained; the court saying that, if the defendants would rely upon the defect of parties plaintiff, the objection should have been presented in their answer. In Rutenberg v. Main, 47 Cal. 221, the court said that the statutory provision (of the same class as that we are considering) requiring an objection for misjoinder of defendants to be pleaded "to the extent necessary to give it effect controls the principle that the proofs and allegations must correspond." The object of the statute is to bring the parties to speedy issue on the merits; and we are of opinion, following the incontestable trend of authority, that the absence as parties of some of the partners from a complaint by one or more of them on a partnership demand does not, speaking strictly, affect the merits, and, in order to be considered, must be pleaded by the defendant. The motion for nonsuit was therefore properly denied.

2. At the close of the evidence, the court instructed the jury on the request of the defendant, that if they found that plaintiff made the alleged contract on behalf of his firm, and that the firm did the work at the expense of the partnership, pursuant to such contract, and none other, then they should find for defendant. The court then, of its own motion, gave the jury other instructions, which, defendant contends, were contradictory of that above stated, and nullified its effect. We agree with this contention, but defendant took no objection or exception to such additional instructions, and must be deemed to have consented to the presentation of the case to the jury in this manner. Wilkinson v. Parrott, 32 Cal. 102. Moreover, the first instruction, being upon a point not in issue, was erroneous; and, being in favor of appellant, the conflict with other instructions is no ground for reversal. Dennison v. Chapman, 105 Cal. 448, 39 Pac. 61. The judgment and order should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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110 Cal. 455

BAKER et al. v. SOUTHERN CALIFORNIA RY. CO. (L. A. 61.)

(Supreme Court of California. Dec. 17, 1895.)

SUPREME COURT—JURISDICTION.

The supreme court, having appellate jurisdiction "in all cases * * * which involve the title or possession of real estate," has jurisdiction of defendant's appeal in an action under Civ. Code, § 485, declaring a railroad company, in case it does not fence its right of way, liable for cattle killed by its train on its road, which passed through or along the property of the owner thereof,—plaintiff having to show ownership, or at least possession, of the adjoining land, and issue thereon being raised by the pleadings; and it is immaterial that defendant, by his appeal, raises no question as to such ownership or possession.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Amelia B. Baker and others against the Southern California Railway Company. Plaintiffs had judgment, and defendant appealed. Plaintiffs move to dismiss appeal. Denied.

Wm. J. Hunsaker, for appellant. Withington & Carter, for respondents.

GAROUTTE, J. This is a motion to dismiss an appeal upon the ground of lack of jurisdiction in this court to entertain it. Section 485 of the Civil Code provides: "Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owner thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same." Plaintiff brought an action in the justice's court, under the provisions of this section of the Civil Code, to recover for the value of two certain domestic animals killed by the cars and engine of defendant, said animals being of the value of $130. It will be noticed that by this section it is contemplated that the plaintiff must be the owner of the land through which the line of road passes, and an allegation of ownership was made in the complaint in the present case. Defendant filed a verified answer, and, among other things, put in direct issue the allegation of the complaint as to the ownership of the land, and demanded that the case be certified to the superior court for trial, as one involving the title to real estate. The case was thereupon certified to the superior court, where judgment went for plaintiffs, and the appeal was taken which we now have under consideration.

We think the appeal will lie. This court has appellate jurisdiction "in all cases at law which involve the title or possession of real estate" (Code Civ. Proc. § 52, subd. 2); and in this case the title, or at least the possession, of a certain tract of land was involved. It was a material fact in the case, and the establishment of that fact was a condition precedent to a recovery. In cases like the present one, jurisdiction of the court is determined by the nature of the evidence necessary to support the national allegations of the complaint. And the fact that defendant, by his appeal to this court from the judgment, or from the order denying a motion for a new trial, has raised no question as to those matters which give jurisdiction to this court, is not material as shedding light upon the disposition of the motion we are now considering. We indorse the views of the learned commissioner, as expressed in the case of Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196; and in consonance with the principle there declared, we conclude the motion to dismiss the appeal must be denied, and it is so ordered.

We concur: HARRISON, J.; VAN FLEET, J.

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110 Cal. 590

RANDOL v. SCOTT et al. (No. 15,910.)[1]

(Supreme Court of California. Dec. 26, 1895.)

FORFEITURE OF LEASE—ASSIGNMENT OF LESSEE'S HALF INTEREST—BREACH OF COVENANT.

1. A covenant by two lessees not to assign the lease, or permit an assignment thereof to be made, by bankruptcy or otherwise, for breach of which the lessor retained the right of reentry, was not broken by an assignment of the undivided half interest of one of said lessees to his assignee in insolvency.

2. Though the lessees of a fruit orchard covenanted to keep the demised premises free from undergrowth, except that they might raise squash and pumpkins between the trees, the lease will not be forfeited because the lessees planted corn and beans and nursery trees over a small portion of the land, particularly as the lessor, having the right to view the land, made no objection to the manner in which it was planted.

Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Christiana T. Randol against Eugene B. Scott and others, to recover possession of leased land. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Pringle & Boyd, for appellant. Archer & Bowden and W. C. Kennedy, for respondents.

McFARLAND, J. A demurrer to the amended complaint was sustained, plaintiff declined to further amend, and judgment was rendered for defendants. Plaintiff appeals from the judgment. The action is to recover possession of land leased by the plaintiff, upon the ground that certain covenants of the lessees have not been kept,—substantially a bill to declare the forfeiture of a lease. The provision for the forfeiture is that "if default shall be made in any of the covenants herein contained, then it shall be lawful for the lessor to re-enter the said premises." The term of the lease was 10 years from the 1st day of October, 1890. The lessees were Eugene B. Scott and W. W. Cozzens. The land leased was 419 acres of uncultivated land. By the terms of the lease the lessees were to lay out and divide 400 acres of this land into 8 convenient parts, as nearly equal as may be, "having regard to separate facility of access, and, subject to the approval of the lessor," they were to "thoroughly prepare" this 400 acres for planting, and to plant the whole thereof with trees of French prunes and peaches of certain specified varieties, and to complete the planting in the winter of the year 1890. They were to properly tend, cultivate, prune, and care for these trees during the whole term of the lease, and to protect them from disease and insects by the most improved methods; and they were to gather the fruit (of course, after the trees should have commenced to bear) each year in boxes and deliver one-third thereof, as rent, to plaintiff at a place in San José to be selected by her agent. There are other covenants by the lessees not necessary to be here noticed, because the complaint admits that all the covenants were fully complied with except the two hereinafter mentioned. One of the covenants alleged to have been broken is as follows: "And the said lessees do hereby covenant * * * not to assign this lease, or permit any assignment thereof to be made, by bankruptcy or otherwise, without the written consent of the lessor." And the alleged breach of this covenant is based upon the alleged facts that in September, 1891, said Cozzens filed his petition in insolvency in the proper court, and included in the schedule of his property "an undivided one-half interest" in said lease; that he was subsequently adjudged by said court to be an insolvent debtor; that in October, 1891, one Burkholder duly became his assignee; that in due course all of said Cozzens' property was assigned to said assignee; that in March, 1892, said assignee was empowered by said court to sell all the property of said insolvent; that he threatens to sell the same, including the said half interest in said lease; and that said Scott and said Burkholder are in possession of said demised premises, and withheld the same from plaintiff.

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[1] Rehearing denied.

These averments do not show an assignment of the lease by the lessees within the meaning of said covenant; waiving other points made by respondents in support of the judgment,—as, for instance, that, under the strict construction applicable to forfeitures, "bankruptcy" does not include insolvency; that the assignment to the assignee in insolvency was by operation of law, and was not the act of Cozzens; that Scott did not "permit" the bankruptcy; and that the covenant is against public policy, and in express contravention of the insolvent law. Scott and Cozzens were tenants in common of the land leased. This is admitted and declared by appellant. Neither could, therefore, dispose of the interest of the other, nor could either prevent the other from disposing of his interest; and appellant must be considered as having dealt with the lessees as tenants in common, and with knowledge of their rights, powers, and disabilities as such tenants. When, therefore, under these circumstances, it was covenanted merely that the "lessees" should not assign "the lease,"—the lease, as an entirety,—the meaning of the parties is presumed to be that the lease should not be assigned in the only way in which it could have been assigned, namely, by the joint act of the lessees. The lease, therefore, was not assigned within the meaning of the contract. If the proceedings in insolvency worked a valid assignment of anything, it was only an interest in the lease; and that Scott could not have prevented. The covenant does not provide that the lease should be forfeited upon the assignment by one of the tenants in common of his interest. The understanding of the parties as to the covenant in question is illustrated by another clause, which provides that the lessor may cancel the lease "in case of the death of the lessees,"—not of one of the lessees. A forfeiture can be enforced only when there is "such a breach shown as it was the clear and manifest intention of the parties to provide for." Tayl. Landl. & Ten. (8th Ed.) § 489, and cases cited. In all the cases cited by appellant the covenant was by a single lessee, holding in severalty. In Varley v. Coppard, L. R. 7 C. P. 505, the original lessee had assigned to copartners. Of course, it is unnecessary to cite authorities to the points that covenants in restraint of alienation are barely tolerated, and that contracts looking to penalties and forfeitures must be strictly construed; but a few instances of particular expressions used in statements of the rule, and cases to which it has been applied, may not be unprofitable. Our own Code provides that "a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." Civ. Code, § 1442. As to the power of re-entry for the forfeiture of a lease, it was said by Justice Miller: "It has always been considered that it was necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised." Elevator Case, 17 Fed. 201. "Covenants of this description are construed by courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation." Tayl. Landl. & Ten. § 403. In Hasbrook v. Paddock, 1 Barb, 635, it was held that a lease of a lot of state land (under a statute) which provided for a forfeiture if the lot should be used for purposes other than the manufacture of salt was not forfeited by the use of a part of the lot for other purposes; and the court after referring to the rule of strict construction against penalties and forfeitures, said: "Until the legislature has explicitly declared their intention to forfeit parts of lots, it is no part of the duty of courts, in the construction of a penal statute, to extend the meaning of words and phrases which the law makers have chosen to employ." In Jackson v. Silvernail, 15 Johns. 278, the covenant of the lessees was not "to sell and dispose of, or assign their estate in the demised premises," and the lessees "demised, leased, and to farm let" a part of the premises for 20 years —being less than the full term; and the court held that this did not give a right of re-entry, saying that "the plaintiff's right is stricti juris, and to enable him to recover on the ground of forfeiture he must bring his case within the penalty on the most literal and rigid interpretation of the covenant," and that the covenant meant an assigning of the whole estate and not a mere subletting. It has been held, also, that a covenant "not to let or underlet the whole or any part" of the demised premises does not preclude an assignment of the whole interest. Lynde v. Hough, 27 Barb. 415. These instances (extreme perhaps) are noticed merely to show the tenacity with which courts hold to the rule that forfeitures of estates and restraints upon alienations should not be enforced, except when the terms of the conditions are so plain as to be beyond the province of construction. And an application of these principles to the case at bar clearly precludes the forfeiture here attempted. It is difficult to imagine a case where the enforcement of a forfeiture would be more unjust. This action was not commenced until the fourth year after the execution of the lease, and three years after the insolvency of Cozzens; and it is quite apparent that the lessees had then performed the burdensome part of their contract without having received any substantial remuneration. They created a valuable property for appellant, by preparing the soil and planting and taking care of the trees, until they were about in a condition to bear fruit, and return something to them for their outlay; and now the appellant proposes to take possession of the land thus improved, and appropriate, without consideration, the results of their money and labor.

2. A mere statement of the second ground for a forfeiture is sufficient to show its insufficiency. The covenant for the violation of which the forfeiture is sought in the second count of the complaint is as follows: "The land to be continuously cultivated in a good and husbandlike manner, and kept clear of other growth, except that the lessees may raise squash or pumpkins between the peach trees during the first two years of their growth, and between the prune trees during the first three years of their growth." And the averment upon which forfeiture is sought is that the cultivation was not in a good and husbandlike manner, "in this: that the defendants have planted and now maintain 4 rows of corn between every 2 rows of the said fruit trees over a space of about 12 acres, and 4 rows of beans between every 2 rows of the said fruit trees over a space of about 20 acres, and a nursery of young trees between the rows of the fruit trees in the said land described over a space of 2 acres." Whatever other remedies appellant may have had, the planting of corn, beans, and nursery trees over a very small part of the 400 acres, instead of squash and pumpkins over the whole of it, is entirely too trivial a matter, under the principles above stated, to warrant a forfeiture, particularly as the lessor had the right, under the terms of the lease, to "at any and all times enter upon and inspect the demised premises, in order to be informed of the condition of the land and trees, and of the faithful performance by the lessees of their covenants aforesaid," and made no objection to the corn and beans. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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110 Cal. 467

FREESE v. PENNIE. (No. 15,990.)

(Supreme Court of California. Dec. 17, 1895.)

ACCOUNTING OF ADMINISTRATOR—ATTORNEY'S FEES —ALLOWANCE—REVIEW.

On suit by an administrator against the executor of a former administrator for an accounting, an allowance of $80,000 as a credit on the account for money paid to an attorney for his services in the administration will not be revised, where it appears that all the attorneys summoned as expert witnesses placed their value above that sum, and the only heir, by her counsel, in open court, consented to the allowance of a sum not greater than that amount.

Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by A. C. Freese, administrator, against James C. Pennie, Jr., executor, for an accounting of his testator's administration of the estate of plaintiff's intestate. From an order allowing a credit of $80,000 for attorney's fees paid out by defendant's testator for plaintiff's intestate during his administration, plaintiff appeals. Affirmed.

W. H. H. Hart and J. D. Sullivan, for appellant. Horace G. Platt and Naphtaly, Freidenrich & Ackerman, for respondent.

GAROUTTE, J. James C. Pennie, having acted as administrator de bonis non of the estate of Thomas H. Blythe, deceased, from May, 1889, until his death, in December, 1893, his executor, James C. Pennie, Jr., the defendant herein, was cited in this proceeding to account for his testator's administration of the estate of Blythe. In answer to this citation, he rendered an account of such administration, in which he claimed a credit for his testator for fees paid and to be paid to Messrs. Naphtaly, Freidenrich & Ackerman, for legal services rendered in the matter of the estate of Blythe during the term of his testator's administration thereof. The only question as to the credit claimed related to the amount thereof, and that question was submitted to the court, on evidence of the services rendered by said legal firm, including expert testimony as to the value of such services. The court allowed and ordered paid from the estate of Blythe the sum of $80,000, and this appeal is from that order.

There was no conflict of evidence, either as to the amount of the services or the value thereof. The disinterested expert witnesses as to the value of the services were all eminent attorneys at law, practicing in the city of San Francisco. The average of their estimates of the value of the services rendered by the aforesaid legal firm was about $90,000, and the estimate of each of them was above $80,000. At the close of defendant's evidence on this issue, Mr. W. H. H. Hart, attorney for Florence Blythe Hinckley, sole heir of Thomas H. Blythe, and Mr. Horace G. Platt, attorney for defendant, addressed the court as follows: "Mr. Hart: I have had a conversation with Messrs. Naphtaly, Freidenrich & Ackerman with reference to the matter of their compensation, and they have stated to me that they will not make a claim for more than $80,000. Out of that sum they are to pay Mr. John A. Wright for services rendered by him during the Pennie administration, and also deduct from said sum the amount they have already received on account, and with that understanding, viz. that they are not to make any greater claim than $80,000 in the aggregate, we do not care to submit any testimony contrary thereto." Mr. Horace G. Platt, attorney for defendant, stated: "That will be satisfactory to us." Mr. J. D. Sullivan, attorney for the plaintiff, was present at the time these statements were made, but it does not appear that he said anything relating to the subject of them, or that he objected to Mr. Hart's proposal.

In their brief, counsel for appellant say: "If expert testimony is binding upon this court in cases of this character, then we are compelled to admit that the allowance of $80,000 to said attorneys for their services is not excessive." But plaintiff's counsel oppose the soundness of that principle, and upon their view and construction of the opinion of the court in the case of In re Dorland, 63 Cal. 281, contend that this court, regardless of the finding of the trial court, should review the evidence as to the value of the services rendered, and then compare its own judgment of their value with that of the expert witnesses, and thereupon make such allowance as may be considered just. We think that case does not go to the lengths here insisted upon, and the principle there declared does not apply to this court as an appellate court. The true rule is the one there announced, and that is, the trial court is not bound to fix the amount of the fee in accordance with the opinion of expert gentlemen, learned in the law. While such evidence is proper, and always admissible by way of assisting the court in arriving at a conclusion, it is not at all conclusive upon the trial court; and it is for that court to say, upon a consideration of all the evidence, taken in connection with its own best judgment, what would be a fair and just allowance for the services rendered. Attorneys are inclined to place a very high estimate upon the value of their services when rendered in important litigation, and also inclined to look with kindly eyes and sympathetic feelings upon the efforts of brother attorneys when engaged in establishing before the court the value of services performed in large estates, fortunate enough to possess well-filled coffers. Under these conditions, when upon the witness stand as experts, they entertain most liberal views as to what should be the amount of a brother attorney's allowance, and hold large ideas as to the importance of the litigation in which he has been engaged. It is well, and it is the law, that the court should temper this kind of evidence with its own calm judgment, based upon the amount and kind of labor performed, and to thereupon make its decree. When a court has done this, this court, as an appellate court, only has the right to interfere with its judgment when a plain and palpable abuse of its discretion (for it has a large discretion in such matters) has occurred.

While the fee allowed in the present case is a very large one, still we think the judgment must stand. It appears that the allowance made is less than the estimate of any witness who testified, and such fact indicates that the trial court did not consider itself absolutely bound by the expert testimony presented. Under these circumstances, we cannot say that the allowance is clearly and palpably too great. In addition, it appears that the sole heir to the estate, by her counsel, in open court, at the trial, consented to an allowance of this amount. Practically and substantially, she is the only party interested in this litigation, for the amount of the fee must come from her estate. The administrator is here as an appellant, testing the validity of this decree, presumptively for his own security as a disbursing agent only.

For the foregoing reasons, the judgment is affirmed.

I concur: VAN FLEET, J.

TEMPLE, J. I concur in the judgment on the ground last discussed by Mr. Justice GAROUTTE. I do not think the learned judge of the probate court could have used his own judgment as to the sum to be allowed; for there is nothing in the record which would justify, as a matter of discretion, the allowance of so large a sum. The court properly allowed the sum agreed to by the party who must pay it. Courts have no right to be liberal with the money of other people, and should be careful that fees allowed for trust estates are no larger than would be paid for like services by those who are competent to contract for themselves.

110 Cal. 480

McKUNE et al. v. SANTA CLARA VALLEY MILL & LUMBER CO. (No. 15,964.)[1]

(Supreme Court of California. Dec. 17, 1895.)

OBSTRUCTING STREET—INJURY TO TEAM—NONCOMPLIANCE WITH ORDINANCE—CONTRIBUTORY NEGLIGENCE—PRESUMPTIONS—MISJOINDER OF ACTIONS—WAIVER.

1. One maintaining lumber piles on a street without authority is liable to one injured because thereof without fault of his own.

2. Lumber piles projecting into a street prevented a team advancing on the proper side of the street, and shut out the view of anything beyond it. Considerable noise was also made by a neighboring sawmill. The team being driven around the pile was brought close to a railroad track, and then an approaching train was seen. The team could not cross the track in safety, and was prevented by lumber piles from moving in any other direction. The horses became frightened and backed into the train. *Held*, that the court could not say, as matter of law, that the driver was guilty of contributory negligence, and properly left it to the jury.

3. Possession and ownership of lumber piled in a street being shown, it will not be presumed that its location was without the knowledge or contrary to the wishes of the owner.

4. Where the piling of lumber by defendant in a street is alleged to have been the cause of plaintiff's injury, it is not error to charge that failure to comply with an ordinance is negligence, and that if defendant was obstructing the street in the manner alleged, in violation of an ordinance, it was negligence.

5. Joinder of action for injury to a wife, to which the wife is a necessary party, with action for consequential damages to husband, to which the wife is not even a proper party, is waived by failure to demur.

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by B. F. McKune, administrator, and Elizabeth Jones, against the Santa Clara Valley Mill & Lumber Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

Frs. E. Spencer and D. W. Burchard, for appellant. S. G. Tompkins, for respondents.

HENSHAW, J. Appeals from the judgment, and from the order denying defendant a new trial. Samuel Jones and Elizabeth Jones, his wife, prosecuted this action, alleging that defendant piled and maintained lumber upon a public street of the city of San José, contrary to and in direct and continual violation of an ordinance of the city of San José, and in willful neglect and disregard of the rights, safety, and convenience of persons traveling along the highway. On May 23d, while these piles of lumber were so maintained, plaintiff Elizabeth Jones was being conveyed in a buggy driven by one Aurelia Jones along said street. Reaching the first pile of lumber, the driver was compelled to turn around it, and was thus brought close to a railroad track, and then, for the first time, became aware of the approach of a train. Being unable to turn out, or to move away, by reason of the lumber piles, the horse became frightened, and backed the buggy into the passing cars, throwing out plaintiff Elizabeth Jones, and seriously injuring her, to the damage of plaintiffs in the sum of $15,000. "Plaintiffs [the complaint proceeds] have been compelled to expend the further sum of $600 for medical attendance upon plaintiff Elizabeth Jones' said injuries, and the further sum of $300 for the attendance of a nurse." Defendant's motion for a nonsuit was denied, and the cause submitted to the jury for decision upon the evidence of plaintiffs alone.

The motion for nonsuit was properly denied. It is true that when the evidence is unconflicting the question of contributory negligence is often one of law for the court rather than one of fact for the jury. But if the court is not satisfied that the evidence, as matter of law, establishes the contributory negligence of the plaintiff, or if it believes that, under the evidence touching the conduct of plaintiff, reasonable minds might differ upon the question whether or not he was negligent, then the question at once returns to the domain of fact, and the duty of the court is to allow the jury to solve it as a fact. The evidence disclosed that the occupants of the buggy were driving upon the proper side of the roadway. They saw a pile of lumber in front of them which projected into the street. They could have driven, and did drive, with safety around this first pile, but there was a succession of piles beyond, of which they were in ignorance. The pile shut out their view. The mill made considerable noise. Only upon driving around the first pile did they see the other piles, and for the first time noticed the approaching train. The engineer then, too, first observed them. They were thus caught in a position where they could neither advance nor retreat, nor cross the track with safety, and where they could not move to the roadside away from the approaching train, because of the obstructing lumber. They tried to get into a passage or driveway between the lumber piles, but could not succeed. As the engineer testified, they were shut in a box. Under these facts, which are no more strongly stated than the evidence warrants, the question of contributory negligence was properly left to the jury.

2. That the defendant was guilty of negligence admits of no doubt. One who maintains any unauthorized obstruction upon a highway by means of which another, through no fault of his own, is injured in person or property, is responsible in damages therefor. It is claimed, however, that the evidence did not show that the defendant owned or maintained the lumber piles. But it did show that defendant operated a planing mill, and that the lumber was piled upon its premises projecting into the street. "It was from the front of the mill north along the outside of the sidewalk." It was in evidence, also, that defendant owned this lumber, and immediately after the accident commenced to remove it. This, in the absence of any counter showing, was clearly sufficient. For, the possession and ownership of the property being thus established, it will not be presumed that its location was without the knowledge or contrary to the

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[1] Rehearing denied.

wishes of the owner. For these reasons the instructions bearing upon this proposition were properly refused.

3. An ordinance of the city of San José was introduced, declaring it a misdemeanor for any person to place, erect, or maintain an obstruction upon any of the streets of the city. The court instructed the jury as follows: "The failure to comply with a municipal ordinance, or to perform a duty which is imposed by a municipal ordinance, is negligence in itself. Therefore, if you find that the defendant, at the time of the alleged accident, was obstructing the said Fourth street in the manner alleged, in violation of an ordinance of the city of San José, that in itself establishes negligence upon the part of the defendant, and it is not necessary that the plaintiffs make any further showing of negligence in defendant in order to recover." Appellant criticises this instruction, using the language of the supreme court of Oregon: "To say that the mere fact of the violation of the ordinance is conclusive evidence of negligence, is negligence per se, without regard to the conduct of the plaintiff, or the duty imposed upon him under the circumstances, would be to relieve him of the consequences of his acts, when they contribute to the injury, and result in an unjust liability upon the defendant." Beck v. Railway Co., 34 Pac. 755. That the failure of any person to perform a duty imposed upon him by statute or legal authority is sufficient evidence of negligence has been repeatedly declared by this court. Siemers v. Eisen, 54 Cal. 418; Driscoll v. Railway Co., 97 Cal. 553, 32 Pac. 591. But the principle has this very obvious limitation: The act or omission must have contributed directly to the injury, or, however improper or illegal it may have been in the abstract, no action for damages can be founded upon it. The failure of a locomotive engineer to sound his bell or whistle before crossing a highway would be essentially negligent, but a totally deaf traveler upon the highway could in no way have suffered from the omission, and as to him it would not be negligence. So, too, the requirement of a night light to warn the public of a temporary obstruction upon a street would not advantage a man absolutely blind, and the failure to maintain it would not, as to him, be negligence. But with an exceptional case, such as the foregoing, the court was not dealing, and, under the facts presented, we do not think the objection that the instruction eliminated from consideration the "conduct of the plaintiff, or the duty imposed upon him," or, in other words, the question of his contributory negligence, is well taken. For, in the first place, the instruction declares the defendant to be negligent only if obstructing the street "in the manner alleged," which manner, as alleged, directly contributed to the accident. In the second place, the instruction, which is one of a series, cannot fairly be torn from its context for criticism, and the instructions, as a whole, show that the jury was fully instructed upon the doctrine of contributory negligence; the court saying, among other things: "An obstruction cannot be complained of by a party who fails to exercise ordinary care and prudence in avoiding it."

4. The court admitted evidence, over defendant's objection, of the husband's necessary disbursements for physicians and nurses in attending his wife, and, likewise, instructed the jury upon the subject. This, it is claimed, was error. The action was, primarily, one for the recovery of damages for injuries done to the wife; and though the right of action and the damages recovered are community property, this form of action is an exception to the rule that the husband has control of the community property, and may sue or be sued alone where it is concerned. The wife is a necessary party. Tell v. Gibson, 66 Cal. 247, 5 Pac 223; McFadden v. Railway Co., 87 Cal. 464, 25 Pac. 681. The husband has a separate action for consequential damages to him for his wife's injuries, in which are included loss of service and expenses incurred looking to her recovery. In this action the wife is neither a necessary nor a proper party. The two causes of action cannot, with us, be joined in one suit, though the practice is elsewhere permissible. Add. Torts, 952. The complaint was, therefore, open to demurrer for improper joinder of causes of action. Code Civ. Proc. § 430, subd. 5. The defendant failed to avail himself of his right to demur, and made no objection to the complaint until evidence was sought to be introduced in support of these averments. His objection, then for the first time made, came too late. Having failed to demur, he is conclusively deemed to have waived the objection. Id. § 434. The instructions, the refusal to give which is complained of, were either properly refused or were covered by those given of the court's own motion. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

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110 Cal. 563

In re DELANEY'S ESTATE. (S. F. 147.)

(Supreme Court of California. Dec. 23, 1895.)

EXECUTORS AND ADMINISTRATORS—SETTLEMENT OF ACCOUNT—COMMISSIONS—APPELLATE COURTS—JURISDICTION—APPEAL—NOTICE—PARTIES—DECISION.

1. Under Code Civ. Proc. § 1618, providing for allowance to executors of commissions on the amount of the estate "accounted for," an executor should not be allowed commissions for the care of land in the possession of decedent at his death, but for the recovery of which a judgment has been rendered in favor of a third person, though at the time of the settlement of the executor's account an appeal is pending from such judgment.

2. Under the constitution, giving the supreme court appellate jurisdiction on all such probate matters as may be provided by law, and the Code of Civil Procedure, authorizing appeals from an order "settling the account of an executor," such order is appealable, irrespective of the amount involved.

3. Though the order of distribution and the order settling the account of the executor are included in the same instrument, under one signature of the judge, yet each order is appealable, and therefore, on appeal by an heir from the order settling the account, service of notice on a distributee is unnecessary.

4. On reversal of the order settling the account of an administrator, an order of distribution must also be reversed.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Appeal, in the matter of the estate of Mary Delaney, from an order of distribution and from an order settling the account of the executrix. Reversed.

F. J. Castlehun, for appellant. Sawyer & Burnett and Nicholas Bowden, for respondent.

HARRISON, J. The executor of the last will of Mary Delaney, deceased, presented his final account to the court for settlement and allowance, and at the same time petitioned for the distribution of the estate. In his account he included a claim for commissions upon two parcels of land which had been included in the inventory of the estate, but which were at that time involved in litigation wherein a judgment was subsequently rendered adverse to the estate. One of the heirs contested this item of the account, but her objections were overruled, and the court settled the account, allowing the executor commissions upon this land, and thereupon made a decree of final distribution. This appeal is taken by her from the order settling the account, and also from the decree of distribution. These two parcels of land form a portion of Lafayette Square, in the city and county of San Francisco, and were in the possession of the deceased at the time of her death, and were afterwards taken into possession by the executor, and cared for by him during his administration of the estate. He was allowed for all the expense incurred in thus caring for the property, and was also allowed commissions upon the income received therefrom. It was shown at the hearing that the land was a portion of that included in the action of City and County of San Francisco v. Mooney, for the recovery of Lafayette Square, and that at the time the court made the order appealed from judgment had been rendered therein in favor of the city and county, and that an appeal therefrom was then pending. This judgment was subsequently affirmed by this court. 106 Cal. 586, 39 Pac. 852. This land had been originally appraised at $39,200, and when the account came up for settlement, and the appellant objected to any allowance of commissions upon its valuation, the court ordered a reappraisement, and upon such reappraisement the land was valued at $109,200, "upon condition that the estate has title to the same." The record does not show at what time this reappraisement was made, or that any further proceedings were had upon the final account until after the filing of the supplemental account. The final account was filed March 30, 1892, and the objections thereto were filed in April, 1892. The supplemental account was filed in November, 1894, and when these accounts were again brought on for settlement the appellant renewed her objections to the allowance of commissions upon this amount, but her objections were overruled.

We are of the opinion that the court erred in allowing the executor commissions upon the value of these two parcels of land. They were a portion of a public square in the city and county of San Francisco, and delineated as such upon the official maps of said city and county, and presumptively were not susceptible of private ownership. The litigation over this square was a matter of public notoriety, and at the time the order appealed from was made it had been judicially determined that the city was entitled to its possession. It is not shown by the record upon what basis the allowance of commissions upon this land was fixed by the court, the order settling the account in this respect being: "Said executor should be allowed the sum of $1,487.50, as commissions on the estate accounted for by him in said final account, and as compensation for the care of the property belonging to and claimed by said estate." The commission which the statute authorizes to be allowed an executor is the compensation fixed by law for his care of the property belonging to the estate, and the court is not authorized to make any additional allowance, unless he shall have petitioned for an allowance therefor, and shown that he has rendered some extraordinary service. In re Moore's Estate, 96 Cal. 522, 31 Pac. 584. As there is no claim by the executor in the present case that he had rendered any extraordinary service, the order of the court, in awarding him the above amount of commissions, must be construed to be as his compensation for caring for the property belonging to the estate; and, to the extent that it is in excess of the statutory percentage upon the estate that he has accounted for, it is erroneous. The executor is to be allowed commissions upon the amount of the estate "accounted for" by him (Code Civ. Proc. § 1618), and in Re Ricaud's Estate, 70 Cal. 69, 11 Pac. 471, this phrase was construed as entitling him to commissions upon only such property as belonged to the estate, and for which he would be chargeable in his account. In that case the executors took possession of certain real estate which was held by the testator at the time of his death, and defended an action which was then pending for its recovery, and, when judgment had been rendered against them for its possession, surrendered the same. To their claim for commissions upon the appraised value of the land the court said: "The land itself did not belong to the estate. It was, therefore, no part of its assets, and its value did not form any part of the value of the estate in the possession of the executors for which they were chargeable. Therefore, as it was not legally included in the value of the estate taken into their possession and for which they had to account, they were not entitled to commissions upon it." The reasoning of the court in that case is fully applicable to the present. The only interest of the estate in the land was that of possession, and the judgment of the superior court that the title to the land was in the city and county should have been recognized by the court as a reason for disallowing any commissions thereon. The effect of the judgment was to determine that the estate had no title to the land, and, consequently, it did not constitute a portion of the estate to be accounted for by the executor. Although the judgment had been appealed from, there was no presumption that it would be reversed, and, if it should be affirmed, it could be enforced at any time. It was immaterial that the executor had not surrendered possession of the land. If he had surrendered it upon the entry of judgment, it would not be contended that he should have been allowed commissions upon its value, and, whether he surrenders it before or after the settlement of his account, it is equally evident that it does not constitute a portion of the estate accounted for by him. The fact that the property was in litigation might have been a reason for the court, in the exercise of its discretion, to delay a settlement of the account until the litigation should be determined, but, if the executor would have his account settled at that time and under those circumstances, the court was not authorized to allow him commissions upon the valuation of property which had been determined not to belong to the estate.

The respondent urges that, inasmuch as the appellant's share of these commissions, if they had been disallowed, is less than $300, the appeal cannot be entertained. The constitution, however, gives to this court appellate jurisdiction "in all such probate matters as may be provided by law," and the legislature has authorized an appeal from an order "settling an account of an executor," irrespective of the amount involved. Code Civ. Proc. § 963.

A motion was made by the respondent to dismiss the appeal for failure to serve the notice of appeal upon one of the distributees named in the decree of distribution. This appeal is, however, taken from the order settling the account, as well as from the decree of distribution. Each of these orders is appealable, and, although both were made at the same time, and are included in the same paper, under one signature of the judge, the right of appeal from either is not affected thereby. Upon an appeal from an order settling an account, the executor is the only adverse party upon whom it is necessary to serve the notice of appeal. As the reversal of the order settling the account necessarily vacates the decree of distribution, it is unnecessary to determine whether the appeal from that decree has been properly taken. The orders appealed from are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

110 Cal. 513

HOWLAND et al. v. OAKLAND CONSOL. ST. RY. CO. et al. (No. 15,978.)

(Supreme Court of California. Dec. 18, 1895.)

STREET RAILROADS—ACTION FOR INJURY TO PASSENGER—EVIDENCE—EXPERT TESTIMONY—EXCESSIVE DAMAGES—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. In an action against two street-railway companies for injuries due to a collision between their cars, where there was direct evidence of negligence on the part of the company against which judgment was rendered, it was proper to deny a motion for new trial based on newly-discovered evidence bearing on the relative negligence of the two companies.

2. Where an expert has described the personal injuries received by plaintiff, and given his opinion as to the cause, a question subsequently put to another expert, who examined plaintiff and heard the testimony of the first expert, as to his opinion of the cause of the conditions he observed, "assuming the statement" made by the first expert to be true, was not objectionable as asking one expert to base his opinion on the opinion of another expert.

3. An objection to a question put to an expert, that it was irrelevant, immaterial, and incompetent, was too general to allow consideration of whether the question was not objectionable as asking one expert to base his opinion on the opinion of another expert.

4. An objection that a question to an expert was not a proper hypothetical question would not permit the consideration of whether it was proper in framing the question to refer witness, as a basis for his opinion, generally, to facts testified to by another expert immediately before.

5. Whether an expert has qualified himself to answer a hypothetical question is within the discretion of the trial court.

6. In an action for injuries due to a collision of electric street cars, the manner of running the cars, their speed, and the facility with which they can be stopped, are proper subjects of expert testimony.

7. In an action against two street-railroad companies for injuries to a passenger on the car of one, received in a collision at a crossing, evidence of a custom between street-railroad companies of giving the older company the right of way at crossings was admissible to show which defendant was guilty of the greater negligence.

8. In an action by a passenger of a street-railway company for injuries, where it appeared that plaintiff was pregnant at the time of the accident, and that a miscarriage resulted, and that her eyesight and the action of her heart were impaired, a verdict of $10,000 was not excessive.

Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Action by Clara Howland and another against the Oakland Consolidated Street-Railway Company and the Consolidated Piedmont Cable Company for personal injuries. From a judgment against the defendant Oakland Consolidated Street-Railway Company, and an order denying a new trial, it appeals. Affirmed.

Chickering, Thomas & Gregory and R. M. Fitzgerald, for appellant. Coogan & Foote and F. E. Whitney, for respondents.

VAN FLEET, J. Action for damages resulting from personal injuries. The action was against both defendants, the injuries having resulted from a collision of the cars of defendants at a point where their roads crossed. Verdict and judgment were in favor of plaintiff against the defendant Oakland Consolidated Street-Railway Company alone and the latter appeals from the judgment and an order denying it a new trial.

1. The first point urged for a reversal is that the court below erred in not granting appellant a new trial upon the ground of newly-discovered evidence. The evidence at the trial upon the question as to which one of the two defendants was guilty of the greater degree of negligence in bringing about the accident was conflicting, but that there was evidence tending directly to show negligence on the part of appellant there is no question. The newly-discovered evidence, if it may be so regarded, bears only upon the question of the relative degree of negligence of the two defendants, and in no way tends to rebut or defeat plaintiff's right to recover from one or both of the defendants. While it may not be purely cumulative, it is largely of the same general character and to the same point as much of the evidence adduced at the trial, and in any event is not such as, in our judgment, would be likely to render a different result upon a new trial reasonably probable. Under these circumstances, the court below was not only justified in denying the motion, but we think its ruling in that regard was clearly correct.

2. The evidence showed that, about three months after the receipt of the injuries complained of, plaintiff, who was pregnant at the time of the accident, suffered a miscarriage, and the evidence tended to show that such miscarriage was a result of those injuries. Dr. Huntington, who treated plaintiff for the injuries, and subsequently attended her at the time of the miscarriage, was a witness in her behalf, and described to the jury the character of the injuries inflicted upon her, and testified in effect that, in view of her condition and the character of injuries which he described, it was his judgment that the miscarriage was produced thereby. Another physician, Dr. Stratton, who was present and heard the testimony given by Dr. Huntington, was then called as a witness for plaintiff, and testified that he had been called in consultation with Dr. Huntington at plaintiff's bedside, shortly before the miscarriage, but too late to note personally the immediate character of her injuries. After describing plaintiff's condition at the time he was so called, he was asked by plaintiff this question: "Assuming the statement made by Dr. Huntington to be true, and the character of the injuries he has described to have been inflicted by a collision of two street cars, what, in your judgment, was the cause of the condition that you observed? Was it the accident, or any other cause?" The appellant objected to the question "as irrelevant, immaterial, and incompetent," which was overruled, and the witness answered that in his opinion the condition was due to the accident. The question was then repeated in a slightly modified form, thus: "Now, assuming again that Dr. Huntington's statement was true as to the character of the injuries which were inflicted, as I have stated, what, in your judgment, was the cause of the miscarriage, if there was a miscarriage?" To which appellant made the same objection as before, and, further, that it was not a proper hypothetical question. The objection was again overruled, and the question received a like answer. These rulings are now assigned as error. It is said that the "statement" of Dr. Huntington to which the attention of Dr. Stratton is directed by the question, and upon which he is requested to base his opinion, necessarily included, not only the facts testified to by Dr. Huntington, but also the opinion of the latter based thereon, and that the question, therefore, called for the opinion of one expert based upon that of another, which, it is claimed, was improper. We do not think appellant's construction of the question a fair one, or that the language used would so strike the apprehension of the jury. The question may not be as free from ambiguity as it could have been made, but we think it sufficiently appears therefrom, and would be so understood, that what the witness was asked to base his opinion on was the facts stated by Dr. Huntington as to the injuries to plaintiff. This was made, indeed, quite clear by the question as put in its modified form. The construction contended for by appellant would seem to lead to an absurdity. He says it was equivalent to asking the witness: "Assuming that Dr. Huntington is correct when he states that the injuries caused the miscarriage, what, in your opinion, was the cause of the condition that you observed?" If such were to be taken as the sense of the question, we think it quite obvious that it could have done appellant no harm, since the answer would have been practically meaningless. But such is not its ordinary import. The witness had listened to the testimony of Dr. Huntington as to the injuries produced upon plaintiff's person, and he was asked, assuming the injuries to have been as described, to give his opinion thereon as to the inducing cause of the condition in which he found the patient at the time he was called in.

If, however, we were to assume that the question is open to the criticism now urged, we do not think the objection could avail defendant here, for the reason, as claimed by respondent, that it was not taken in the court below. The objection there was that the question was "irrelevant, immaterial, and incompetent, and not a proper hypothetical question." This form of objection was entirely too general to call the court's attention to the particular vice now pointed out, and it is well settled that a party will not be permitted to avail himself in this court of a more specific objection than that made in the court below. Appellant should have pointed out the particular defect which rendered the question either incompetent, irrelevant, or immaterial, or wherein it was not a proper hypothetical question, that the objection could have been intelligently ruled upon, and, if necessary or proper, obviated. Water Co. v. Swartz, 99 Cal. 284, 33 Pac. 878; Crocker v. Carpenter, 98 Cal. 421, 33 Pac. 271; People v. Frigerio, 107 Cal. 151, 40 Pac. 107. The reason of this obviously just rule is well stated in the case of Crocker v. Carpenter, above cited. There the objection in the trial court to certain offered evidence was the general one that it was irrelevant, incompetent, and immaterial. In this court the appelant sought to point out specific reasons why that objection was good, but it is said: "We think there was no error in overruling the general objection thus made. If the defendants desired to object to the offered evidence upon the ground that the proper foundation for its admission had not been laid, because it had not been shown that the facts stated in such answers were inserted with the knowledge of defendants, the objection should have been specifically pointed out, and called to the attention of the court and the opposing counsel. If this specific objection had been made, it is possible that it could have been removed by further evidence upon the part of plaintiffs showing such knowledge, but the general objection that the offered evidence was incompetent was not sufficient. When such a general objection is overruled by a trial court, the party against whom the ruling is made cannot be permitted for the first time to urge in the appellate court the particular objection which, if it had been openly urged in the trial court at the time of the ruling complained of, might have been easily cured. This is not laying down a merely technical rule. It is one which has its foundation in the proper consideration of what is due to the court and adverse counsel in the trial of a case." And the court refer to Rush v. French, 1 Ariz. 124, 25 Pac. 816, where it is said: "The object of requiring the grounds of objection to be stated, which may seem to be a technical rule, is really to avoid technicalities, and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified, so that the party offering the evidence can remove it, if possible, and let the case be tried on its merits." For like reasons, the general objection made did not sufficiently point the further specific objection now urged, that it was improper, in framing the hypothetical question, to refer the witness generally to the facts testified to by Dr. Huntington, as a basis for his opinion, but that the question itself should have contained a statement of such facts. Obviously, the general and sweeping suggestion, "not a proper hypothetical question," would not be calculated to direct the court's or opposite counsel's attention to what the objection was aimed at. It might refer to one of a dozen supposed reasons why the question was deemed improper. If, however, the objection were sufficient to raise the point, we are not prepared to hold that in an instance such as this, where the witness has heard a statement of facts by another, it is not sufficient, in putting the question, to direct his attention to such statement as the basis upon which his opinion is desired.

3. We cannot say the court abused its discretion in holding that the witness McCarthy had shown himself sufficiently qualified to answer the hypothetical question tending to elicit his opinion as to whether the car of appellant could with proper care and attention have been stopped in time to avoid the collision. This is a question largely for the determination of the trial judge, and his ruling will not be disturbed, except error clearly appears. In this case it does not so appear. We think the witness disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury. It is true, he was not as familiar with the condition of the car as might have been desired, but this objection goes more to the weight of the evidence than its admissibility. Nor is there any question but that the subject was one upon which the opinion of the witness was admissible. The manner of running electric cars, their rate of speed, and the facility with which they can be stopped or handled, is not a matter of such common knowledge that the jury could judge as intelligently as one skilled in their use. It was therefore proper to resort to expert evidence.

4. There was no error in admitting evidence on behalf of appellant's codefendant as to the custom between street-railroad companies of giving the older company the right of way at crossings. The codefendant had been jointly sued with appellant for the alleged injury, and it had a right, if such custom existed, to establish the fact, as tending to show to the jury which defendant was guilty of the more culpable negligence, and thus save itself, if possible, from being mulct in damages.

5. The jury gave a verdict for $10,000, and it is claimed that this amount is excessive. While we might not, had the question rested with us, have awarded damages in so large an amount, yet we are unable, under all the circumstances, to say that the amount is so far excessive as to imply that it was awarded under the influence of passion or prejudice. The evidence as to the extent of plaintiff's injuries and suffering therefrom, and the resulting condition of her physical system, as exhibited at the time of the trial, was not controverted by appellant, and consequently stands without conflict for whatever it tends

to establish. While that evidence does not show that the immediate result of the accident was the infliction of any very great external injury, it does show resulting injury, flowing proximately therefrom, of a very serious character. According to the testimony of the medical witnesses, owing to plaintiff's condition of pregnancy at the time, the result of the shock was such as to cause the death of the fœtus, and induce a miscarriage, and cause plaintiff a long and painful period of suffering, through a number of months, which has left her constitution and nervous system much shattered and broken, greatly impaired the action of her heart, and weakened her eyesight,—a condition regarded by her physicians as permanent. "In actions for negligence, the law does not attempt to fix any precise rules for ascertaining what is a just compensation, but, from the necessity of the case, leaves the assessment of the damages to the good sense and judgment of the jury, whose province it is to make the assessment; and their verdict, though subject to review, will not be disturbed merely upon the ground that the damages are excessive, nor because the opinion of the court differs from that of the jury, unless it appears that the excess was given under the influence of passion or prejudice." Lee v. Railroad Co., 101 Cal. 118, 35 Pac. 572. Before the appellate court can interfere on the ground of excessive damages, the verdict must be so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury. Aldrich v. Palmer, 24 Cal. 513; Wheaton v. Railroad Co., 36 Cal. 590. Applying these principles, we do not feel that we would be justified in disturbing the verdict upon the ground that it is excessive.

6. The other questions discussed do not require special notice. The objection that the evidence does not sustain the verdict is clearly untenable, and in our judgment the verdict sufficiently finds upon the issues submitted. The judgment and order denying a new trial are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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110 Cal. 506

WARREN et al. v. HOPKINS et al. (No. 15,943.)[1]

(Supreme Court of California. Dec. 18, 1895.)

APPEAL—TRANSCRIPT—PRESUMPTIONS—MECHANICS' LIENS—APPORTIONMENT.

1. Under rule 15 of the supreme court, providing that, when notice has been given to appellant of any objection to the transcript affecting his right to be heard, it shall be his duty to file at the hearing of the cause an additional record to remove the objection, where a motion was made to dismiss an appeal on the ground that the transcript was not authenticated, and failed to show that notice of appeal had been served, the omissions were cured by appellant's filing, on the hearing of the cause, a transcript properly authenticated, and a copy of an affidavit showing service of the notice of appeal, with a certificate of the clerk of the trial court that the original affidavit was on file in his office.

2. Code Civ. Proc. § 1188, requiring a claimant who files a lien against two or more improvements to designate the specific amount for which he claims a lien on each, does not apply where claimant made a contract to grade two blocks of land, under which the earth from one was to be used in filling the other, and compensation was fixed at so much per cubic yard for filling.

3. The word "lot," as used in Code Civ. Proc. § 1191, giving one who grades a lot a lien thereon, means whatever territory an owner causes to be graded under a single contract.

4. Where a contractor sued to enforce liens for grading blocks and the streets in front thereof, under separate contracts, and appellant claimed priority of his mortgage lien over the lien for street grading because the contract for street grading was made after the mortgage was recorded, and the court found the amount due under the contracts, but failed to find that any portion was due for street grading, it will be presumed on appeal, in support of the judgment, in the absence of objection to the finding in the trial court, that the amount found due was on the contract for grading the blocks.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Two actions, by one Warren and others against Hopkins and others, to foreclose liens for grading. The actions were consolidated and judgment was rendered for plaintiffs, and, from the judgment and an order denying a new trial, defendant Leopold Loupe appeals. Affirmed.

John J. Roche and Page & Eells, for appellant. J. C. Bates, for respondents.

HARRISON, J. The plaintiffs brought an action upon a contract made by them with the defendant Hopkins for grading outside land blocks 664 and 665 in San Francisco, and to enforce a lien upon the land for such grading, and subsequently brought another action upon a contract made by them with the defendants Hopkins and Bowie for grading the streets in front of said blocks, and to enforce a lien therefor upon the same land. The appellant, Loupe, held a mortgage upon block 664, executed to him by the defendant Hopkins, subsequent to the date of the contract for grading the blocks, and for that reason was made a defendant in the actions, and filed answers therein, setting up his mortgage lien, and in the latter action filed a cross complaint against the plaintiffs and Hopkins and Bowie for the foreclosure of his mortgage, claiming that the lien thereby created was superior to the lien of the plaintiffs. To this cross complaint the plaintiffs filed an answer denying this priority of lien, and alleging that their claim for grading constituted a lien prior to that of the mortgage. Before the actions came on for hearing, judgments of dismissal were entered by consent of all parties as to block 665; and thereafter, upon an order of the court, made by consent of all the parties, the actions were consolidated and tried together. Prior to the trial, Hopkins and Bowie stipulated with the plaintiffs as to the amount due and unpaid upon their contracts with them, and that judgment therefor might be taken. The cause was thereafter tried between the plaintiffs and the appellant, upon the issue as to the priority of lien; and findings of fact were made and filed, and judgment entered declaring the lien of the plaintiffs superior to that of the appellant. The appellant moved for a new trial, upon the ground that the evidence was insufficient to sustain certain findings of fact. His motion was denied, and from this order, and also from the judgment, he has appealed.

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[1] Rehearing denied.

1. A motion was made on behalf of Bowie and Hopkins to dismiss the appeal, upon the ground that the transcript filed herein was not authenticated, either by the attorneys or by the clerk of the superior court, and that it failed to show that the notice of appeal had been served upon them. Rule 15 of this court provides that, when notice has been given to the appellant of any objection to the transcript affecting the right of the appellant to be heard, "it shall be the duty of the appellant to present and file at the hearing of the cause such additional record, if such there be, to remove or answer the objection or exception so taken." In compliance with this rule, the appellant, at the hearing of the cause, produced and filed a transcript properly authenticated by the clerk of the superior court, and has therefore obviated this objection of the respondents. Estate of Medbury, 48 Cal. 83; In re Wierbitszky, 88 Cal. 333, 26 Pac. 174; Woodside v. Hewel, 107 Cal. 141, 42 Pac. 152. The fact that it appears from the certified transcript that there were certain typographical and clerical errors in the one originally filed is immaterial. All that was essential to a review of the action of the superior court was contained therein, and, when served upon the respondent, was received by him without objection. The object of rule 15 is to enable the appellant to remedy any defect or omission of the transcript for the purpose of enabling him to present his appeal upon the merits, and is to be liberally construed for that purpose.

The appellant is required to furnish this court with a copy of the notice of appeal, and, although the statute requires that a copy of this notice shall be served upon the adverse party, there is no provision in the statute or in the rules of this court prescribing the mode in which such service shall be authenticated. The better practice is to have the proof of such service made a part of the record in the court from which the appeal is taken, in order that there may be evidence in that court that the judgment has been removed therefrom. In such cases that record, when properly certified to this court, becomes conclusive of the facts therein stated, and no extrinsic evidence will be received to contradict it. Boston v. Haynes, 31 Cal. 107; Boyd v. Burrell, 60 Cal. 280. If, however, the record, as certified to this court, is silent upon the fact of such service, that fact itself will not authorize a dismissal of the appeal. The jurisdiction of this court to hear an appeal depends upon the fact that the notice of appeal has been properly served, and not upon the proof of that fact being contained in the transcript; and, when an objection is made that the transcript does not contain evidence of the service, the appellant will be allowed to make proof thereof. For this purpose he may file in this court either original proof of such service or a certificate of the clerk below that such proof has been made and filed in that court. Knowlton v. Mackenzie (Cal.) 42 Pac. 580. In conformity with this rule of procedure, the appellant presented at the hearing, and filed as a part of the record of the cause in the superior court, a copy of an affidavit showing that the notice of appeal herein had been duly served upon the defendants Hopkins and Bowie, and a certificate of the clerk of that court that the original of said affidavit was on file in his office.

2. It is contended by the appellant that the notice of lien filed in behalf of the plaintiffs is defective, for the reason that the contract for grading embraces two blocks of land, and that under section 1188, Code Civ. Proc., the claim of lien should have specified the amount due to them upon each block. The lien which is claimed by the plaintiffs is, however, authorized by section 1191, Code Civ. Proc., and not that which is authorized by section 1183. Section 1191 gives to the contractor a lien upon the "lot" for his work done, while section 1183 gives him a lien upon the "building or other improvement." And in Davis v. McDonough (Cal.) 42 Pac. 450, the "improvement" upon which a lien is authorized by section 1183 is held to refer to the objects enumerated in that section upon which the labor was performed, or for which the materials were furnished. "The buildings, mining claim or other improvements" named in section 1188 have the same significance as in section 1183; and the clause in section 1191 giving to the contractor a lien upon the "lot" which he grades or fills, or "otherwise improves," refers to some improvement of the "lot" upon which the lien is given, rather than to the "improvements" upon the lot referred to in section 1188. While section 1188 requires the claimant who files a lien against two or more buildings, or other improvements, to designate the specific amount for which he claims a lien upon each of such improvements, it does not require him to make such designation unless there is in fact a specific "amount due to him" on each of such improvements; and it might frequently happen that a contractor would construct several buildings under one contract, and there would not be any specific amount due to him on each of such buildings. In the present case the plaintiffs made a single contract for the grading of the two blocks at a fixed price, and, as it

appears that the character of the two blocks was such that the earth taken from one was to be used in filling up the other, and that the compensation for the entire work was fixed at "ten cents per cubic yard for filling," it is evident that there could be no separate amount chargeable against either block; and that, while the grading had the effect to improve the land, it did not constitute such "improvements" to the different blocks as are contemplated in section 1188, or for which separate liens were authorized. We are of the opinion, moreover, that the lot upon which a lien is authorized by section 1191 is not limited to any artificial subdivision upon the surface of the earth, or to any official designation upon a map, but that its meaning includes whatever territory is owned by a person which he may cause to be graded under a single contract. It sufficiently appears that, at the time of entering into the contract for the grading, Hopkins was the owner of all the land for which he employed the plaintiffs.

The appellant, however, contends that, as the contract for grading the streets in front of the blocks was made subsequent to the recordation of his mortgage, the lien therefor is subordinate to the lien of his mortgage, and that the court should have directed that the mortgage debt be paid prior to allowing the plaintiffs any compensation for grading the streets. As a proposition of law this contention is correct, but the record fails to authorize its application. The court finds the amount that was unpaid under the contracts for grading the blocks and the streets surrounding the same, but does not find that any portion of this unpaid sum was for grading the streets; and, as any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it (Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742), this finding must be read as a finding that the entire amount was due upon the contract for grading the blocks. If the appellant would question the correctness of the judgment in this respect, it was incumbent upon him to make his objection in the court below when that court made its finding of the amount unpaid upon the plaintiffs' contracts. In his motion for a new trial, the appellant has not assigned any error in this finding; and it must be not only assumed as authorized by the evidence, but of such a character as to sustain the judgment. By the dismissal from the controversy of all the land except the block covered by the appellant's mortgage, any evidence upon the amount due to the plaintiffs upon the other block was irrelevant to the issues before the court, and it cannot be assumed that the court has considered such evidence in making its finding.

The motion to dismiss the appeal is denied, and the judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

110 Cal. 277

REDFIELD et al. v. OAKLAND CONSOL. ST. RY. CO. (No. 15,942.)

(Supreme Court of California. Jan. 4, 1896.)

DEATH BY WRONGFUL ACT—DAMAGES.

In an action for the death of a wife and mother it is proper to refuse to instruct the jury to award such a sum as damages as invested in an annuity would be a fair equivalent to the husband and children of the monetary value of the life of the dead wife and mother, where the instruction fails to set forth the life expectancy of either the husband or children, as to the latter of which there is no evidence.

In bank. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Horace A. Redfield, personally and as guardian, against the Oakland Consolidated Street-Railway Company, for the death of his wife. From a judgment for plaintiffs, and from an order denying a new trial, defendant appeals. From a commissioners' decision (42 Pac. 822) affirming the judgment, defendant again appeals. Affirmed.

Chickering, Thomas & Gregory, R. M. Fitzgerald, and Carl H. Abbott, for appellant. Hall & Earl, for respondents.

PER CURIAM. The opinion heretofore filed in the above-entitled cause is modified by striking therefrom all of subdivision 2, and substituting therefor the following:

2. The refusal to give defendant's proposed instruction above quoted was not error. The contention of appellant as to the measure and amount of damage is that the jury should have awarded such a sum as, invested in an annuity, would have yielded to the husband and to the children an income which would be the fair equivalent to them of the monetary value of the life of the dead wife and mother. Conceding, for the purposes of this discussion only, and not deciding, that this is a correct rule, it is at once apparent that the elements of which such a measure would be composed are the expectancies of life—First, of the wife; second, of the husband; and, third, of each of the children. In other words, the annuity in no event should continue longer than the life expectancy of the wife. If the husband's expectancy was less than her's, then, as to him, it should continue only during that expectancy; and so as to the annuity of the children. In addition, the value of the mother's life to the children becomes less in law upon their obtaining majority. Each of these considerations, therefore, becomes essential to a proper determination under appellant's rule. Yet a reading of the instruction discloses that it fails to set them forth. The expectancy of life of the husband and children is not brought into the calculation, nor the time when the minority of the children would cease. Moreover, the record discloses no evidence given of the life expectancy of the minors. The proposed instruction, therefore, was radically defective, even under appellant's theory, and was therefore properly refused.

Let the opinion heretofore rendered stand as thus amended, and the petition for hearing in bank denied.

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110 Cal. 579

SCHLICKER v. HEMENWAY et al. (No. 15,819.)

(Supreme Court of California. Dec. 23, 1895.)

EXECUTOR'S SALE—INDIVIDUAL LIABILITY OF EXECUTOR—LIABILITY OF THE ESTATE.

1. A complaint, against one individually and as executor, to recover back money paid on the purchase price of land of the estate, at a sale which was afterwards vacated, is bad for misjoinder of parties defendant, misjoinder of causes, and ambiguity, it not appearing whether it was sought to charge the defendant personally or in his representative capacity.

2. A complaint to recover back money paid at a private sale of land of an estate, on the ground that the executor was directed to make public sale thereof, does not state a cause of action against the executor individually.

3. Where an executor sold land privately, though he was directed to make sale at public auction, he is not liable in his representative capacity in an action by the purchaser to recover back money paid on the purchase price, it not appearing that said money was made a part of the assets of the estate.

Department 2. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by Frederick Schlicker against D. D. Hemenway, individually, and as executor of the estate of Greenbury Hinkston, to recover back money paid on the purchase price of land. From a judgment for plaintiff, defendants appeal. Reversed.

J. P. Rodgers, for appellants. Haskell & Meyer and Lippitt & Lippitt, for respondent.

TEMPLE, J. This is an appeal taken from a judgment rendered because defendants declined to answer after their demurrer was overruled. The action is brought against defendant, individually, and as executor of the estate of Greenbury Hinkston, deceased, to recover $750, received by Hemenway under the following circumstances, as set out in the complaint: An order of sale was made in the estate, authorizing and directing the executor to sell certain real estate at public auction. The executor negotiated a private sale to plaintiff, and reported it to the court as a private sale. In the probate court, when the matter of the confirmation came up, plaintiff increased his bid from $6,000 to $6,800. The sale was then confirmed to him. At the time of making his bid he put up, as required, $750. Plaintiff refused to complete his purchase, and therefore the order of confirmation was vacated, and the property resold. The complaint does not show whether it brought more or less than the offer of plaintiff. Plaintiff demanded the return to him of the $750, and, as the defendant declined, he brought this action.

The complaint was demurred to on various grounds, and, among others, on the ground that there is a misjoinder of parties defendant in that Hemenway, as an individual, is joined with the representative of the estate of Hinkston, when the complaint not only fails to show a joint or joint and several liability, but shows that both cannot be liable. Also, that there is a misjoinder of causes of action, with specifications very nearly as above. Also, that the complaint is ambiguous, because it cannot be ascertained therefrom whether it is sought to charge Hemenway or the estate. Also, uncertain for the same reason. The demurrer should have been sustained on all these grounds.

The complaint is also specially demurred to on the ground that it does not state a cause of action against Hemenway, and, separately, that it does not state a cause of action against the representative of the estate. The cause of action is based, generally, upon the proposition that, because the return of the sale made by the executor shows that the land was sold at private sale, and not at public sale as directed in the order of sale, the court had no jurisdiction to confirm it, or, at least, that the sale was void on the face of the record. I think this must be conceded.

Then, did the executor receive the money in his representative capacity? If he had taken the money to make good a bid which he had a right to receive, it might have been contended with some plausibility that he received it in his representative capacity. But, inasmuch as he had no right to demand or to receive the money, because the sale in that mode was void, I think the estate is not liable, unless it be further shown that it has been actually made a part of the assets of the estate, through being accounted for to the estate, or actually used for its benefit. Suppose, for instance, the executor had been required to give no bonds, and was irresponsible, and had embezzled the money, could the plaintiff have sued his successor in office, and compelled the estate to pay it? If so, why? The bid was not authorized by the order of sale. As executor he had no right to receive the money, and it was not received in the discharge of any official duty. I do not concede that, even had the executor received the money in his official character, the estate would be liable for it; but, waiving that question, I think it evident that here the estate cannot be held.

Judgment reversed, and cause remanded, with direction to sustain the demurrer.

We concur: McFARLAND, J.; HENSHAW, J.

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110 Cal. 502

KIRSCHNER v. DIETRICH. (No. 15,975.)

(Supreme Court of California. Dec. 18, 1895.)

DIVORCE—DEATH OF PARTY—RIGHTS OF SURVIVOR

1. As an action for divorce does not survive upon the death of either party, Code Civ. Proc. § 473, providing that, in case of service of summons by publication, defendant may, by leave of court, answer to the merits of the original action within a year after the rendition of a judgment therein, cannot be invoked on the death of plaintiff after the entry of a judgment of divorce having no reference to the subject of property.

2. In the absence of any reference to the subject of property in the judgment for divorce, the parties become tenants in common of the community property; and, upon the death of plaintiff after the entry of judgment, the rights of defendant therein are not impaired.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action for divorce by Filomen Dietrich against Joseph F. Dietrich. After the judgment was rendered the plaintiff in the action died, and Conrad Kirschner, administrator of deceased, was substituted as plaintiff in the action. From an order denying a motion to vacate the judgment, defendant appeals. Affirmed.

T. Z. Blakeman and Benj. Healey, for appellant. Otto Tum Suden, for respondent.

HARRISON, J. In an action for divorce against the appellant, brought by his wife, Filomen Dietrich, service of the summons was made by publication, and judgment of divorce was entered July 13, 1893. The plaintiff in the action died February 22, 1894, and on June 8, 1894, upon an ex parte motion in behalf of the defendant, the court ordered that the administrator of the plaintiff be substituted as plaintiff in place of the deceased, and directed that the action be continued in his name. Thereafter the defendant, upon notice to the administrator, moved the court to vacate the judgment, and that he be allowed to answer the complaint, upon the grounds that the summons had not been personally served upon him, that the judgment was void, and that it had been procured by false testimony. The court denied his motion, and the present appeal is from that order.

It is difficult to understand upon what principle the court made the order substituting the administrator of the plaintiff in the place of his intestate, or directed a continuance of the action in his name after the death of the original plaintiff. But, as the respondent does not appear to have objected thereto, we are not required to determine the correctness of the order. The court, however, properly denied the defendant's motion to vacate the judgment and allow him to answer the complaint. The action was solely for the purpose of procuring a judgment of divorce between the parties,—a purely personal action, which would not survive the death of either party, and which, upon the death of the plaintiff, could not be further prosecuted or defended, whether her death was before or after judgment. If she had died prior to the entry of judgment, there could have been no judgment in the case, and her death subsequent to the entry of judgment deprived the court of all power to review its action and determine her right to a divorce. The action having been brought to change the personal status of the plaintiff in her relations towards the defendant, it is evident that upon the termination of her life there was no personal status which a judgment could change.

The provision of section 473, Code Civ. Proc., under which the appellant made the present motion, authorizing the court to allow a defendant, in case he has not been personally served with the summons, to answer to the merits of the original action within a year after the rendition of judgment therein, implies that at the time of his application there shall be an action still pending (Code Civ. Proc. § 1049), to the merits of which there can be an answer. The section has no application to a case in which, by the death of the plaintiff, the action has abated, and all opportunity of controverting its merits has been removed.

The effect of the plaintiff's death upon the action is not changed by reason of the question of property which is suggested by the appellant. The complaint, as well as the judgment, is silent upon the subject of property; and, although there is an allegation in reference thereto in the answer which the appellant proposed to file, this did not prevent the abatement of the action, nor is it stated in his notice of motion as one of the grounds upon which he would make it. The primary and substantive subject of litigation in a suit for divorce is the personal relation of the parties, and their right to the community property is but incidental thereto. If, before a decision upon that question is made, one of the parties dies, the action cannot be continued for the purpose of determining the rights of property; and, if there was originally no issue upon this subject, it cannot be revived, in case of death after judgment, for the purpose of having this question adjudicated. In the absence of any reference thereto in the decree, the parties to the suit became tenants in common of the community property, and the death of the plaintiff after the entry of judgment did not impair the appellant's right thereto; but this right must be enforced in an independent action (Godey v. Godey, 39 Cal. 157), in which all who may have any interest therein should be made parties. The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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110 Cal. 543

SCHWIESAU v. MAHON et al. (No. 16,024.)

(Supreme Court of California. Dec. 20, 1895.)

ASSESSMENT LIEN—COMPLIANCE WITH STATUTE.

A contract reciting that plaintiff would construct curbing and gutter ways in accordance with the specifications thereto annexed, but to which no such specifications were annexed, is not a sufficient compliance with the statute requiring all contracts to be in writing and signed by the contractor; and under it no lien can be fixed, in invitum, against abutting property.

Department 2. Appeal from superior court, Marin county; J. M. Seawell, Judge.

Action by E. Schwiesau against T. J. Mahon and others to foreclose the lien of a street assessment. There was judgment for defendants, and plaintiff appeals. Affirmed.

D. H. Whittemore, for appellant. E. B. Mahon, for respondents.

TEMPLE, J. By this action it was sought to foreclose the lien of a street assessment. The court held that there was no valid contract for the work, and therefore no lien. Defendant put in evidence, at the trial, the contract entered into by the plaintiff. By it plaintiff agreed to do all the work necessary to be done to grade Fifth street, in the town of San Rafael, and to construct curbing and rock gutter ways along both sides of said Fifth street, between certain points named, "all in strict accordance with the specifications hereto annexed and made a part of this contract, and also that he will furnish, at his own cost and expense, all necessary material required for the execution and completion of said work, and in full accordance with said specifications, and to the satisfaction of the said superintendent of streets." No specifications were attached to the contract, and it was shown by the evidence of the street superintendent that none had ever been attached thereto. Plaintiff contends that inasmuch as bids were received to do the work in accordance with the specifications, which, in the advertisement for bids, was specifically referred to, and as the superintendent of streets was not authorized to reduce to writing any other contract than that made by the board, there could be no mistake as to the specifications, and, as the work has been done strictly in accordance with them, the objection cannot now be made. If the contract were one entered into by the taxpayer individually, there would be no answer to this position. But this is a proceeding to fix upon property a lien in invitum, and it has been held that in such case every requirement that could be of benefit to the person to be charged must be complied with. It cannot be said that there is no possible benefit to the owner in having a written contract signed by the contractor. In this case the contractor was required to give a bond with sureties for the faithful performance of the contract. This bond, to be valid, must be conditioned that the contractor will perform the contract entered into by him. Sureties are bound only by, and may insist upon, the very letter of their contract. In this case, would there be any contract by which they would be bound? The statute requires the contract to be in writing and signed by the contractor. The contract signed does not define the work to be done, nor does it refer to any specifications in which it is described. It not only does not refer to specifications filed, but negatives such reference by express reference to those attached. It is said that the owner might have had this corrected by appeal to the board. But an appeal to the board could not have provided the security by a written contract, and sureties for its performance, without which there was no binding contract. If the assessment had been vacated and the work rejected, it would not then have been in the power of the board to supply this defect. Manning v. Den, 90 Cal. 614, 27 Pac. 435. In that case Dougherty v. Hitchcock, 35 Cal. 524, was expressly affirmed; and if Chambers v. Satterlee, 40 Cal. 497, contains anything contrary to this doctrine, it was, so far, overruled in Manning v. Den. The case seems a hardship, but it must be remembered that it is a proceeding to charge one with the cost of improvements for which he has not contracted. The liability depends upon a strict compliance with the law, and not upon the equities of the claimant. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

DIGGINS v. MAHON et al. (No. 16,029.)

(Supreme Court of California. Dec. 20, 1895.)

Department 2. Appeal from superior court, Marin county; J. M. Seawell, Judge.

Action by A. C. Diggins against T. J. Mahon and others. There was a judgment for defendants and plaintiff appeals. Affirmed.

D. H. Whittemore, for appellant. E. B. Mahon, for respondent.

PER CURIAM. Upon the authority of Schwiesau v. Mahon (No. 16,024, this day decided) 42 Pac. 1065, the judgment and order appealed from are affirmed.

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110 Cal. 538

CALIFORNIA STATE BANK v. WEBBER. (No. 15,912.)

(Supreme Court of California. Dec. 20, 1895.)

RENEWAL OF NOTE—AGREEMENT TO PAY TAXES ON MORTGAGE.

1. Where a note, appearing on its face to be overdue, recited that, if it was not paid at maturity, it was thereby renewed from year to year, at the option of the holder, to maintain the defense that the note was not due, defendant must affirmatively show that the holder had renewed the note.

2. An agreement that, if the mortgagor should pay the taxes assessed against the mortgage, then he would be credited with a certain per cent. of the interest due upon the mortgage note, is not within Const. art. 13, § 5, providing that every contract by which a debtor is obligated to pay any tax on any mortgage shall, as to any interest specified therein, and as to such tax, be void.

3. Where the mortgagor testified to an oral agreement whereby he was to pay the taxes upon the mortgage, and be credited with a certain per cent. of the interest due upon the note, and there was evidence that the mortgagee wrote with a pencil, on the margin of the note, a less rate of interest than that fixed by the note, there was no sufficient proof that such agreement was in writing, and in violation of Const. art. 13, § 5.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action to foreclose a mortgage by California State Bank, a corporation, against Charles F. Webber. There was a judgment of foreclosure, and defendant appeals. Affirmed.

A. B. Hotchkiss, for appellant. Johnson & Johnson, for respondent.

VANCLIEF, C. Action to foreclose a mortgage to secure payment of a promissory note of which the following is a copy: "$2,500.00. Sacramento, Cal., May 27, 1889. Two years after date, for value received, I promise to pay to the California State Bank, a corporation, or order, the sum of twenty-five hundred dollars in gold coin of the present standard of value, with interest thereon from date until paid at the rate of eight and one-half per cent. per annum, in like coin, payable annually, and, if not so paid, the interest may be added to the principal, and bear like interest, or the whole may, at the option of the holder, without notice to the maker thereof, be treated as due and collectible. If this note is not paid at maturity, it is hereby renewed from year to year, at the option of the holder, until paid; and during such year the maker shall not have the right to pay the same. Both principal and interest to be paid at the California State Bank in Sacramento, California. Chas. F. Webber." The mortgage, bearing the same date as the note, contained the following provision: "And in case default be made in the payment of said note, or any installment thereof, or of any interest thereon, then the mortgagee may, at their option, and without notice to the mortgagor, at once proceed to foreclose this mortgage." This action was commenced August 26, 1893, without previous notice to defendant of any exercise of plaintiff's option mentioned in the note or in the mortgage. It was alleged in the complaint, among other things, that no part of said note has been paid, either principal or interest, and the whole thereof, amounting to $3,518.44, is due, owing, and unpaid. The defendant's demurrer to the complaint on the ground that it does not state a cause of action was overruled. Thereupon the defendant answered, denying that the debt evidenced by the note was due at the time of the commencement of the action, and denying that no part thereof had been paid, and alleging certain payments of interest and of taxes on the mortgage; and, as a separate defense to the demand for any interest whatever, alleged as follows: "That at the time and place the said note and mortgage were made, executed, and delivered, as alleged in the complaint, it was then and there agreed by and between plaintiff and defendant, C. F. Webber, and as a part of the same contract and of the same transaction with the making of the said note and mortgage, that the said Webber, defendant herein, should and would pay and discharge all taxes and assessments which might be assessed or levied upon said money so loaned by plaintiff to said defendant, and on the said mortgage, or on either the said money or mortgage, anything in the said promissory note or mortgage or either to the contrary notwithstanding. It was also agreed that the real rate of interest to be paid by defendant for the use of said money was to be seven per cent. per annum; but, for the purpose of covering said taxes and assessments on said money and mortgage, the rate of interest was inserted in said note as eight and one-half per cent.; and it was agreed between the said parties that if this defendant should pay said taxes and assessments on said money or mortgage, and the interest on said note annually, at seven per cent. per year, together with the principal sum, the same should be in full payment of said note and interest, notwithstanding the rate in said note was nominally eight and one-half per cent. That said agreement and arrangement was knowingly made and omitted from the terms of said note and mortgage, with the intent to evade the provisions of section 5 of article 13 of the constitution of this state; and on that ground defendant denies that any interest is due or owing or unpaid from defendant to plaintiff." The court found that the defendant had paid the interest according to the terms of the note for the first three years,—that is, until May 27, 1892,—and had also paid the taxes on the mortgage for the same period, amounting to $39.11, but had failed to pay the interest for the fourth year, ending May 27, 1893, or any part of the principal; and further found that the principal and interest, minus said payments, was overdue at the time the action was commenced. As to the alleged agreement that the mortgagor should pay the taxes on the mortgage, the court found as follows: "That prior to the execution of the said note and mortgage it was verbally agreed between the defendant, Webber, and A. Abbott, who then was the cashier of the plaintiff, that if the defendant, Webber, should pay the state and county taxes each year assessed against the mortgage of the plaintiff, then said defendant would be credited upon the interest due upon said promissory note with one and a half per cent. thereof, and the amount of interest that said defendant should pay to plaintiff in case he paid such taxes should be seven per cent. per annum; that said defendant did pay said taxes for the year 1890, 1891, and 1892, and paid interest on said note as aforesaid found at the rate of $175 per year, being seven per cent. per annum, up to May 27, 1892, and such payments of interest were accepted by plaintiff in full payment of the interest due for said period; that since May 27, 1892, the defendant has paid no interest whatsoever, and has paid no taxes assessed upon said mortgage for any other year than said 1890, 1891, and 1892." As matter of law the court found that plaintiff was entitled to a decree of foreclosure for the full amount of principal and interest, according to the terms of the note, less the amount of said payments of interest and taxes, and so decreed.

1. It is contended by appellant that, according to the terms of the note and mortgage, the defendant was not in default, nor the note due, at the time the action was commenced; but to maintain this point it devolved upon the defendant to show affirmatively that the plaintiff, in the exercise of the option given him, renewed the note, and thereby extended the time of payment to a day later than that on which the action was commenced; yet he neither alleged nor attempted to prove such renewal of the note. In the absence of evidence tending to prove it, such renewal of the note cannot be presumed. If there was no renewal of the note, nor extension of the time of payment,

both principal and interest became due on May 27, 1891. If there had been a renewal of the note whereby the time of payment was extended to a later day than that on which the action was commenced, such renewal would have been relevant only as an affirmative defense, which must have been pleaded and proved by the defendant.

2. The alleged agreement that the mortgagor should pay the taxes on the mortgage as found by the court, is not a violation of the constitution of the state, and does not release defendant from his contract to pay the conventional interest specified in the note, even though that agreement had been found to be in writing (Hewitt v. Dean, 91 Cal. 10, 27 Pac. 423); and the only exception to that finding is that the agreement was found to have been merely verbal, whereas the court should have found that it was in writing. Neither is the agreement as pleaded by defendant any defense to the demand for interest, unless it was in writing. Daw v. Niles, 104 Cal. 106, 37 Pac. 876; Harrelson v. Tomich, 107 Cal. 627, 40 Pac. 1032. The only evidence that the agreement was in writing was the testimony of defendant that plaintiff wrote with a lead pencil on the margin of the note "seven per cent.," which, it is claimed, had been erased. But he further testified that the agreement that he should pay the taxes on the mortgage was not written, for the reason that the officer of the bank with whom he made the agreement said such an agreement would not be lawful; and this corresponds with the averment in his answer that the agreement "was omitted from the terms of said note and mortgage." It is, therefore, clearly apparent that the finding that the agreement was verbal was justified by the evidence. I think the judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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5 Cal. Unrep. 211

MUTTER v. I. X. L. LIME CO. (No. 15,891.)

(Supreme Court of California. Dec. 20, 1895.)

EVIDENCE IN REBUTTAL—DECLARATION OF AGENT.

1. Where the defense in an action for cutting wood was that plaintiff agreed to pile it for measurement, but failed to do so, and defendant's foreman testified that the wood was not in condition to be measured, it was error to permit a witness called in rebuttal to testify that he had a conversation with said foreman after the suit had commenced, and that said foreman told the witness that the wood could be easily measured, as, if said testimony was intended to impeach said foreman's testimony, it was improper, because no foundation had been laid.

2. If intended to prove that the wood was in condition to be measured, it was improper, because the declaration of an agent under such circumstances cannot bind his principal.

Commissioners' decision. Department 2. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by Clement Mutter against the I. X. L. Lime Company, a corporation, to recover for work and labor performed. Plaintiff had judgment, and defendant appeals. Reversed.

Lucas F. Smith and Chas. B. Younger, for appellant. Z. N. Goldsby, for respondent.

BELCHER, C. Plaintiff brought this action to recover from the defendant the sum of $1,599, with interest thereon from June 1, 1892. The complaint contains three counts. In the first count it is alleged that the defendant is indebted to the plaintiff in the sum of $434 for cutting, at its special instance and request, 250 cords of pine wood at $1 per cord, and 230 cords of redwood at 80 cents per cord. In the second count it is alleged that the defendant is indebted to the plaintiff in the sum of $1,165, balance due for cutting and delivering, at its special instance and request, 1,204¾ cords of wood at $2.15 per cord, and for cutting 22½ cords of heading bolts at $1.10 per cord, and that the cutting and delivering of said wood and the cutting of said bolts were reasonably worth the prices named. The third count is the same as the second, except that it alleges that defendant promised and agreed to pay plaintiff, at the rates aforesaid, upon the 1st day of each and every month, for all wood cut and delivered and all bolts cut by plaintiff during the previous month. The answer denies most of the averments of the complaint, and alleges that, before the commencement of the action, defendant had paid plaintiff the sum of $1,449.96, in full satisfaction of all wood cut and delivered by him to it. The case was tried by the court without a jury, and the findings were that the defendant was indebted to the plaintiff, upon the causes of action set up, in the sum of $1,456.99, for which sum and costs judgment was entered. The defendant moved for a new trial, which was denied, and has appealed from the order.

It is claimed for appellant that several errors were committed by the court in its rulings upon the admission of evidence, and that the findings were not justified by the evidence, and hence that the order should be reversed. It is not necessary to notice all of the rulings complained of, as most of them were, in our opinion, correct, but one of them, we think, was clearly erroneous. The plaintiff was a witness in his own behalf, and testified: That he made an agreement with Mr. Blum, the superintendent of the defendant company, to do the work for which he sought to recover under the first count of his complaint, and that in pursuance of the agreement he commenced cutting the wood in November, 1891, and finished the cutting in March, 1892. That he could not tell exactly how much wood he cut, but it was about 400 cords. That "Mr. Blum agreed to measure the 400 cords in January, and he didn't come. The 400 cords were to be paid for as soon as it was put up in the woods where I cut it. He agreed to pay when it was done, and he didn't come up to measure it. * * * By March 4th it was all cut. It was to be all paid for by the 4th of March. * * * Mr. Blum said he would come in January, and pay for what they had cut, but he didn't come, but come in March, and he didn't measure, or do nothing. * * * It was agreed between Mr. Blum and myself that, when the wood was cut and put up, it should be measured and paid for. * * * This 400-cord lot of wood was in a condition last spring—April, May, and along at that time —to be measured, so as to ascertain the amount there was there." Joseph Krater was also a witness for plaintiff, and testified that he was present when Mutter agreed with Blum to cut that wood. "Blum promised to measure it in January, and pay for it then. Mutter finished cutting that lot of wood in the month of March, 1892. I do not know how much there was of that wood. The four hundred cords were to be measured on the ground where it was chopped." I. Blum was a witness for defendant, and testified that he was the superintendent of the defendant company, and that he made a contract with the plaintiff for the so-called 400-cord lot of wood mentioned in the plaintiff's first cause of action. "The agreement was that Mutter was to cut this wood, and pile it properly for measurement. He was to notify the company when it was ready for measurement. The 400-cord lot had not been measured or hauled to the limekiln up to the 17th day of June, 1892 [the day when the complaint was filed]. Plaintiff did not notify the defendant that the wood was ready for measurement. * * * There was no specified number of cords mentioned to be cut. I told him the place where to cut the wood. I was to pay him one dollar for pine, and eighty cents for redwood. He was to cut all the wood in that locality, and pile it in merchantable order, so it could be measured. The time of payment was after the wood was measured and hauled in, then the amount hauled was to be paid for the succeeding month on the company's regular pay day. It was agreed that, when we wanted the wood, we would measure it and haul it, and then pay for it the succeeding month, at the company's regular pay day. We were to make arrangements to haul the wood as soon as it was measured and as soon as it could be hauled. We were not to haul anything except what was measured up to that time. The company's pay day was on the fifteenth of each month." M. Hickey was a witness for defendant, and testified that he was foreman of the defendant company, and that he "heard Mutter state what his contract with Blum was in reference to the 400-cord lot; he told me he was to put up 400 cords of wood,—so much pine, so much redwood,—and after he got it out the company was to measure it, and it was to be paid for when it was delivered at the kilns. I went up there and looked at the wood, and it was not piled so it could be measured. This was in April, 1892. It was piled in all kinds of shapes. I could not explain it, really, but it was crossways and lengthways. It was not compact. It was piled too loosely. Some of it was not piled at all. I could not measure it. About the 31st of August, 1892, I went with Cerf, Mutter, and Spellman to measure this wood. At that time it was in a little better condition, because they had repiled some of it, and Mutter agreed to take our measurement, which he had refused to do before that time. I have reference to what you call the 400-cord lot. I saw this lot of wood in April, 1892. It could not then be measured. No man living could measure it accurately. Up to the bringing of this suit, the wood was in such condition that it could not be measured accurately. The plaintiff never demanded of the defendant payment for this 400 cords of wood, or any part thereof, up to the bringing of this suit. It had not been measured or hauled at that time. The plaintiff told me that it was to be paid for when it was measured and hauled to the limekilns."

George Ley was called by plaintiff as a witness in rebuttal, and stated: "I had a conversation with Hickey about the 400 cords. He was the foreman of the lime company." He was then asked, "What did he tell you?" The question was objected to on the ground that it was incompetent, immaterial, irrelevant, not in rebuttal, and hearsay. The objection was overruled, and an exception reserved. The witness answered: "He was talking about the 400-cord lot. He said that wood could be measured easy enough, if they only wanted to measure it; that he had measured lots of worse wood than that was,—worse put up than that was." The witness further said that this statement was made to him since the suit was brought, and that no one but Hickey and himself was present. The objection to the question should have been sustained. Whether the wood was in condition to be measured before the suit was brought was a material issue in the case, and was sharply contested; there being evidence upon the question, other than that above referred to, introduced upon both sides. If the purpose of the evidence sought to be elicited was to impeach the witness Hickey, it was clearly inadmissible, because the proper foundation for it had not been laid. Code Civ. Proc. § 2052. And if the purpose was to prove that the wood was in fact in condition to be measured, and should have been measured, before the suit was brought, it was inadmissible, because the declarations of an agent do not bind the principal unless they are made during the continuance of the agency, and are a part of the res gestæ. To be admissible, they must be in the nature of original, and not of hearsay, evidence; and must be made, not only during the continuance of the agency, but in regard to a transaction depending at the very time. Clunie v. Lumber Co., 67 Cal. 313, 7 Pac. 708; Beasley v. Packing Co., 92 Cal. 388, 28 Pac. 485; Birch v. Hale, 99 Cal. 299, 33 Pac. 1088. For the error above noted, the order should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed, and the cause remanded for a new trial.

5 Cal. Unrep. 215

WHITE et al. v. ADLER. (No. 18,357.)

(Supreme Court of California. Dec. 20, 1895.)

VENUE—JOINDER OF PERSONAL AND LOCAL ACTIONS.

An action upon a contract whereby defendant was to pay a certain sum for land in case the title thereto was satisfactorily cleared, or to reconvey the land if the title was not so cleared, the complaint, praying for relief in the alternative, is not within Code Civ. Proc. § 392, providing that actions for the recovery of real property must be tried in the county where the land is situated, but is within section 395, providing that in all other cases the action must be tried in the county in which the defendants reside.

Department 1. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by W. C. White and others against Moses Adler upon a contract to pay the purchase price of land, or reconvey the same to plaintiffs. From an order denying his motion to change the place of trial, defendant appeals. Reversed.

Reinstein & Eisner, for appellant. Frank H. Smith, for respondents.

PER CURIAM. This action was commenced in the superior court of Yolo county, and was based upon a written contract executed by the plaintiffs, as parties of the second part, and by the defendant, as party of the first part. The contract was dated May 28, 1892, and the material parts of it read as follows: "Whereas, a conveyance has this day been made by said parties of the second part to said party of the first part of certain lands [describing eighty acres of land situate in Yolo county], the title of which eighty acres is defective, and the payment for which has not been made by said party of the first part: Now, it is mutually understood and agreed that said parties of the second part will clear the title to said land, satisfactorily to said party of the first part, within twelve (12) months from this date; and should said title, within said time, be made satisfactory to said party of the first part, he will pay to said parties of the second part the sum of two thousand two hundred ($2,200) dollars in U. S. gold coin; and, should said title not be so as aforesaid made satisfactory to said party of the first part, then said party of the first part will reconvey said land to said parties of the second part, at the expiration of said twelve (12) months, free of cost to said second party." The complaint alleges "that, within twelve months from the date of said agreement, these plaintiffs took steps to, and endeavored to, clear the title to said land satisfactorily to said Adler, and to make the title to said land satisfactory to said Adler, and plaintiffs are informed and believe, and therefore allege, that plaintiffs did clear the title to said land, and quiet the same in said Adler; that plaintiffs have furnished defendant with a complete abstract of all the steps taken by them affecting said title, which said abstract contains an abstract of everything of record affecting the title to the said tracts of land upon the records and files of said Yolo county; that defendant has refused to state, and still refuses to state, whether or not the title to said land is now satisfactory to him or not; that said defendant, although demand has been made upon him by plaintiffs, has refused, and still refuses, to either pay to plaintiffs the said sum of $2,200, or to reconvey to said plaintiffs the said land." And the prayer of the complaint is for the judgment and decree of the court "that defendant specifically perform his said contract, and, according to the terms thereof, either pay said sum of $2,200, or, in case said title is not satisfactorily cleared and quieted according to the true intent and meaning of said contract, reconvey said land to plaintiffs, and for such other and further, or other or further, relief as may be proper." In due time the defendant, upon proper notice, demand, and affidavit, moved the court that the place of trial of the action be changed from the county of Yolo to the city and county of San Francisco, upon the ground that at the time the action was commenced he was, and ever since has been, a bona fide resident of said city and county. The court denied the motion, and, from the order made, defendant appeals.

Section 392 of the Code of Civil Procedure provides: "Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this Code: (1) For the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property." And section 395 of the same Code provides: "In all other cases the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action." The meaning and import of these sections were under consideration in the case of Smith v. Smith, 88 Cal. 572, 26 Pac. 356, and it was there said: "The general spirit and policy of the statute is to give to the defendant the right of having all personal actions against him tried in the county of his residence. Provision is made for the trial of actions affecting real estate in the county where the land is situated, and for the trial of certain other designated actions in the county where the cause of action arose; but the general rule for the place of trial is prescribed by section 395, by the declaration that 'in all other cases' the action must be tried in the county in which the defendant resides at the commencement of the action. * * * The plaintiff cannot, by uniting in his complaint matters which form the subject of a personal action with matters which form the subject of a local action, compel the defendant to have both those matters tried in a county other than that in which he resides. It is only when real estate alone is the subject-matter of the action that the provisions of section 392 can be invoked against a defendant who resides in a county different from that in which the land is situated. If, in his complaint, the plaintiff join with such a cause of action another which is not embraced in its provisions, or if he also seeks a remedy against the defendant upon matters which are not embraced within the provisions of this section, his action becomes one of those 'other cases' provided for in section 395, which the defendant is entitled to have tried in the county of his residence." If it be conceded that the subject-matter of this action is the land, still it is evident from an inspection of the complaint that the primary object of the action is to recover $2,200, the purchase price thereof, and not to obtain a reconveyance. The plaintiffs might have sued for the money alone, without asking for any alternative relief. They were, however, not satisfied with such an action, but chose to join with it a cause of action for a reconveyance. By so doing they united in the complaint "matters which form the subject of a personal action with matters which form the subject of a local action," but the defendant was not thereby deprived of the right to have the action tried in the county of his residence. Upon the authority of Smith v. Smith, supra, the order appealed from is reversed, and the court below is directed to make an order changing the place of trial from the county of Yolo to the city and county of San Francisco.

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110 Cal. 587

WARD, Sheriff, v. HEALY et al.

(Sac. 89.)

(Supreme Court of California. Dec. 23, 1895.)

APPEAL — TRANSCRIPT — FILING — MOTION TO DISMISS.

1. Sup. Ct. Rule 12, authorizes the filing of a written transcript when accompanied by funds to pay for printing it, and requires the clerk to have it printed. *Held*, that an agreement by the clerk to let appellant himself procure and pay for the printing of the transcript and forward a printed copy for filing is unauthorized, and is in no sense a compliance with the rule.

2. Under Sup. Ct. Rule 5, providing that filing a transcript shall defeat a motion to dismiss for failure to file it, only when filed before the notice to dismiss is served, the filing of a transcript on the same day, but after notice to dismiss is served, will not defeat the motion.

3. A transcript, placed in the hands of an express company to be forwarded to the clerk for filing, is not filed, within Sup. Ct. Rule 5, providing that the filing of a transcript before motion to dismiss for failure to file is served will defeat the motion.

4. The clerk of the supreme court authorized appellant, on filing a written transcript, to have it printed himself, instead of depositing the money to pay for its being printed under his own direction, as required by Sup. Ct. Rule 12. Appellant, 48 days later, filed the printed transcript, and on the same day, but prior to such filing, a motion to dismiss for failure to file was served on him. No unnecessary delay on appellant's part in having it printed was shown. *Held*, that the motion to dismiss must be denied.

In bank. Appeal from Superior Court, Lassen county.

Action by F. G. Ward, sheriff, against Matt Healy. M. Asher, assignee, intervened. From a judgment against him, defendant appealed. On motion to dismiss appeal. Denied.

Spencer & Raker and F. E. Spencer, for appellant. Shinn & Shinn, for respondent. Goodwin & Goodwin, for intervenor.

GAROUTTE, J. This is a motion to dismiss an appeal upon the ground of failure to file the printed transcript within the time provided by law. Rule 12 of this court provides that a written transcript in civil cases may be filed with the clerk of this court, if, when presented for filing, it be accompanied with sufficient funds to pay the expenses of printing the same, and that the clerk, upon receipt thereof, shall cause the transcript to be printed, and to the printed copy shall annex his certificate, etc. Appellant, in line with the foregoing rule of the court, transmitted to the clerk the written transcript, with a request that it be filed, but failed to accompany it with the funds to pay for printing the same. In lieu thereof, he asked the clerk to allow him the privilege of having the transcript printed at his home printing office at his own expense, and the clerk granted such request. The printing of the transcript was proceeded with, and some 48 days thereafter the printed copy was served, and also filed, as provided by the rule. The motion to dismiss the appeal was served upon appellant prior to the time when the printed transcript was actually filed in the office of the clerk of this court.

Appellants seldom invoke the provisions of the rule of court heretofore referred to, and, as a consequence, the true construction thereof has never been a question presented for decision. But they are often desirous of delay in the decisions of questions pending upon their appeals, and it is plainly apparent that, if we should indorse the practice here adopted as one justified by the rule, grave abuses would inevitably result, and the delays in litigation be more aggravated. We think the rule should be strictly enforced, that it should be obeyed as written, and, when it says that the funds necessary to pay for the printing of the transcript should accompany it when transmitted to the clerk of this court, the provision should be upheld, and a compliance therewith demanded. With funds in hand, the clerk has the means and also the opportunity to have the work done promptly and well, and work which the appellant's attorneys were in this case more than 40 days in having done the clerk could probably have done in 10. We conclude that no understanding or agreement between the clerk of this court and appellant's attorney could dispense with a compliance with the provisions of the rule of the court here involved, and that appellant had no right, in law, to rely upon any such understanding.

While the motion to dismiss the appeal and the printed transcript were filed upon the same day, none of appellant's rights were saved thereby, for by rule 5 of this court the filing of the transcript can only defeat the motion when it is filed before the notice to dismiss is served, and such was not the fact in this case. Carter v. Paige, 77 Cal. 64, 19 Pac. 2; Chapman v. Bank, 88 Cal. 419, 26 Pac. 608. Again, it is contended that the printed transcript was in the office of Wells, Fargo & Co., in transit to the clerk of this court for filing, when the motion to dismiss was served, and for that reason the motion should be denied. Placing the document in the office of Wells, Fargo & Co. was not the equivalent of filing, and it cannot be considered as filed when so placed. The principle declared in Hanson v. McCue, 43 Cal. 178, does not go to such lengths.

It thus appears that appellant has no legal ground upon which to stand in combating this motion of respondent, and, therefore, the only question to be determined is, are the facts shown in the affidavit on behalf of the appellant sufficient to excuse his failure to file the printed transcript? Upon consideration we have arrived at the conclusion that they are sufficient. When we consider the understanding had between the clerk of this court and appellant's attorney as to how and when the transcript should be printed, and that the attorney proceeded under such understanding and had the transcript printed without unnecessary delay, as far as any direct showing to the contrary is concerned; when we consider that the clerk, although without any authority to do so, in effect waived the payment of the funds provided for by the rule, and that the rule has never heretofore been construed, and that the construction placed upon it by appellant's attorney is neither arbitrary nor unreasonable, —we conclude that to dismiss the appeal would be a hardship upon appellant too heavy to find justification in the foregoing facts. For the foregoing reasons the motion to dismiss the appeal is denied.

We concur: McFARLAND, J.; VAN FLEET, J.; HARRISON, J.; TEMPLE, J.; HENSHAW, J.

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5 Cal. Unrep. 218

STIMSON MILL CO. v. RILEY et al.

(L. A. 3.)[1]

(Supreme Court of California. Dec. 20, 1895.)

MECHANICS' LIENS — BUILDING CONTRACT — PAYMENTS—BOND—VALIDITY—APPEAL—REVIEW —ALLOWANCE OF ATTORNEY'S FEES.

1. The fact that the building contract, in providing for the payments, retains, until 35 days after the completion of the work, slightly less than the 25 per cent. of the contract price required by statute, does not render the owner personally liable for all labor and materials furnished, especially when more than 25 per cent. was in fact actually retained.

2. When the building contract provides for payments as the work progresses, payments made when the work has been substantially finished to the required stages cannot be considered premature, so as to subject the owner to liability to material men to the additional extent of the payments so made.

3. Where a bond is in form joint and several, the failure of all the parties named in the instrument as obligors to sign the bond does not render it void.

4. An allowance of attorney's fees in an action to enforce mechanics' liens will not be set aside as insufficient unless clearly unreasonable.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Actions by the Stimson Mill Company, a corporation, and by one Duncan, against Spurgeon V. Riley and others. The cases were consolidated, and from the judgment plaintiff the Stimson Mill Company appeals. Affirmed.

H. A. Barclay, for appellant. D. K. Trask and E. C. Bower, for respondent.

BELCHER, C. This action was instituted to foreclose 12 liens for labor and materials furnished and used in the construction of a house for the defendant Riley, the several claims, including costs of recording, aggregating in amount the sum of $1,728.86. One of the said liens was for materials furnished by the plaintiff, and the others were duly assigned to the plaintiff. One Duncan also commenced an action to foreclose a lien for labor done by him on the building, of the value of $25, and the two actions were consolidated and tried together. The contract, under which the building was constructed, was executed by Riley, as owner, and J. H. Cummins, as contractor, on October 10, 1893, and was duly recorded. It provided that Cummins should do all the work and furnish all the materials necessary to complete the building according to the plans and specifications made by Charles W. Davis, architect, for the sum of $2,180. It further provides that the payments, so far as need be stated here, should be made as follows: (4) When ready for plastering, $250; (5) when first coat of plastering is finished, $250; (6) when white coat of plastering is finished, $250; (7) when whole work completed and accepted by architect, $300; balance, $530, usual 35 days; "provided, that in each of the said cases a certificate be obtained and signed by the said Chas. W. Davis that he has done his work so far as done to his satisfaction, and also a statement of the value of the work so done by him." Accompanying the contract was a bond, as required by section 1203, Code Civ. Proc., which was signed by S. C. Dodge, one of plaintiff's assignors, and R. A. Buchanan, but not by Cummins. It reads: "Know all men by these presents, that we, the undersigned, * * * do hereby jointly and severally guaranty the faithful performance of the above contract, and the delivery of the said building to Spurgeon Riley, Esq., free from all liens that may be filed against the contractor on the above contract, not exceeding the sum of five hundred and forty-five dollars, that may accrue against him by reason of the nonfulfillment of the said contract by the said J. H. Cummins, the contractor aforesaid. We further agree that he will pay all his subcontractors, laborers, and material men all of the moneys that may become due them by reason of labor or materials under this contract. We hereby guaranty to them the payment in full of all their claims, and hold ourselves responsible to them in the sum of five hundred and forty-five dollars, or so much as may be necessary of the said sum to pay them in full of all labor and materials furnished for said building, exclusive of the contract price of the same." It is alleged in the complaint, among other things, that at least 25 per cent. of the whole contract price was not, by the terms of the contract, made payable at least 35 days after the final completion of the contract; that the first, fourth, fifth, and sixth payments were made by Riley to Cummins before they became due according to the terms of the contract; and that $750 is a reasonable sum to be allowed plaintiff as attorney's fees in the action. Wherefore plaintiff prayed judgment against the defendant Cummins for the several sums specified, aggregating $1,728.86; that it be allowed an attorney's fee in the sum of $750; and that the said several sums be adjudged and decreed to be liens upon the land and building described, and that the same be sold, and the proceeds applied, etc. Cummins suffered his default to be entered. Riley appeared and answered. The answer set out the contract and accompanying bond and the work done thereunder. It denied that any payment was made before it became due, and alleged that each and every payment was made upon the certificate of the architect as provided by the contract. It also denied the right of the plaintiff to recover on the lien of S. C. Dodge, for the reason that Dodge was estopped from claiming or maintaining any lien against said building by the covenants of the said bond, whereby he obligated himself that the contractor would complete his contract according to its terms, and deliver the house to defendant free of liens and charges. It also admitted that there was still in defendant's hands money due and unpaid under the contract amounting to the sum of $870; and it asked that an order be made permitting the defendant to deposit the said sum in court, subject to the further direction of the court. The case was tried, and the court found, in effect, that the said contract was a valid and binding contract between the parties; that the first payment of $150 was made before the same became due; that the fourth, fifth, and sixth payments were not made before the same became due; that plaintiff was not entitled to recover anything upon the cause of action assigned to it by S. C. Dodge, except as against the defendant Cummins; that $25 was a reasonable sum to be allowed Duncan as an attorney's fee, and $75 was a reasonable sum to be allowed plaintiff as an attorney's fee; that Duncan and the plaintiff were each entitled to recover of the defendant Cummins the amount of their respective liens, together with their costs and attorneys' fees as aforesaid, and interest as prayed for, and were entitled to recover of the defendant Riley the sum of $1,020, being the $870 which was deposited in court and the $150 which was prematurely paid, and also the cost of verifying and recording their liens and their attorneys' fees and costs of suit, which said several sums were declared to be liens on the land and building described. In accordance with the findings a judgment and decree of foreclosure was entered, from which, and from an order denying its motion for a new trial, the plaintiff Stimson Mill Company appeals.

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[1] Rehearing denied.

The principal points made for a reversal are: (1) That the court erred in deciding that the contract was valid and binding, when, by its terms, 25 per cent. of the whole contract price was not made payable at least 35 days after the final completion of the contract. (2) That the court erred in deciding that the fourth, fifth, and sixth payments were not made before they became due. (3) That the court erred in deciding that the plaintiff was not entitled to enforce the lien for the claim of S. C. Dodge. (4) That the court erred in allowing plaintiff only $75 as an attorney's fee.

As to the first point. It appears that the sum reserved for the last payment was $15 less than 25 per cent. of the whole contract price. The statute (Code Civ. Proc. § 1184) provides that the contract price shall be made payable in installments, or on the completion of the work, "provided, that at least twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract"; and that, "in case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." It will be observed that this section does not declare the contract void in case it fails to conform substantially to its provisions, but only imposes a penalty upon the owner by making him personally liable, and his improved property subject to liens, for the labor and materials done and furnished; and it was so held in Lumber Co. v. Wooldredge, 90 Cal. 574, 27 Pac. 431. In that case the contract made the last payment due 30 days after the final completion of the contract, and not 35 days, as required; and it was held that the plaintiff was not injured by the nonconformity, and the penalty had not been incurred; the court saying that in such cases "every reasonable intendment is indulged to avoid a penalty." So in Yancy v. Morton, 94 Cal. 558, 29 Pac. 1111, the contract provided that 35 days after the completion of the building 25 per cent. of the contract price should be paid, "provided that payment may be made at any time between the date of completion and the said thirty-five days, in case said contractors show receipts and give special bonds that all bills will be paid, and that no liens or other claims exist against said premises; such payment to be optional with the owner." It was held that this was in substantial conformity with the requirement of the Code, and was sufficient. In this case it would seem that the parties to the contract intended to have 25 per cent. of the whole contract price reserved for 35 days after the completion of the building, and that the failure to do so arose unintentionally from some mistake of figures in apportioning the amounts of the several installments to be paid earlier. This is shown by the contract, which expressly provides that the money is to be paid "in the manner following, that is to say: seventy-five per cent. of said sum of two thousand one hundred and eighty dollars as said work progresses, and in sums proportionate to the value of the work done from time to time by said second party in sums as follows." The court below was of the opinion that the contract was in substantial compliance with the requirements of the statute, and that the deficiency of $15 was so trivial that, in view of the whole amount of the last payment, and the consequences to the owner if it is held not to be a substantial compliance, the maxim, "De minimis non curat lex," should be applied. It is a settled rule that courts of equity are always reluctant to enforce penalties, and every reasonable intendment is indulged to avoid them. Here it clearly appears that the appellant was in no way injured by the small deficiency in the amount reserved for the last payment, since much more than 25 per cent. of the contract price was in fact reserved and paid into court for the use and benefit of the lien claimants. Under these circumstances we think the decision of the court below upon this point was right, and that it should be upheld.

As to the second point. The house constructed under the contract had a bath room, which was 7 by 12 feet in size and 12 feet in height. It was wainscoted up 5 feet from the floor, and had a window and door and transom over the door. At the times when the three payments complained of were made the bath room was not entirely lathed or plastered, but it was partially lathed when the fourth payment was made, and partially plastered when the fifth and sixth payments were made. It was proved that it would take one man five or six hours to complete the lathing and plastering. Mr. Davis, the architect, testified: "I issued an architect's certificate for each payment that was made on this building before the payment was made, upon my own authority, as the architect of the building. At the time of issuing each certificate I personally examined the building, and know that the building was at each time completed to the stage authorizing the payment to be made." There is no pretense that the certificates were obtained by fraud or collusion, but it is claimed that, because the bath room was not fully lathed and plastered when the payments were made, the owner should be subjected to the penalty of paying the money—$750—a second time. Here, again, it appears that the defect relied on was trivial, and that to sustain appellant's claim would work out an injustice and wrong, which should be avoided, if possible. In section 1187, Code Civ. Proc., it is provided that every person save the original contractor, claiming the benefit of the chapter in regard to liens, must file his claim of lien within 30 days after the completion of any building, improvement, or structure, or after the completion of the alteration, addition to, or repair thereof, and that "any trivial imperfection in the said work, or in the construction of any building, improvement or structure, or the alteration, addition to or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien." The rule thus declared as to the filing of liens should, we think, in reason and equity, be applied to the payment of the installments of the contract money. All that the law requires is a substantial compliance with the terms of the contract and good faith on the part of the owner. It must follow, therefore, that the court properly found that the fourth, fifth, and sixth payments were not prematurely made.

As to the third point. It is claimed for appellant that the bond executed by Davis was void, because not signed by Cummins, and in support of this position Sacramento v. Dunlap, 14 Cal. 421, and People v. Hartley, 21 Cal. 585, are cited. The cases cited are not in point. In each of those cases the bond sued upon was in form the joint bond of the principal and sureties, and not joint and several, and was signed only by the sureties. It was held that under such circumstances no recovery could be had on the bond. And see Weir v. Mead, 101 Cal. 125, 35 Pac. 567, where the authorities upon the subject are reviewed. Here the bond in question was in form joint and several, and in Kurtz v. Forquer, 94 Cal. 91, 29 Pac. 413, a similar bond, which was executed for a like purpose, was held valid and binding. Whether the execution of the bond by Dodge should be held to operate as an estoppel against him and his assignee from enforcing his claim against Riley, it is unnecessary to determine. The claim was assigned to and was owned by the plaintiff, and judgment against Cummins was entered in favor of plaintiff for the aggregate of all its claims. And, without including the Dodge lien, liens were foreclosed for sums more than sufficient to exhaust all the money remaining unpaid and due from Riley. If, therefore, the court erred in refusing to foreclose the Dodge lien, the error was harmless, and the plaintiff was in no way aggrieved thereby.

As to the fourth point. The Code provides that the court must allow a reasonable attorney's fee to the lien claimant. What is a reasonable fee is a matter to be determined by the trial court, and its action will not be disturbed on appeal unless it appears that the sum allowed is clearly unreasonable. The record only shows that the trial of the case occupied a portion of four days, but how much of each day does not appear. While the sum allowed seems rather small, we cannot say that the court abused its discretion in determining that $75 was a reasonable fee.

Certain rulings of the court upon the admission of evidence are specified in the statement as erroneous, but they are simply referred to in appellant's brief without argument. On examination of the record we fail to discover any material error in any of the rulings referred to, and therefore pass them by without special notice. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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5 Cal. Unrep. 225

WARDLAW v. CALIFORNIA RY. CO.

(No. 15,880.)

(Supreme Court of California. Dec. 23, 1895.)

CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

1. Where a passenger goes on the side of a platform car opposite the platform, and not at the place arranged to receive passengers, and attempts to climb on the train from between the cars, and in so doing places his foot on the bumper, where it was injured by the engine moving up to couple the train, he is guilty of contributory negligence, and cannot recover.

2. Where the facts are undisputed, and the inference of negligence is irresistible, the question is one of law for the court.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by James J. Wardlaw, by James Wardlaw, his guardian ad litem, against the California Railway Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Cross, Hall, Ford & Kelly, for appellant. Chickering, Thomas & Gregory, for respondent.

SEARLS, C. This action is brought to recover damages from the defendant, a corporation, and a carrier of passengers by railroad, for personal injuries sustained by the infant plaintiff, while boarding defendant's car, at Fruitvale, in the county of Alameda. At the trial, and upon the close of the evidence on the part of plaintiff, counsel for defendant moved for a nonsuit, upon the ground that the evidence of the plaintiff showed that he, the said plaintiff, was guilty of contributory negligence. The motion was granted by the court, and judgment entered in favor of defendant for costs. Plaintiff excepted in due form, and prosecutes this appeal from the judgment of nonsuit, and assigns the granting of the motion for nonsuit as error.

It was admitted at the trial that plaintiff was, at the date of the accident, of the age of about 18 years, and that James Wardlaw had been duly appointed his guardian. Also, that the defendant corporation owned and operated a steam railroad in the county of Alameda, together with engines, cars, etc., running between the villages of Fruitvale and Laundry Farm in said county, and was a common carrier of passengers for hire over said railroad. The testimony of plaintiff was to the effect that on Sunday, May 21, 1893, he purchased a ticket in San Francisco for Laundry Farm, and in company with a party of young friends rode on the Southern Pacific cars to Fruitvale, at which point the road of defendant begins. The cars of defendant were what plaintiff terms picnic cars, and were platform cars, with a railing around them and seats extending across. The parties were going to a private picnic and approached the rear end of the train, as we must infer from the fact that the engine was at the other end, but probably not attached to the train. Upon approaching the train, which stood in front of defendant's depot, plaintiff passed forward upon the right-hand side of the cars, looking forward, and, seeing no steps, he attempted to climb on a car at the end where it was attached to another car, by putting his foot upon a brakebeam, his hands on the platform, and swinging himself up, so that he placed his other foot upon the bumper just in time to have it caught between the bumpers and crushed as the engine started the cars back and pressed them together, probably in coupling onto the train.

Plaintiff heard no bell, whistle, or other signal from the engine. After his injury, plaintiff saw that, on the other or left-hand side of the car (on the depot side), there was an opening in the railing of the car, and steps by which to ascend to it. On cross-examination plaintiff said, among other things: "I cannot handle myself as well as a boy who has the full use of his limbs. I never have been able to. I have to be careful. I cannot get around as easily as other boys, and know that perfectly well. This is only on account of being fleshy. Am not injured in any other way." There were several other witnesses on the part of the plaintiff, from whose testimony it is to be inferred that the Laundry Farm train came in about the time plaintiff and his party of about 30 persons arrived at the station. The train came down the track with the engine in advance, which engine was switched to a side track and run back to be attached to the other end of the train, at which time plaintiff and some three others of the party attempted to board the car on the right-hand side, and between the ends of two cars. The witnesses concur in stating: (1) That they heard no signal from the engine as it backed down and coupled on the train. (2) That the depot was on the left-hand side, and that there were steps and facilities for boarding the cars on that side, and none on the other, and that ample time was given for passengers to board the train. (3) The cars were ordinary platform freight cars, with a railing constructed around them, except with an opening on the left-hand side, and steps for the entry and exit of passengers, and a cover over the top. (4) There is no evidence tending to show that defendant knew or was aware of the position of plaintiff when it attached its engine to the train. (5) At the moment of plaintiff's injury it is to be inferred the cars were simply crowded together by the shock of attaching the engine. John Noriega, a witness, at folio 44 of the transcript, says: "I felt the shock of the car just as though the engine had been hitched on, and then heard the scream."

The sole question in the case is this: Was there such evidence of contributory negligence on the part of the plaintiff as to preclude a recovery, conceding the defendant to have been negligent? Negligence, though variously defined, may be said to be "the failure to do what a reasonable and prudent person would ordinarily do under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done." Railroad Co. v. Jones, 95 U. S. 439. "Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or cooperating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of." Beach, Contrib. Neg. § 7. It is the duty of a railway company, as a common carrier of passengers, to keep its stations and the approaches thereto in such a condition that those having occasion to use them for the purposes for which they are designed may do so with safety. So, too, the duty devolves upon it of preparing all proper means of ingress and egress to and from its cars devoted to the carriage of passengers. This duty performed by the railway company, the reciprocal duty devolves upon one who would take passage by the cars to use his natural faculties in selecting such means and place of access thereto as have been provided for that purpose, and as promise immunity from danger. Not to do so is evidence of negligence on the part of the passenger, and where, as in the present case, the plaintiff went upon the side of the car opposite the platform, and presumably not the place arranged to receive passengers, and, finding no place of access, attempted to climb upon the train from between the cars, with the barrier of a railing before him to be scaled when he reached the level of the car floor, and in so doing placed his foot upon the bumper, where it was caught by the connecting car, pressed back by the engine moving up to couple on the train, but one inference can be drawn from the facts, and that is that he was guilty of such negligence as is denominated negligence in law.

As a general proposition, cases of negligence (to which those of contributory negligence form no exception) present a mixed question of law and fact, in which it devolves upon the court to say, as matter of law, what is or amounts to negligence, and upon the jury to determine, as matter of fact, whether or not, in the particular case, the facts in proof warrant the imputation of negligence. Where, however, the facts are undisputed, and the inference of negligence is irresistible and not open to debate, doubt, or rational difference of opinion, the question becomes one of law to be passed upon by the court. Dufour v. Railroad Co., 67 Cal. 319, 7 Pac. 769; Long v. Railroad Co., 96 Cal. 269, 31 Pac. 170; Jamison v. Railroad Co., 55 Cal. 593; Van Praag v. Gale, 107 Cal. 438, 40 Pac. 555; Maumus v. Champion, 40 Cal. 121; Davis v. Button, 78 Cal. 247, 18 Pac. 133, and 20 Pac. 545; Meeks v. Railroad Co., 52 Cal. 602; Glascock v. Railroad Co., 73 Cal. 137, 14 Pac. 518; Holmes v. Railway Co., 97 Cal. 161, 31 Pac. 834. That plaintiff's negligence was the proximate cause of his injury needs no argument, and there is no evidence of wanton or willful negligence to bring it within the purview of that class of cases of which Esrey v. Pacific Co., 103 Cal. 541, 37 Pac. 500, is a fair sample. The gist of that case is involved in a single paragraph, as follows:

> "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered responsible."

In the present case there is nothing to indicate that defendant had any knowledge of the perilous position of plaintiff. Its negligence consisted in backing its engine against the train without a warning signal, and for this negligence plaintiff is not entitled to recover because of his own negligence, without which no harm would have come to him. The judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

110 Cal. 530

RICHTER v. BLASINGAME. (No. 18,419.)

(Supreme Court of California. Dec. 20, 1895.)

Corporations — Stockholders' Liability — Distilling Corporations—Contribution—Limitation of Actions—Trial—Findings.

1. Rev. St. U. S. § 3251, making "every person in any manner interested in the use" of any still jointly and severally liable for the taxes imposed on the liquors distilled therefrom, renders the stockholders of a distilling corporation liable for such taxes.

2. A stockholder of such a corporation paying more than his share of such taxes is entitled to contribution from the others.

3. A right of action for contribution from persons jointly and severally liable for a debt accrues only on the payment of more than one's share, and limitation does not begin to run against an action therefor until then.

4. The failure to directly find on the issue of limitation is not ground for reversal where the facts found show that a finding would have necessarily been adverse to appellant.

Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by Charles Richter against A. Henningsan, L. A. Blasingame, and others. There was a judgment for plaintiff, and defendant Blasingame appeals. Affirmed.

Sayle & Coldwell and W. P. Thompson, for appellant. G. B. Graham and F. H. Short, for respondent.

PER CURIAM. This is an action to enforce contribution by defendants as stockholders in the Fruitvale Wine & Fruit Company, a corporation organized and existing under and by virtue of the laws of the state of California, on account of money paid by the assignor of plaintiff upon a judgment against the stockholders in said corporation, and in favor of the United States, for $1,827.40, due to the United States as a balance on a tax of 90 cents per gallon upon the distillation of 5,586 gallons of brandy and spirits by said corporation, between August 1, 1887, and September 22, 1887, which judgment is averred to have been paid February 2, 1892, by the First National Bank of Fresno, a corporation organized and existing under the laws of the state of California, a stockholder in the corporation first named, and one of the defendants and judgment debtors in said judgment in favor of the United States. Plaintiff, as the assignee of said First National Bank of Fresno, had judgment in the court below against sundry of the defendants herein, and against the defendant L. A. Blasingame, for $213, from which judgment said Blasingame alone appeals. The cause comes up on the judgment roll, without a statement or bill of exceptions.

Appellant contends that the complaint does not state facts sufficient to constitute a cause of action against him, and that the findings of the court are not sufficient to support the judgment. So much of the complaint as is necessary to illustrate the point made by appellant may be epitomized as follows: (1) The Fruitvale Wine & Fruit Company was a California corporation. (2) Defendant (appellant here) was a stockholder in said corporation, and the owner and holder of 10 shares of its corporate stock, out of 141 shares issued. (3) The corporation distilled 5,586 gallons of brandy and spirits, upon which it was liable to pay to the government of the United States a tax of 90 cents per gallon, and which amounted in the aggregate to $5,027.40. (4) In 1890 the United States of America brought an action in the circuit court of the United States, Ninth circuit, Southern district of California, against the First National Bank of Fresno, and certain others, all stockholders in said corporation, to recover from them said tax. (5) The corporation was insolvent, and had no property. (6) The United States recovered judgment for $2,163.02. (7) On January 2, 1892, an execution issued on said judgment, and was about to be levied upon the property of said bank (defendant), when it paid the judgment, and assigned its claim or right to contribution by the other stockholders to the plaintiff and respondent herein. (8) It does not affirmatively appear that appellant was a defendant in said action by the United States.

The question is, does the foregoing statement show a liability for his proportion of the tax upon the part of the appellant, either under the laws of the United States, or under the constitution and laws of the state of California? So much of the act of congress of 1872 as bears upon the subject is to be found in the latter part of section 3251 of the Revised Statutes of the United States, and is as follows: "Every proprietor or possessor of and every person in any manner interested in the use of any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom," etc. A stockholder in a private corporation for profit is not in any proper sense the owner of the property of the corporation as such. He has, however, a direct interest in the corporation. In Plimpton v. Bigelow, 93 N. Y. 592, it was said: "The right which a shareholder in a corporation has, by reason of his ownership of shares, is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts." Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, and Kohl v. Lilienthal, 81 Cal. 378, 20 Pac. 401, and 22 Pac. 689, are to like effect. A stockholder has an insurable interest in the property of the corporation. Riggs v. Insurance Co., 125 N. Y. 7, 25 N. E. 1058; Warren v. Insurance Co., 31 Iowa, 464. At common law, a stockholder in a corporation, on account of his interest, was not a competent witness for the corporation in an action against it, or to serve as a judge or juror where the corporation was a party. We must not confound the liability of a stockholder in a corporation, under the law of its creation, with that imposed upon him by the act of congress. His liability under the latter is quite independent of the former, and is just what the act of congress has imposed upon him. That liability under the law applies not only to every proprietor and possessor of a still, but also to "every person in any manner interested in the use of any still, distillery," etc., and makes them all jointly and severally liable for the tax. So far as we know this particular provision of the act has not received an interpretation by the supreme court of the United States. In 1876 the acting secretary of the treasury addressed to the attorney general of the United States this precise question, in the following language: "Is a stockholder in a distilling corporation, not otherwise liable for the debts of the corporation beyond the amount of his stock therein, made individually liable therefor by the provisions of section 3251 of the Revised Statutes, and can his individual property, in no way connected with the business of such corporation, be seized and distrained for taxes due on spirits produced by it?" The answer was: "I am of the opinion that the section cited does include stockholders of private corporations engaged in distilling for gain," etc. The opinion proceeds to argue that stockholders are included in the expression "every person in any manner interested," and are therefore jointly and severally liable for the tax. 15 Op. Attys. Gen. p. 559. A similar opinion may be found in volume 16, at page 10, where it was held that being jointly and severally liable under the provisions of section 3251, Rev. St., for the taxes imposed upon the spirits manufactured by the corporation, stockholders therein could not be accepted as sureties upon a bond required of the corporation by another section. These opinions, while not conclusive, are valuable as serving to show the interpretation given to the section of the Revised Statutes under consideration by the department of justice of the federal government. Like considerations apply to the ruling of the circuit court, in holding the stockholders liable for the tax due from the corporation in the case which serves as a predicate for this action. We are of opinion that the stockholders in the corporation had such an interest in the use of the distillery as rendered them jointly and severally liable for the tax upon the spirits distilled therein, within the purview of section 3251 of the Revised Statutes, and hence that the allegations of the complaint stated facts sufficient in that respect to constitute a cause of action against them, and that the facts as found by the court which affirm these allegations were sufficient in that respect to support the judgment.

In the absence of any statement or bill of exceptions, we must infer, in favor of the judgment, that there was evidence in support of every material fact found by the trial court; and hence we cannot assume that the judgment in the circuit court against the bank and others was accepted by such trial court as conclusive evidence that defendants in this action, who were not parties to the original suit in the circuit court, were bound by the judgment therein; but, on the contrary, we must presume that the evidence established their liability precisely as charged in the complaint and found by the court, which, as we have before observed, was sufficient to establish the liability of the defendant here.

The cause of action against these defendants is not based upon the judgment against the bank and others, but upon the fact that the Fruitvale Wine & Fruit Company, a corporation, owned, possessed, and operated a distillery, and manufactured distilled spirits upon which there was a tax due to the government of the United States, and that these defendants, as stockholders in said corporation, were interested therein, and hence liable under the statute. These facts, being charged and found, establish their liability. Being jointly and severally liable, defendants are liable to contribute their proportion to their co-obligors, who have paid the demand for which all were liable.

The appellant, in his answer, pleaded the statute of limitations, and in his brief urges that "the findings do not support the judgment, for the reason that there are no findings upon defendants' plea of the statute of limitations." In the findings as originally prepared, and upon which the judgment was entered, there was no finding upon the statute of limitations, but several weeks after the entry of the judgment, the court, by an ex parte order, and upon the ground that it had inadvertently omitted them, made and caused to be filed findings upon this plea. This practice was unauthorized, and it may be conceded was erroneous, but it does not follow that the judgment should be reversed on that ground. The judgment does not depend upon these findings, but finds its support in the findings which were originally filed. The appeal is brought here upon the judgment roll alone, without any bill of exceptions. and the facts found by the court show of themselves that the action is not barred by limitation, and any finding that the court would have made upon this plea must have been adverse to the defendant. A formal finding to that effect, in the absence of all the evidence upon which the facts found are based, would be but a conclusion of law, and, whether given or omitted, would not constitute reversible error. The findings show that the demand of the United States was paid by the First National Bank of Fresno, the assignor of plaintiff, on the 3d day of February, 1892. The present action was brought August 18, 1892, less than two years thereafter. "A party acquires a right to contribution as soon as he pays more than his share, but not until then, and consequently the statute of limitations does not begin to run until then." 2 Pars. Cont. (8th Ed.) p. 37, and cases there cited; Sherwood v. Dunbar, 6 Cal. 53. The liability of a co-obligor to contribution, where not founded upon an instrument in writing, is governed by the first subdivision of section 339 of the Code of Civil Procedure, and is barred in two years.

The judgment appealed from is affirmed.

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110 Cal. 547

NORTHEY v. BANKERS' LIFE ASS'N.

(No. 15,983.)[1]

(Supreme Court of California. Dec. 23, 1895.)

INSURANCE CERTIFICATE — FAILURE TO PAY ASSESSMENT.

An insurance certificate provided that on failure to make payments at maturity in January, April, July, or October, the membership should be forfeited. The insured was mortally wounded April 28th, and died May 1st. The last day of April fell on Sunday, and the April assessment was not paid. Code Civ. Proc. § 13, provides that, when any contract is to be performed on a holiday, it may be performed upon the next business day. *Held*, that the last day to pay the assessment was May 1st, and, the insured having died on that day, the membership was in force.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Charlotte Northey sued the Bankers' Life Association, a corporation, on an insurance certificate. Judgment for defendant. Plaintiff appeals. Reversed.

Van Ness & Redman, for appellant. Sheldon G. Kellogg, for respondent.

BELCHER, C. On July 29, 1892, a certificate of membership in the defendant corporation was issued to Frank T. Northey, providing that, in the event of his death during his membership, his wife, Charlotte Northey, who was named in the certificate as beneficiary, should receive the sum of $2,000, and the return of a portion of the guaranty fund, amounting to $31. The certificate also provided that "upon the failure of the above-named member to make any payment due from him to the association at its maturity in January, April, July, or October of each year, his guaranty deposit shall be forfeited, and his membership shall thereupon cease." Certain payments became due from Northey to the association in the months of July and October, 1892, and January, 1893, and were made at their respective dates of maturity in said months. Upon or about April 1, 1893, Northey received from the defendant a written notice that an assessment of $3.10 had been levied against him, and that the said sum must be paid during the month of April, 1893. Upon April 28th, Northey was shot and mortally wounded, and upon May 1st he died. The last day of April fell upon a holiday (Sunday), and this last assessment was never paid. Subsequent to the death of Northey, the plaintiff, who was the payee named in the certificate, furnished the defendant due notice and proof of his death, and otherwise performed all the conditions of the certificate required of her; but the defendant refused to pay to her the said sum of $2,031, or any part thereof. Thereafter the plaintiff commenced this action, and, in an amended complaint, set forth the facts as above stated, and demanded judgment against the defendant for the sum of $2,031, with interest and costs. The defendant demurred to the complaint upon the ground that it appeared therefrom that the assessment maturing and payable during the month of April, 1893, was not paid during said month, or at all, and that the nonpayment of the same at its maturity caused the membership of Northey in the association to cease before his death. The court sustained the demurrer, and gave judgment for the defendant, from which the plaintiff appeals.

It will be observed that the only provision in the certificate as to the forfeiture of membership is that upon the failure of the assured "to make any payment due from him to the association at its maturity in January, April, July, or October of each year," his membership shall cease. This in no way fixes the day or date of maturity. It might be the last or any other day of the month. And as against the insurer, in the absence of anything more definite, it would be presumed to be the last day of the month, the general rule being that, "where the language of a policy may be understood in more senses than one, it is to be construed most strongly against the insurer, because he frames it, and is supposed to make it as potent as possible in his own favor." Rankin v. Insurance Co., 89 Cal. 209, 26 Pac. 872; Thompson v. Insurance Co., 136 U. S. 287, 10 Sup. Ct. 1019; Civ. Code, § 1654. It will also be observed that the notice of the assessment of $3.10 which was not paid was only that the said sum must be paid during the month of April, 1893. This was, in effect, a notice that the insured would have to and including the last day of April to make the payment.

Our Codes provide: "Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day with the same effect as if it had been performed upon the day appointed." Code Civ. Proc. § 13; Civ. Code, § 11. In Blackwood v. Packing Co., 71 Cal. 461, 12 Pac. 493, the time for the defendant to answer was extended by stipulation "to, and to include, February 17, 1884." On the 18th of February, no answer being filed, the default of the defendant was entered and judgment rendered in favor of the plaintiff. In due time the defendant moved to set aside the default and judgment upon the ground that the default was entered and the judgment rendered before the time to answer had expired. The 17th day of February fell upon Sunday, a holiday; and, on appeal from the order of the trial court denying the motion, it was held that under the stipulation, and the provisions of the Codes, the defendant was entitled to answer at any time during the succeeding Monday. In Campbell v. Society, 4 Bosw. 298, the assured held a policy which provided that it would not be in force "if the premiums remain unpaid beyond thirty days after becoming due." A premium became due on the 29th of May, and the policy holder was notified that, unless the same should be paid "on or before thirty days from that date, the policy will become void." The last day of the 30 days was Sunday, and the question was, could the tender of the premium be made on the Monday following? It was held that it could, and that the policy was not forfeited because payment was not made within the 30 days. In Hammond v. Insurance Co., 10 Gray, 306, the assured held a policy which provided that the premiums should be paid quarterly, in advance, "on or before the day, at noon, on which the same shall become due and payable." A premium became due on October 1st, which was Sunday, and it was held that a tender on the day following was in time. The court said: "The day of payment was on this occasion the first day of October. That day, as it appears, fell on Sunday; and, this being so, he was entitled to the ordinary privilege of discharging his obligation on the Monday following. The quarter-yearly payment, it is true, in terms, became payable on Sunday noon; but that day was not a day for secular business, and therefore, legally speaking, Sunday was not the day 'at which the same became payable'; and so, by the very provisions of the policy, properly construed, the quarterly premium was seasonably tendered on Monday." In Bliss on Life Insurance (2d Ed., p. 317) it is said: "If the last day for the payment of the premium, as fixed in the policy, occurs upon Sunday, at noon, the premium is not payable till the following Monday, and the company is liable if the assured dies Sunday afternoon." In Sands v. Lyon, 18 Conn. 18, the father of the defendant devised to him certain real property "on condition that he do pay, in one year next after my decease, to each of my daughters, * * * one hundred dollars." The last day of the year, next after the death of the testator, fell on Sunday, and the court held that payment might be made on the following Monday, saying: "We think that the defendant had, by the terms of the devise, a full year allowed him for paying the money, and, therefore, that he was not bound to pay it on the Saturday preceding the day on which the year expired." And in Weeks v. Hull, 19 Conn. 376, the court, referring to Sands v. Lyon, supra, said that that case recognized a conservative principle, which ought to govern all other cases to which it is applicable, namely, "that the computation of time should be so made as to protect a right and prevent a forfeiture, if this can be done without violating a clear intention or a positive provision."

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[1] Rehearing denied.

Without following the adjudicated cases further, it is enough, in our opinion, to say that, as Northey had to and including the last day of April to pay the assessment against him, and as that day was Sunday, he was, under the law, as declared by the Codes and the cases cited, entitled to make the payment at any time during the ensuing Monday. It follows, therefore, that his certificate of membership was still in force at the time of his death, and that the court erred in sustaining the demurrer to the complaint. The judgment should be reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded, with directions to the court below to overrule the demurrer.

110 Cal. 553

ARBIOS v. SAN BERNARDINO COUNTY.

(L. A. 34.)

(Supreme Court of California. Dec. 23, 1895.)

COUNTIES—ALLOWANCE OF CLAIMS—ACTIONS AGAINST COUNTY.

The county government act (section 43) provides for an allowance by the supervisors of a portion of a claim presented, and, if a claimant is unwilling to receive the amount, for the reconsideration thereof. Section 44 provides that a claimant, if dissatisfied after final action of the board, may sue the county. *Held* that, where a claim is allowed in part, claimant cannot sue on the entire claim without first notifying the supervisors of his unwillingness to accept the allowance.

Department 1. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by one Arbios against the county of San Bernardino. From the judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Henry W. Nisbet, for appellant. Frank B. Daley, for respondent.

HARRISON, J. The plaintiff is constable of one of the townships in the county of San Bernardino, and on the 5th day of May, 1894, filed with the clerk of the board of supervisors of that county and presented his claim for $383.40, properly itemized and verified, for services rendered by him as such constable. The board of supervisors, at its meeting on the 7th of August, allowed the claim for $198.99. Thereupon the plaintiff commenced the present action to recover the full amount of his claim. A demurrer to the complaint was sustained by the court, and from the judgment entered thereon this appeal is taken.

The controverted question on this appeal is whether the plaintiff was authorized to bring an action upon the claim before the supervisors had acted thereon, after being informed of his unwillingness to accept the amount allowed. Section 43 of the county government act (St. 1893, p. 364), after providing that the board of supervisors may allow a portion of a claim presented, provides: "If the claimant is unwilling to receive such amount in full payment, the claim may again be considered at the next regular succeeding session of the board, but not afterwards;" and section 44 provides: "A claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after the final action of the board, but not afterwards." This provision in section 44, limiting his right to sue the county to six months after its "final action" upon his claim, implies that the board is to act more than once thereon, and its "final action" is that which in the concluding portion of section 43 is directed to be taken when it has again considered the claim, after learning that the claimant is dissatisfied with its prior action. The supervisors would not know whether the claimant would be willing to accept the amount allowed, unless he should in some way indicate his disposition, and until they were informed of his unwillingness there would be no occasion for them to again consider the claim. Statutes requiring the presentation of claims against a county are framed with the purpose of avoiding useless expense in litigation, and to give to the county ample opportunity to avoid such expense; and we hold, therefore, that under a proper construction of the concluding portion of section 43 the plaintiff was required to indicate to the supervisors his unwillingness to accept the amount which they had allowed, and give them an opportunity to again consider his claim, in order that the county might have an opportunity to avoid incurring the costs of litigation which by section 44 would be imposed upon it if he should recover a judgment for more than the amount for which the claim was allowed. He was not authorized to bring a suit upon his claim until after they had again taken action thereon. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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110 Cal. 624

CONLAN v. SULLIVAN et al. (Sac. 49.)

(Supreme Court of California. Dec. 31, 1895.)

VENDOR AND PURCHASER — FRAUD OF PURCHASER — RESCISSION—IMPROVEMENTS—SUFFICIENCY OF FINDINGS.

1. Where, by a mistake of fact, a vendor believed the lot conveyed to be mortgaged for $500, instead of another lot owned by him, and offered to sell it for $700,—$200 to be paid in cash, balance to be paid on the mortgage,—and the purchaser, after telephoning the recorder, and learning the vendor's mistake, bought the lot on said terms, intending to defraud the vendor of the $500, the vendor could, on discovering his mistake, and on the refusal of the grantee to pay the $500 to him or the mortgagee, and on tendering the $200 received, maintain an action for rescission.

2. A finding, in an action to rescind a sale of land, that defendants expended a certain sum on the property, would not entitle defendants to be reimbursed for that amount, in the absence of a finding that the value of the property was increased by that amount.

Department 1. Appeal from superior court, Butte county; John C. Gray, Judge.

Action by William Conlan against John Sullivan and another for the rescission of a sale of land. From a judgment for plaintiff, defendants appeal. Affirmed.

Reardan & White, for appellants. John Gale and J. M. McGee, for respondent.

PER CURIAM. This is an action of rescission. The findings of the court were in accord with the allegations of the complaint, and judgment went for plaintiff. The appeal is from the judgment, and the merits of the case will be determined by a consideration of the sufficiency of the complaint in stating a cause of action. It appears substantially from the complaint that plaintiff owned a lot worth $700. By reason of a mistake of fact, he fully believed that it was mortgaged for $500, when it was another and different lot that was so mortgaged. He offered to sell the lot to appellants for $700, —$200 to be paid in cash, the balance, $500, to be paid on the mortgage. The appellants, through their attorney, telephoned to the recorder, and learned that respondent was mistaken, and that the lot was not incumbered at all. Then they agreed to buy the lot, and pay therefor $700, to be paid as above stated. They did not intend to keep this agreement, but did intend to take advantage of respondent's mistake, to obtain the property for $200, and to defraud him of the balance of the purchase price, $500. The $200 was paid, and the transfer made. Subsequently the plaintiff ascertained his mistake, and demanded that the $500 be paid to him, or to his mortgagee, in satisfaction of the mortgage upon the other lot. Defendants refused so to do. Plaintiff thereupon tendered the $200 received, with interest, and demanded a reconveyance, which tender and demand were also refused. We think the foregoing statement of facts sufficient to justify relief by a court of equity, and that the contract should be set aside.

The court made a finding to the effect that defendants had expended $282 upon the property, but made no finding as to the increased value of the property by reason of this expenditure of money. The mere expenditure of money upon the property by defendants is not sufficient to justify a reimbursement of the amount expended. Perchance, such expenditure did not add a dollar to the actual value of the realty. In addition, there is no allegation that such expenditure had increased to any degree the value of the realty. For the foregoing reasons, the judgment is affirmed.

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110 Cal. 387

In re WALKER'S ESTATE. (Sac. 34.)

(Supreme Court of California. Jan. 9, 1896.)

On motion for rehearing. Denied.

For former opinion, see 42 Pac. 815.

PER CURIAM. The opinion heretofore rendered herein is modified by eliminating from the paragraph preceding the judgment the first and last sentences, so that the same will read: "When a will is proved, every exertion of the court is directed to giving effect to the wishes of the testator therein expressed, but in the proving of the instrument the sole consideration before the court is whether or not the legislative mandates have been complied with." As so amended, the petition for a rehearing is denied.

McFARLAND, GAROUTTE, and VAN FLEET, JJ., dissent from the order denying the petition for rehearing.

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110 Cal. 556

In re RYER'S ESTATE. (S. F. 113.)

(Supreme Court of California. Dec. 23, 1895.)

ORDER DENYING NEW TRIAL—APPEAL—DISMISSAL—AUTHENTICATION OF TRANSCRIPT—PROBATE PROCEEDINGS—NECESSARY PARTIES.

1. Failure to serve the adverse party with notice of motion for a new trial, or with a statement of the case, cannot be urged as ground for dismissal of an appeal from an order denying the motion, on the ground that the supreme court has no jurisdiction.

2. A motion to dismiss an appeal for improper authentication of the transcript must be denied, where a properly authenticated transcript has been filed before the hearing of the motion.

3. Beneficiaries under a will, who have not, under Code Civ. Proc. § 1660, appeared and resisted the petition in probate proceedings of one claiming as heir, for his distributive share of the estate, authorized by section 1658, when notice of the petition has been given, as required by section 1659, "to all persons interested in the estate," are not necessary parties to an appeal from an order denying the petitioner a new trial.

Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Petition by Christopher B. Ryer against the estate of W. M. Ryer, as heir, for his share of the estate. There was a judgment denying the petition, and from an order denying him a new trial plaintiff appealed. On motion to dismiss the appeal. Denied.

L. J. Maddux, Reddy, Campbell & Metson, Pillsbury, Blanding & Hayne, James H. Budd, and L. W. Fulkerth, for appellant. E. N. Deuprey, F. E. Spencer, Garber, Boalt & Bishop, Charles F. Hanlon, Joseph Hutchinson, E. B. Holladay, Jos. P. Kelly, and Stanly, Hayes & Bradley, for respondent.

HARRISON, J. Motions to dismiss the appeal. The last will and testament of Washington M. Ryer, deceased, was admitted to probate, and letters testamentary issued thereon, July 13, 1892; and after the expiration of four months therefrom the appellant herein, claiming to be an heir of the deceased, presented his petition to the superior court for the share of the estate to which he claimed to be entitled. To this petition the executors and certain of the heirs and legatees of the deceased filed their answers, and the issues thus presented were tried by the court, and judgment rendered denying the petition. The petitioner then moved for a new trial, which was denied, and he has appealed from the order denying this motion. A motion is now made by the executors, and also by certain corporations claiming to be beneficiaries under the will of the deceased, to dismiss the appeal, upon the grounds that the notice of intention to move for a new trial, as well as the appellant's draft of his statement of the case, were not served upon these corporations; that the transcript on appeal, which was filed herein, was not properly authenticated, by reason of not having been certified on behalf of these corporations; that the notice of appeal was not served upon either of these corporations; and that, as they are adverse parties to the appellant, this court has no jurisdiction of the appeal unless they have been properly brought before it.

1. A failure to serve the adverse party with notice of the intention to move for a new trial, or with the draft of a statement of the case, may be a reason for denying the motion for a new trial, or for refusing to settle the statement, and may upon an appeal, if such service was necessary, be a ground for affirming or reversing the order appealed from; but it does not deprive this court of jurisdiction to hear the appeal, or constitute a

reason for its dismissal upon the ground that the court has not acquired jurisdiction to hear it. Barnhart v. Fulkerth, 92 Cal. 155, 28 Pac. 221. Matters occurring prior to the judgment or order appealed from cannot be considered on a motion to dismiss an appeal upon the ground that the appeal has not been perfected. Ditch Co. v. Bachtold, 41 Pac. 813.

2. Prior to the hearing of this motion the appellant had filed with the clerk of this court a transcript properly authenticated by the clerk of the superior court, and has thus removed this ground of the motion. Estate of Medbury, 48 Cal. 83; Woodside v. Hewel, 107 Cal. 141, 40 Pac. 103; Warner v. Hopkins, 41 Pac. 868.

3. Upon an appeal from an order denying a new trial, the parties to the motion in the court below are the only proper parties to the appeal. Watson v. Sutro, 77 Cal. 609, 20 Pac. 88. And the appellant is not required to give notice of appeal to others than those to whom the original motion was directed. The "adverse party" upon whom a notice of appeal is to be served is the party who appears by the record to be adverse. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103. And the record which is to be considered for that purpose is the record of the proceedings in which the appeal is taken. The rule that the notice of appeal must be served upon all parties that would be affected by a reversal of the order and judgment appealed from is to be construed with the other rule that only the record can be examined for the purpose of determining who are such adverse parties. The fact that the judgment or order may be used as evidence in some collateral action or proceeding, or that its reversal may have a remote or consequential effect to the prejudice of one who is not a party thereto, does not entitle such person to be made a party to the appeal. If it is necessary to resort to evidence extrinsic to the record upon the appeal, in order to show that the reversal will have such effect, the appeal will not be dismissed. The record to be used on an appeal from an order granting or refusing a new trial consists of the judgment roll and the bill of exceptions or statement used on the hearing of the motion, with a copy of the order appealed from. Code Civ. Proc., § 661. There is no "judgment roll," strictly speaking, in proceedings in probate; but, whenever proceedings in probate are so akin to a civil action as to necessitate the "papers" which are declared by section 670 to constitute the judgment roll in a civil action, they may be held to constitute the judgment roll referred to in section 661. In Estate of Bauquier, 88 Cal. 302, 26 Pac. 178, 532, it was held that a motion for a new trial is appropriate in proceedings in probate "whenever the action of the court which is invoked is dependent upon the existence of certain extrinsic facts which are presented to it for determination in the form of pleadings, and are to be decided by it in conformity with the preponderance of the evidence offered thereon," and that an appeal will lie from the order made upon the motion for a new trial. The proceeding instituted in the superior court by the appellant herein is in the nature of a collateral inquiry or episode interjected into the proceedings for the administration of the estate, in which there are pleadings, process, trial, findings, and a judgment,—thus presenting all the elements of a civil action instituted in an independent suit for the purpose of determining the right of the appellant to a share of the estate,—and, in matters of procedure upon an appeal, should receive the same consideration as upon an appeal in a civil action. The proceedings were taken by virtue of sections 1658–1660, Code Civ. Proc. Section 1659 provides, "Notice of the application must be given to the executor or administrator personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator." The manner in which notice of the settlement of the account of an executor or administrator is to be given is prescribed in section 1633, which requires the clerk to "appoint a day for the settlement thereof, and thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account." In the present case, personal notice of the application was served upon the executors, and the clerk caused to be posted for five days, in three public places in the city and county of San Francisco, a notice "to all persons interested in the estate" to appear and show cause why the said petition should not be granted. The court thus acquired jurisdiction over all parties interested in the estate, to hear the application. Section 1660 provides, "The executor or administrator, or any person interested in the estate, may appear at the time named and resist the application;" and, accordingly, the executors and certain others, claiming to be interested in the estate, resisted the application, and filed answers thereto. The only parties to the record are those who appeared and resisted the application, and they are the only parties who will be affected by a reversal of the order appealed from. The corporations herein referred to, who have not been served with the notice of appeal, did not resist the application, or in any way place themselves upon the record, or make themselves parties to the proceeding; and it is only by resorting to evidence outside of the record that it can be determined whether they are interested in the proceeding, or whether they will be in any way affected if a different result shall be reached upon a new trial. The only issues of fact to be tried in the court be-

low were those presented by the parties who had filed answers to the application, and, as upon the original trial of those issues only the parties thereto could claim the right to be heard, so only the parties to those issues are necessary parties to the hearing of an appeal from the order of the court refusing to re-examine the issues. The motions are denied.

We concur: GAROUTTE, J.; VAN FLEET, J.

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110 Cal. 638

KROUSE v. WOODWARD et al. (No. 15,972.)

(Supreme Court of California. Dec. 31, 1895.)

SPECIFIC PERFORMANCE — TRANSFER OF STOCK — SALE OF PLEDGED STOCK.

1. Specific performance lies to compel a transfer of stock where it appears that the stock has no market value, that plaintiff purchased it with a view to increase in value, and that he cannot purchase other shares because no holder will sell any.

2. Where a bailee unlawfully sold pledged stock, he may be compelled to convey to the bailor similar stock owned by himself in the same corporation.

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Charles Krouse against John A. Woodward and others to recover certain shares of stock. Plaintiff had judgment, and defendant Woodward appeals. Affirmed.

W. C. Kennedy and Wilcox & Patton, for appellant. Jackson Hatch, E. M. Rosenthal, and S. F. Leib, for respondent.

TEMPLE, J. This action was brought to recover from appellant 20 shares of stock in the defendant corporation. Plaintiff avers ownership of the stock on the 25th day of August, 1893, represented by certificate No. 7, then issued to him, and that he still owns the same; that the stock is of uncertain value; that the stock of said company has no known or fixed market value; and that plaintiff purchased said stock with a view of retaining the same for purposes of profit, investment, and speculation; that he became indebted to Woodward in the sum of $400, for which sum Woodward held his promissory note; that he delivered to said Woodward said certificate as a pledge to secure the payment of said note; that afterwards, on January 9, 1894, the note being due, he tendered to Woodward the amount due on said note and demanded the return of the stock and of said note, both of which demands Woodward refused to comply with; that, seven days afterwards, Woodward pretended to sell said stock to defendant Alexander; said pretended sale was without consideration, and was made to deprive plaintiff of his stock; that Alexander had full knowledge of plaintiff's rights; and that the certificate was held by Woodward as a pledge. It was also charged that Woodward now owns and holds more than 20 shares of the capital stock of the corporate defendant; that said Woodward threatens to sell all of his stock, and, unless enjoined, will do so. The tender of the money to Woodward was kept good, and plaintiff asked that plaintiff be declared the owner of certificate No. 7, and of said stock, and that said certificate be delivered to him, or, in case this cannot be done, that he recover 20 shares of the same stock now owned by Woodward. Answers were put in by the defendants, in which practically all the allegations of the complaint were denied. The court found the allegations of the complaint stated above to be true, except that the court found that Alexander purchased the stock from Woodward in good faith, and for a valuable consideration, to wit, for $450, then paid by him. The court also found that Woodward, although not owning the certificate of stock, was by the act of the plaintiff clothed with the apparent ownership, and, inasmuch as Alexander purchased without knowledge of the infirmity of Woodward's title, he acquired a good title. The court, by its decree, required Woodward to convey to plaintiff 20 shares of the stock which he owned and held in the same corporation, in lieu of plaintiff's stock which he had wrongfully sold to defendant Alexander. From this judgment the defendant Woodward brings this appeal, upon the judgment roll alone.

1. Appellant's first contention is that plaintiff has an adequate remedy at law, and is therefore not entitled to equitable relief. It appears somewhat singular that upon this proposition the peculiar language of our Code has never been noticed. As originally enacted, section 3384, Civ. Code, read as follows: "Except as otherwise provided in this article, the specific performance of an obligation may be compelled (1) when the act to be done is in the performance, wholly or partly, of an express trust; (2) when the act to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; (3) when it would be extremely difficult to ascertain the actual damage caused by the non-performance of the act to be done; or (4) when it has been expressly agreed, in writing, between the parties to the contract, that specific performance thereof may be required by either party, or that damages shall not be considered adequate relief." In 1874 this section was amended by striking out all the subdivisions. This apparently establishes the rule that all obligations may be specifically enforced, unless it is otherwise provided in that title, and not that certain specified obligations may be specifically enforced. At the same time, section 3385, which provides that where one party was entitled to specific performance the other was also entitled to the remedy, although not within the rule as then established in section 3384, was repealed. Then follow quite a number of cases in which it is expressly provided

that specific performance cannot be enforced. It would seem that it was intended to reverse the usual test as to the jurisdiction of a court of equity to enforce specific performance of a contract, and to place the burden upon the party resisting such action to show that the case in hand is within some exception. The subdivisions of 3384 stricken out contain a concise statement of the jurisdiction of courts of equity as stated in the textbooks. This amendment was made in 1874, and there are numerous cases since in which it has been assumed that the rule was as established by the decisions of courts of equity. It is not necessary here to determine whether the jurisdiction of courts of equity have been enlarged by this change in the law. Appellant claims that such jurisdiction has been narrowed by the Code, because section 3366 limits the relief to the cases specified in title 3. But section 3384 is a later section, and reverses the rule stated in section 3366; or it may be regarded as itself a specification, under section 3366. At all events, there is no ground to claim that the power of the court to enforce specific performance has been narrowed by the Civil Code. Without appealing to the Code to show a change in the rules of equity upon the subject of specific performance, there can be no doubt of the right of the plaintiff. The specific circumstances which authorize the court to give this relief are (1) that the stock has no market or ascertainable value; and (2) plaintiff purchased the stock for an investment,—in other words, with a view to anticipated increase in value; and (3) that he cannot purchase other shares in the corporation, because no holder will sell any. In Senter v. Davis, 38 Cal. 450, the matter was discussed, and the reasoning found there fully sustains this view. In that case, however, relief was denied, because it did not appear that the property had no market value. The matter is elaborately considered in Cushman v. Jewelry Co., 76 N. Y. 365, where numerous authorities are cited. See, also, Johnson v. Brooks, 93 N. Y. 342; Adams v. Messinger, 147 Mass. 185, 17 N. E. 491.

2. It is further contended that the court could not compel Woodward to convey his own stock in lieu of the certificate which he received from plaintiff. The property assigned to Woodward was 20 shares of stock. There was no difference in the shares. In Atkins v. Gamble, 42 Cal. 86, it was held that, under precisely the same circumstances, the only right which the bailor had was to recover the precise number of shares. He cannot insist upon a return of the identical stock, for it is a matter of no consequence. There can be no pretium affectionis for the certificate. The same rule must prevail here. Appellant has no cause to complain. The propriety of the action of the court is, however, fully sustained by authority. Cushman v. Jewelry Co., supra; 1 Mor. Priv. Corp. § 219; 1 Pom. Eq. Jur. § 164; Johnson v. Brooks, 93 N. Y. 342.

I see nothing in the point that plaintiff made no investment because he borrowed from appellant, upon a pledge of this identical stock, the money with which he paid the subscription. He gave his note, and was personally bound for its payment.

The judgment is affirmed.

We concur: McFARLAND, J; HENSHAW, J.

KROUSE v. WOODWARD et al. (No. 15,972.)

(Supreme Court of California. Dec. 31, 1895.)

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Charles Krouse against John A. Woodward and others to recover certain shares of stock. From the judgment entered, plaintiff appeals. Affirmed.

W. C. Kennedy and Wilcox & Patton, for appellant. Jackson Hatch, E. M. Rosenthal, and S. F. Leib, for respondents.

TEMPLE, J. This is the same case in which two other appeals have been taken, which have now been passed upon. 42 Pac. 1084. Alexander filed a cross complaint, in which he averred his ownership of the 20 shares of stock purchased from Woodward; also, that he purchased the same, after an investigation of the affairs of the corporation, as an investment, and for purposes of speculation, and that the stock has no market or fixed value. The court also found that no shares of the stock could be purchased. Judgment was given in favor of Alexander, and against the corporate defendant, requiring it to enter the transfer of the stock in its stock books, and to issue to Alexander a certificate for the same. For the reasons given in the appeal of Woodward (42 Pac. 1084), this judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

BELL v. WOODWARD et al. (No. 15,973.)

(Supreme Court of California. Dec. 31, 1895.)

Department 2.

Action by Morlin B. Bell against John A. Woodward and others to recover certain shares of stock. From the judgment entered, defendant the San José Meat Company appeals. Affirmed.

C. H. Clement, for appellant. Jackson Hatch, E. M. Rosenthal, and S. F. Leib, for respondent Woodward, and others. W. C. Kennedy and Wilcox & Patton, for respondent Bell.

PER CURIAM. For the reasons given in the case of Krouse v. Woodward (No. 15.972) 42 Pac. 1084, on the appeal of the San José Meat Company the judgment against the appellant herein is affirmed.

5 Cal. Unrep. 230

KROUSE v. WOODWARD et al. (No. 15,972.)

(Supreme Court of California. Dec. 31, 1895.)

Corporate Stock—Purchase from Bailee.

One who purchases stock from a bailee who, by the indorsed assignment, is made the apparent owner thereof, will be protected as against the bailor, though the stock stood on the corporation books in the latter's name.

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge. Action by Charles Krouse against John A. Woodward and others to recover certain shares of stock. From the judgment entered, plaintiff appeals. Affirmed.

W. C. Kennedy and Wilcox & Patton, for appellant. Jackson Hatch, E. M. Rosenthal, and S. F. Leib, for respondents.

TEMPLE, J. This is the same case as that already decided on the appeal of Woodward (42 Pac. 1084). The plaintiff has also appealed from that part of the judgment which denies him relief against Alexander and against the defendant corporation. The judgment is clearly right. By the indorsed assignment, he made Woodward the apparent owner of the stock; and, when the court found that Alexander was a purchaser in good faith and for value, plaintiff had lost his case against Alexander. It did not matter that the stock stood on the books in plaintiff's name. These indorsed certificates do pass from hand to hand, and such is a usual mode of selling stock. The judgment in favor of Alexander is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

BELL v. WOODWARD et al. (No. 15,973.)

(Supreme Court of California. Dec. 31, 1895.)

Department 2.

Action by Morlin B. Bell against John A. Woodward and others to recover certain shares of stock. From the judgment entered, John A. Woodward appeals. Affirmed.

Jackson Hatch, E. M. Rosenthal, and S. F. Leib, for appellant. W. C. Kennedy and Wilcox & Patton, for respondent.

PER CURIAM. This case is the exact counterpart of the case of Krouse v. Same Defendants, 42 Pac. 1084. For the reasons given in that case, on the appeal of Woodward, the judgment of plaintiff herein against said Woodward is affirmed.

BELL v. WOODWARD et al. (No. 15,973.)

(Supreme Court of California. Dec. 31, 1895.)

Department 2.

Action by Morlin B. Bell against John A. Woodward and others to recover certain shares of stock. From the judgment as entered, plaintiff appeals. Affirmed.

W. C. Kennedy and Wilcox & Patton, for appellant. Jackson Hatch, E. M. Rosenthal, and S. F. Leib, for respondents.

PER CURIAM. For the reasons given in the case of Krouse v. Woodward (No. 15,972) 42 Pac. 1084, for the affirmance of the judgment recovered in that case by defendant Alexander, the judgment rendered in this case in favor of said Alexander, and against the plaintiff herein, is affirmed.

110 Cal. 568

ROBERTSON et al. v. BURRELL. (No. 16,027.)

(Supreme Court of California. Dec. 23, 1895.)

PARTNERSHIP — SURVIVING PARTNER — CONCEALMENT OF PARTNERSHIP — ACCOUNTING — RIGHT TO DEMAND IN PERSONAL REPRESENTATIVE — LACHES.

1. Code Civ. Proc. § 1585, gives a surviving partner possession of the partnership property, and requires him to settle the affairs without delay, and to account to the personal representative of his deceased partner. *Held*, that the right to demand such accounting of the administratrix of a surviving partner is in the personal representative of a deceased partner alone.

2. Where a widow, knowing that her husband was in partnership, had not, during the 7 years she survived him, and her heirs have not for 24 years after her death, required an accounting by the surviving partner, the right of the heirs to an accounting is a stale demand.

3. A demurrer is properly sustained to a petition against the personal representative of a surviving partner for a partnership accounting, brought more than 20 years after the right accrued, which alleges concealment by the surviving partner of the existence of the partnership, and that its existence was first discovered after his death, without alleging the nature of the concealment, what or of whom any inquiries were made, or why they were not made sooner, and that diligence would not have led to discovery before his death.

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by George P. Robertson and others, as heirs, against A. H. Burrell, administratrix of the surviving partner of plaintiff's intestate, for a partnership accounting. From a judgment for defendant, plaintiffs appeal. Affirmed.

J. A. Hannah and Horace L. Smith, for appellants. E. O. Larkins and S. F. Lieb, for respondent.

HENSHAW, J. Appeal from a judgment entered after demurrer sustained. Plaintiffs are the surviving heirs of their father, Eldridge G. Robertson, who died in the year 1864, and of their mother, who died in the year 1871. No administration was ever had upon the estate of either. They allege that in the year 1862 their father formed a partnership with one Cuthbert Burrell, each partner contributing thereto property of the value of $5,000. The agreement was that, as partners, the two should engage and cooperate in the business of raising, buying, and selling stock, transacting a general farming business, and dealing in real estate and other property, in the state of California, as full and equal partners. The business of the partnership was carried on for about two years, when their father died. At the time of his death the assets of the partnership had swelled in value to the sum of $100,000. Cuthbert Burrell continued in control and management of this property until his death, in 1893, at which date the assets amounted to $1,000,000. All of the property possessed by Cuthbert Burrell at the time of his death was property of the partnership. Soon after the death of their father, Burrell moved plaintiffs (then minors) and their mother to Oakland, Cal., where the children, excepting one, were placed in an asylum, and so grew to majority. "Cuthbert Burrell concealed from their mother the fact that her husband, the father of plaintiffs, was a partner with Burrell, and that she and her children were entitled to one-half of the property which belonged to said partnership, or that she or her children were entitled to receive and demand of him one-half of the sum of one hundred and three thousand dollars, for which he sold a part of the cattle belonging to said partnership." "The plaintiffs, at the time of the death of their father, were of tender years, and the said Cuthbert Burrell, during his lifetime, concealed from them the fact that a partnership existed between him and their father, or that he held any money or property in trust for them; and they have only discovered the fact of the existence of the said partnership since the death of the said Cuthbert Burrell, viz. on or about February 6, 1894. That statements made by Cuthbert Burrell to Esther E. Phelps in his lifetime, and a short time before his death, caused her to make inquiry concerning the property her father had in his lifetime, and such inquiry led to the discovery of the said partnership which existed between their father and Cuthbert Burrell, and facts hereinbefore set out." The foregoing quotations contain all of the averments of the complaint as to concealment, diligence, and discovery of the alleged fraud. Burrell never accounted during his lifetime, and after his death demand for an accounting was made upon defendant, his administratrix, and refused. The action is brought to compel an accounting. In the interim it is asked that a receiver be appointed to take charge of all of the dead man's estate, as being partnership property.

The demurrer was properly sustained. Plaintiffs are not the proper parties to maintain this action, and they have not legal capacity to do so. While, in a sense, they are beneficiaries of the trust which resulted by the death of their father, the fulfillment of which was imposed upon the surviving partner, yet there were certain intermediate steps and processes necessary to be taken and followed before their beneficial interests could be reduced to possession. And it is these necessary processes which the action under consideration entirely ignores; for there was another trust intervening in time and right, and duties between the close of the surviving partner's trust and their enjoyment of its fruits. It is true that, as heirs of their father, the title to his property, real and personal, vested in them, but their title did not carry with it the right of immediate enjoyment. The rights and duties of the administrator of their father's estate interposed and intervened. The administrator, also, is a trustee, with well-defined duties, among the first of which is that of collecting the assets of the estate, and paying its just debts, after due notice to creditors. The heirs' title is subject to the performance by the administrator of all his trusts, and they finally come into the possession and enjoyment of only such portion of the estate as may remain after the execution of them by the administrator. Section 1585 of the Code of Civil Procedure gives to the surviving partner the right to continue in possession of the partnership property, and imposes upon him the duty of settling its affairs without delay. He is required to account, not with the heirs, but with the executor or administrator. This duty of the surviving partner is the correlative of the right of the personal representative, and fixes the person in whom the right of action exists. If he is to account with the administrator, the administrator it must be who has the right to call him to account. Sections 369, 1581, and 1582 of the Code of Civil Procedure broadly define the powers of administrators in matters of litigation. They may sue without joining the heirs or beneficiaries. Section 1452 of the same Code permits the heirs, in designated kinds of actions, affecting the title to real estate, to sue without joining the personal representative. This section was construed and held to apply in the case of Janes v. Throckmorton, 57 Cal. 368–387. There the action was brought to enforce a trust, and as the court, with emphasis, points out, to compel a conveyance of the legal title to real estate. But here the trust sought to be established is a trust growing out of a partnership relation exclusively. Whether the partnership assets consist of real or personal property, or both, is quite immaterial, since in every case it is made the duty of the surviving partner to account with the personal representative. Nor is Ord v. De la Guerra, 18 Cal. 67, in point for appellants. There, upon the death of his wife, the husband, as was proper, continued in management and control of the community property, though a distinct interest in the property vested in the heirs of the wife under the Mexican law. Upon the husband's death without an accounting to her heirs, they sued his representatives to recover their share of the property. The court's decision was largely based upon the opinion expressed,—that there was no necessity for taking out administration upon the wife's estate under the old system of the Mexican law. "We see no difficulty in giving to the right of the heir, whether arising out of a past system or the present, the same remedy which we would apply in the case of a representative at common law of a surviving partner in a commercial partnership, distribution of partnership effects left after settlement of the firm debts in the hands of such survivor." Bettis v. Townsend, 61 Cal. 333, involved no question of partnership, nor rights of representatives. "It was a trust relating to personal property, and could be taken advantage of by the beneficiaries, the present plaintiffs. Civ. Code, § 2251." In Little v. Caldwell, 101 Cal. 553, 36 Pac. 107, the widow of deceased sued her husband's surviving partner, but the foundation of her claim was an alleged contract between herself and the defendant entered into after her husband's death. The action did not involve any claim for a general accounting. Upon the other hand, though the heir succeeds to the ownership of the property, real or personal, he is not thereby given full dominion and control over it. In Smith v. Walker, 38 Cal. 385, the administrator prosecuted his action for an accounting against the surviving partner, and the court said: "He represents the entire estate. * * * Till then [distribution], the administrator is entitled to the possession and control of the entire estate. Till he recovers the whole estate, the amount to be distributed cannot be known." In Bell v. Hudson, 73 Cal. 285, 14 Pac. 791, the action, in nature identical with this, was properly brought by the administrator. Nor can the heir, by any act of his own, strip the representative of any of his rights, nor relieve him from the performance of any of his duties. The heir may sell his interest, but the administrator still has control of the property sold for the payment of debts, and the general purposes of administration. The heir cannot bring an action to enforce payments or collect debts. Harwood v. Mayre, 8 Cal. 580; Grattan v. Wiggins, 23 Cal. 29. And, even when he attempts to do so by suing in his individual capacity and as executor, the right of action not being in both, but in the executor alone, a demurrer will be sustained. Dias v. Phillips, 59 Cal. 293. So much has been said upon the law of our own Code provisions, and the cases interpreting them. But it may be added that elsewhere the authorities are uniform that the personal representative alone has the right to maintain such an action, saving in those exceptional cases—of which this is not one—where the personal representative, by fraud or otherwise, is disqualified. T. Pars. Partn. § 344, and note; Story, Partn. §§ 342–347; Lindl. Partn. *pp. 494, 611; Bates, Partn. § 924; 17 Am. & Eng. Enc. Law, p. 1277.

In contemplation of further litigation, it may be well to consider briefly certain other objections urged to this bill upon demurrer. They are, generally, that the bill is a stale demand, and shows no equity. The attack is directed to the insufficiency of the portions of the bill above quoted. It appears from the pleading that the men engaged in a partnership, to which they gave their personal care and attention. Each contributed to it property of the value of $5,000. At the time of Robertson's death, he was still actually engaged in its business, and the value of his interest had increased to $50,000. Yet after his death no administration is taken out upon his estate, and no demand made upon Burrell for a partnership accounting by any one. It is not averred that the widow, mother of the plaintiffs, did not know of the partnership, and this must be construed as an admission that she did know (Hecht v. Slaney, 72 Cal. 363, 14 Pac. 88); and, indeed, it would be surprising if she did not. Where the right of action is joint, knowledge which would bar it as to one would bar it as to all, either in law or equity. Freem. Coten. § 375; Wait, Act. & Def. p. 279; Jordan v. M'Kenzie, 30 Miss. 32; Hardeman v. Sims, 3 Ala. 747. And, where a right of action is barred to the ancestor, it is barred to his heirs. Shortridge v. Allen (Tex. Civ. App.) 21 S. W. 419. The widow's long silence and inaction under these circumstances, taken with the fact that no claim was ever made upon the surviving partner, would render the demand stale. Bell v. Hudson, 73 Cal. 285, 14 Pac. 791.

Moreover, after the lapse of so much time, and after the death of all the original parties, equity, for the peace of society, scrutinizes with great particularity bills such as this, and is not satisfied to retain one unless the fullest possible credible showing is made by the applicants for relief. Bills v. Mining Co., 106 Cal. 9, 39 Pac. 43; Chapman v. Bank, 97 Cal. 155, 31 Pac. 896; Felix v. Patrick, 145 U. S., at page 333, 12 Sup. Ct. 862; Wood v. Carpenter, 101 U. S. 135, at page 143. It is not sufficient, therefore, to allege ignorance at one time, and discovery at another. The facts and circumstances must themselves be pleaded, in order that the court may determine whether the sources of knowledge at last availed of were not at all times open to plaintiffs, whether they were negligently overlooked, whether other circumstances should not earlier have put plaintiffs upon discovery, what was the nature of the concealment practiced, whether it consisted in mere silence, or was accompanied by active misrepresentation and fraudulent deception. In this bill, upon all these pertinent matters of pleading, where there is not an absolute absence of averment (as of the ignorance of the widow), there is but a fleshless skeleton of allegation. Plaintiffs only discovered the fact of the existence of the partnership after the death of Burrell. The matter leading to the discovery was statements made by Burrell, a short time before his death, to one of the heirs, which led her to make inquiry. What the statements were; how long before his death they were made; whether or not due diligence after their making would not have resulted in discovery during Burrell's lifetime; why, if Burrell's policy was concealment, he should at last have made to one of the heirs declarations so pregnant with meaning that they led to discovery; what were the inquiries which the heir made, and which resulted in discovery; of whom were they made, and why were they not made years before,—are all questions which upon the demand of the demurrer should be answered by the bill, in order that the chancellor, to whose conscience, in the first instance, the equity of the bill is addressed, should satisfy himself that plaintiffs have not neglected or slept upon their rights.

It is claimed that the defects could be cured by amendment, and that an amendment should have been permitted. Leave to amend, while addressed to the discretion of the court, should be liberally granted, to subserve the ends of justice. And in any ordinary case of absence of averment, or of insufficient averment, we should hold it to be an abuse of discretion to refuse leave to amend. But here not only plaintiffs could not file a sufficient bill, for the reason first above discussed, but they did not ask leave to amend, and error will not be presumed. Smith v. Taylor, 82 Cal. 541, 23 Pac. 217; Buckley v. Howe, 86 Cal. 605, 25 Pac. 132. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

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110 Cal. 605

In re WELCH'S ESTATE. (S. F. 146.)[1]

(Supreme Court of California. Dec. 27, 1895.)

Removal of Administrator — Declarations of Deceased—Failure to Account—Evidence.

1. Declarations of deceased that his estate was of a certain value, and that he had a large sum of money in his house, is not competent in an action to remove his administrator for failing to account for moneys received.

2. A finding that deceased was a member of a partnership, his interest standing in the name of his administrator, and that the administrator failed to account therefor in his inventory, is not sustained by proof that deceased, before his death, and in the presence of the administrator, assigned his interest to his wife.

3. The fact that an administrator improperly paid an attorney's fee is no ground for removal.

4. The probate judge has no authority to direct an administrator where and how he shall keep the assets of the estate.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Henry Welch, deceased. John Purcell appeals from an order removing him as administrator of deceased's estate. Reversed.

John T. Greany, for appellant. Chas. A. Sumner, for respondent.

TEMPLE, J. This is the second appeal in this matter. 86 Cal. 179, 24 Pac. 943. After the remittitur was filed, the petition for the removal of the administrator was amended, and the matter retried. The court found as before, and also three additional facts, and again removed the administrator. The order is expressly based solely upon the new facts found on the retrial. They are: (1) That deceased had at the time of his death ten or twenty thousand dollars in money, which came into the possession of the administrator, or of which he had knowledge. That he failed to include it in his inventory, or to inform the court thereof. (2) That said Purcell collected for Henry Welch, before Welch's death. some $1,200, which he has not accounted for or charged himself with. And (3) that Welch was a partner in the firm of McKenna & Purcell, his interest standing in the name of said Purcell, who was only nominally a partner; and that he has not shown that interest in the inventory, or given any information in regard thereto to the court.

In regard to the first finding, which, no doubt, is most relied upon, if the evidence produced were competent, it does raise a grave suspicion that some assets were concealed either by the widow or her father, who is the administrator, or both. It is not necessary to discuss the question as to whether this finding was supported by the evidence. Errors were committed on the trial in the admission of testimony which will necessitate a new trial. The evidence was almost all hearsay, consisting largely of declarations, made by the deceased, to the effect that his estate was of the value of fifty, sixty, or seventy thousand dollars, and that he had a large sum of money in his house. This testimony was not admissible against appellant. There is no analogy between such statements and declarations made by a person in possession of property characterizing his possession. In the last case the claim made by the possessor is of itself a material matter, or in the instances where it is not so the declarations are against interest. Such was not the case here. The declarations were material only as showing the fact asserted, to wit, the ownership and possession of property, the very existence of which was sought to be proven by the declarations. The conversation between Mrs. Welch, Michael Purcell, a brother of appellant, and a witness for petitioner, was irrelevant.

I do not think the evidence sustains the second finding. It seems to show that Purcell did not own the machine, but it also shows that he paid the money to Welch. We may be at liberty to believe that Purcell testified falsely when he said he gave the money to Welch for safe-keeping; perhaps also to suspect that the claim he presented against the estate was simulated. He sold the machine two years and a half before Welch died, and, as he gave the money to Welch, the presumption would be, if Welch owned the machine, it was a payment.

As to the third finding, the only real evidence tending to show that Welch owned the interest in the partnership was the fact that a few days before his death he assigned his interest in it to Mrs. Welch in the presence of John Purcell. There may be grounds for attacking this transfer, but none are shown. Under such circumstances it would not justify the removal of appellant.

If the other matters found were immaterial to the issue they should not have been found. The fact that appellant paid an attorney's fee improperly would constitute no ground for his removal. I know of no law which authorizes a probate judge to direct an administrator where and how he shall keep the assets of an estate, and surely there ought to be no such law. The administrator is liable for their safety on his bond. If the court could lawfully take charge of them, it would deprive interested parties of this security. If goods are lost, it may be a question whether they have been properly cared for. If they have been placed where the judge has directed, and then lost, he will have prejudged the case before the trial. Administrators cannot be deprived of the actual custody of the assets of the estate by such an order. The order is reversed, and a new trial ordered.

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[1] Rehearing denied.

We concur: McFARLAND, J.; HENSHAW, J.

110 Cal. 609

PEOPLE v. KAMAUNU. (Cr. 21.)

(Supreme Court of California. Dec. 27, 1895.)

HOMICIDE — CONFESSION — FOUNDATION—VENUE—PROOF—MISCONDUCT OF DISTRICT ATTORNEY —PUNISHMENT—DISCRETION OF JURY.

1. One who lived with defendant testified for the state that on the night of the murder defendant, on coming home, told witness that he killed deceased, and warned witness to keep silence. *Held*, that error in admitting the confession without foundation having been laid therefor was harmless, since it appeared by the testimony that the confession was voluntary.

2. It was proper to refuse to instruct the jury as to how they should exercise the discretion given them in regard to the punishment in case they found defendant guilty.

3. It was no ground for new trial that the district attorney referred to evidence offered in the presence of the jury, and ruled out, where the court immediately instructed the jury that they had nothing to do with such evidence, and again in its general charge stated that the case should be determined entirely from testimony received.

4. Where it was testified that deceased resided in the county, and that the body was found at the gate, and carried into the house, and from the testimony regarding the house it was plainly to be implied that the house was deceased's residence, and the place where she was killed, the venue was sufficiently proved.

In bank. Appeal from superior court of El Dorado county; M. P. Bennett, Judge.

Paulo Kamaunu was convicted of murder in the first degree, and from the judgment of conviction, and an order denying a new trial, he appeals. Affirmed.

Chas. A. Swisler and Abe Darlington, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

TEMPLE, J. The defendant was convicted of the crime of murder in the first degree, and sentenced to be hanged. He was charged jointly with one Liloi. During the trial the charge against Liloi was dismissed under section 1099, Pen. Code, and Liloi was called as a witness against Kamaunu. Witness and Kamaunu were natives of the Sandwich Islands, and spoke English very imperfectly. They had been employed in cutting wood, and lived together. They had finished their contract, and had just been paid off. There was evidence tending to show that one of them, on the day before the homicide, had purchased a chicken from the deceased. She was an old lady, who lived by herself. On the morning after the purchase of the chicken she was found at her gate, dead, and some circumstance pointed to defendant and Liloi as the murderers. When sworn, Liloi stated that Kamaunu had purchased the chicken from deceased, and told him that he believed she had money in the house, because she promptly produced change for a gold coin with which he paid for the chicken. He states that during the day they drank wine together, and that at night defendant was absent from their cabin, and witness went to bed. That during the night he heard knocking, and opened the door, when Kamaunu entered. It was between 11 and 12 o'clock. Witness asked, "Where have you been?" Here defendant's counsel objected to evidence of confessions, because the proper foundation had not been laid. The objection was overruled and exception taken. The witness proceeded: "Him, he say he been take a walk that night; that is what he say. After that he talka with me he been down that old woman's; he kill that old woman; he lose pistol—revolver; that is what he say; he talka lose revolver very bad." This is the substance of the confession, although, on being questioned, some further remarks to the same effect were elicited. This was a confession, and the rule is, as contended for by counsel for the defense, that the court ought, on a preliminary inquiry, first to determine whether the confession was voluntary. But, if the circumstances already show that it must have been voluntary, there would be no necessity for further inquiry. And if it be admitted that there was error, the question then would be, did the error affect the substantial rights of the defendant? If we cannot determine whether there was injury or not, then, since the defendant has not been tried as the law of the land directs, we must presume injury; for to be so tried is his right. But if we can see that he has not been injured, the judgment will be allowed to stand.

It is apparent from the testimony—if true—that Liloi did not know of the homicide until Kamaunu informed him of the fact in the confession. It was impossible, therefore, that there should have been an inducement offered by Liloi to make the confession. And the testimony further shows a motive which moved defendant to make the confession, and that the motive was suggested by no one. He knew that when Liloi would hear of the tragedy he would at once suspect him. His purpose was to enforce silence by a threat, which immediately followed the confession. But what inducement could Liloi have offered, even if he had known? How could he make it better for him to confess, or worse for him if he did not? There was no threat except from defendant towards Liloi. It is difficult to see how such a person as the witness could have induced a confession otherwise than by threats. I think we can see that defendant was not injured by the ruling, conceding it to have been erroneous. There was no error in refusing to instruct the jury as to how they should use the discretion given them in regard to the punishment in case they found the defendant guilty. This discretion is given to the jury, and the court cannot direct or advise them upon the subject further than to inform them of their function.

The district attorney deserved severe rebuke from the court for the remark set out in the bill of exceptions. He stated no fact, however, not already known to the jury. It was merely a reference to evidence offered and ruled out. The court immediately instructed the jury that they had nothing to do with such evidence, and, again, in its general instructions, stated that the case must be determined entirely from the testimony received, without reference to other things they may have heard.

The venue was sufficiently proven. It was testified that she resided in the county, and that the body was found at the gate. The body was carried into the house. The condition of the house, of the bed, and the doors is shown. The witnesses do not expressly state that this house was her residence, but that it was both the house where she resided and where she was killed is plainly implied.

The rulings in regard to the introduction of testimony seem to be as to unimportant matters or were evidently correct. A particular discussion of them would be of no moment. There was no doubt as to the admissibility of the conversation in the jail at the time, although it does not seem to possess much importance. Besides, the statements of Liloi were afterwards by the judge stricken out when the charge was dismissed against him. If defendant desired more explicit instructions upon that subject, he should have asked for them. The judgment and order are affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.; HENSHAW, J.

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110 Cal. 582

DIXON v. SCHERMEIER. (No. 14,808.)

(Supreme Court of California. Dec. 23, 1895.)

EASEMENT IN WATER DITCH — DISCLAIMER BY MORTGAGEE—EXTINGUISHMENT OF LIEN.

Where the owner of two adjoining mining claims, across one of which a water ditch extended to and upon the other, mortgaged the claim over which the ditch extended, and, in an action to foreclose the mortgage, subsequent mortgagees of the other claim were made parties defendant, and, instead of asserting their lien on the right to use the ditch in the former claim, disclaimed all interest in that claim, the judgment rendered against them on such disclaimer extinguished their lien on the easement.

Commissioners' decision. Department 2. Appeal from superior court, Placer county; G. G. Clough, Judge.

Action by A. Dixon against H. Schermeier to quiet title. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

F. P. Tuttle, for appellant. E. L. Craig, for respondent.

BRITT, C. In the year 1873 the United States issued to one F. Hoffman a patent for certain mining ground, 160.77 acres in area, called by the parties here the "Hoffman Placer Claim." On the easterly and lower side of this, though not quite contiguous to it, lay another parcel of mining ground, containing some 58 acres, and called the "Smith Placer Claim." At the date of said patent there was, and is yet, a water ditch heading about half a mile above the Hoffman claim, and extending through the same to a reservoir a few rods within the eastern boundary thereof, and thence on to the Smith claim, a total distance of about three miles, half of which entire length is included in the Hoffman tract or claim. Mining on both the Hoffman and Smith claims, and to some extent elsewhere, has been carried on by means of water drawn through this ditch, though the ditch was originally constructed—as early as 1855—and has been mainly used to work the Smith claim. Said Hoffman became the owner of the ditch in 1875. It does not appear that he could, or ever did, make use of the same, except in connection with said two placer claims. Plaintiff's action is for the purpose of quieting his alleged title to the ditch. He founds his right on (1) a mortgage executed by said Hoffman, November 13, 1883, to plaintiff and one Tillotson, upon said Smith mining claim and said water ditch,—Hoffman, it seems, having become the owner of the Smith claim; (2) judgment in an action begun December 5, 1887, by Dixon & Tillotson, for the foreclosure of such mortgage, which judgment was rendered February 6, 1888, and directed the sale of the mortgaged property; (3) sheriff's deed dated February 8, 1889, made to plaintiff, Dixon, as purchaser of the property at the sale under such judgment. But on September 15, 1880, several years before the mortgage to which plaintiff traces his title, Hoffman mortgaged to one Elsen and others the land described in said patent to him,—the Hoffman placer claim,—and all the appurtenances thereto, to secure certain indebtedness to fall due May 1, 1881. In 1885 the mortgagees in this instrument instituted an action for the foreclosure thereof, and Dixon and Tillotson were made parties defendant. They filed an answer in which they denied "that they have or claim to have any interest whatsoever, either by mortgage or otherwise, in the land described in the mortgage sought to be foreclosed in this action." Such action resulted in a judgment of foreclosure in favor of Elsen and his comortgagees, under which the property mortgaged to them was sold on September 4, 1886, to Schermeier, the present defendant. No redemption being effected, Schermeier received, April 28, 1888, a deed of the property so purchased by him, and thereunder claims to be the owner of the ditch within the limits of the Hoffman claim, and above to the head of the ditch. He has had possession of the same since the date of sale, September 4, 1886.

It may be, as contended by plaintiff, that prior to the acquisition of title to the ditch by Hoffman, in 1875, it constituted an independent property, dissociated from the land over which it passed,—an easement in gross. See Coonradt v. Hill, 79 Cal. 590, 21 Pac. 1099. Yet as such it was a servitude upon the land. Smith v. Hawkins (filed Nov. 19, 1895) 42 Pac. 453; Ware v. Walker, 70 Cal. 595, 12 Pac. 475; Civ. Code, § 802, subd. 5. And when Hoffman became the owner of both ditch and lands the servitude was, for the time such unity of title might continue, extinguished. Civ. Code, §§ 805, 811; Gould, Waters, § 318. Assuming, as we may (and this is probably the view more favorable to appellant), that Hoffman was the owner of the Smith claim in 1880, when he mortgaged the Hoffman claim, then the ditch—an artificial water course apparently necessary to the working of both claims—was an appurtenance to each of them. Civ. Code, § 662; Crooker v. Benton, 93 Cal. 365, 28 Pac. 953; Standart v. Water Co., 77 Cal. 399, 19 Pac. 689; Fitzell v. Leaky, 72 Cal. 477, 14 Pac. 198; Farmer v. Water Co., 56 Cal. 11. The title of a purchaser at a sale made under foreclosure of a mortgage has relation to the date of the mortgage. Horn v. Jones, 28 Cal. 194. Hence, by the execution of the mortgage of 1880, Hoffman created, potentially, a severance of the tenements to which the ditch was appurtenant,—and it follows that although this mortgage was a lien on the Hoffman claim, and upon the ditch, as an appurtenance thereto, yet an easement of way for the ditch over the Hoffman claim was reserved from that mortgage, by implication of law, in favor of the Smith claim. Such easement was included in the mortgage of 1883. Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69, and cases cited; Oakley v. Stanley, 5 Wend. 523; Huttemeier v. Albro, 18 N. Y. 48; Gould, Waters, §§ 313, 314, 354. Accordingly, when Dixon and Tillotson were made defendants in the suit to foreclose the mortgage of 1880, they could have asserted their lien, in virtue of the mortgage of 1883, on such easement in the Hoffman claim, and have litigated with the mortgagees in that case substantially the same issue Dixon is now waging with defendant here. Tolman v. Smith, 85 Cal. 280, 24 Pac. 743. But they expressly disclaimed any interest in the land which was the subject of that suit; and the judgment there, founded on such disclaimer, and the sale and deed to Schermeier, extinguished the lien they had on every part of the Hoffman claim, including the section of the ditch lying above the mining claim, which, as an appurtenance thereof, was included in the disclaimer. It results that Dixon, as purchaser at the sale under the judgment obtained by himself and Tillotson, acquired no interest in the ditch above the easterly line of the Hoffman claim. Reynolds v. Hosmer, 51 Cal. 205. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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(110 Cal. 655)

WHEELER v. DONNELL. (L. A. 91.)[1]

(Supreme Court of California. Jan. 8, 1896.)

COURT—APPELLATE JURISDICTION — PROCEEDINGS FOR REMOVAL OF PUBLIC OFFICER.

A proceeding under Pen. Code, § 772, providing for the removal of a public officer for misconduct, on accusation presented to the superior court, in which proceeding, in case the accusation is sustained, a judgment for $500 is also to be rendered for the informer, is not appealable to the supreme court, as a "case at law" involving a demand in excess of $300. Beatty, C. J., and Temple, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Accusation filed by one Wheeler against J. A. Donnell. From the judgment dismissing the accusation on a demurrer being sustained, Wheeler appeals. Dismissed.

R. H. Chapman and W. T. Kendrick, for appellant. Allen & Flint and Garrison & Goodrich, for respondent.

GAROUTTE, J. This is a proceeding brought against J. A. Donnell, district attorney of Los Angeles county, by accusation under the provisions of section 772 of the Penal Code, alleging misdemeanors in office. The accusation was tried upon the complaint and answer, and judgment was rendered upon the merits exonerating the accused and dismissing the complaint. This is an appeal by the accuser, Wheeler, from said judgment. Respondent has moved to dismiss the appeal upon the ground that no appellate jurisdiction in such cases is vested in this court, and this is the only point here involved. In Re Curtis (decision filed Sept. 4, 1895) 41 Pac. 793, the question here involved was directly presented, and this court dismissed the appeal for lack of jurisdiction to entertain it. The reasoning upon which the conclusion was there arrived at is entirely satisfactory to us, and it would hardly seem that further consideration of the subject is necessary. That decision is based upon the broad proposition that the proceeding is a criminal one, not prosecuted by information or indictment, and therefore without the appellate jurisdiction of this court. That this proceeding is a criminal one, and in its nature a prosecution for crime, is evident by every section of the Penal Code found in the chapter where this accusation is authorized. In addition to this, section 15 of the Penal Code declares: "A crime or public offense is an act committed or omitted in violation of the law forbidding or commanding it, and to which is annexed upon conviction either of the following punishments: * * * (4) Removal from office." In a case like the present one, if the charges are substantiated, the court must enter a decree that the party accused be deprived of his office, and also enter a judgment in favor of the informer for the sum of $500. It is now sought to avoid the effect of the rule declared in the Curtis Case by claiming the present proceeding to be a case at law in which the demand, exclusive of interest, amounts to $300. Conceding a demand is here involved amounting to $300, such fact of itself is not sufficient to vest this court with jurisdiction. A demand in that amount must be in a "case at law," and here we have no such case. There are many misdemeanors punishable by imprisonment and fine of $500, and it might, upon similar lines of reasoning, be urged that there was a money demand of $500 involved in such cases, and appellate jurisdiction for that reason be vested in this court; but in People v. Johnson, 30 Cal. 98, this court, in construing the provision of the constitution as to its appellate jurisdiction, said: "In view of this clear and precise division of the subject-matter, aside from the ordinary import of the words 'cases at law,' it is clear that those words only refer to civil, as distinguished from criminal, cases. Equity cases are first provided for, then civil cases at law, then probate cases, and lastly criminal cases." This accusation charges a misfeasance in office, and fixes the penalty at removal from such office and fine. As a matter of policy, the law declares that this sum of $500, which is nothing more nor less than a fine, shall go to the informer; and that this money goes to the informer, rather than into the county treasury, is wholly immaterial. Again, the main purpose of the act is to secure the removal of the officer guilty of unlawful conduct, and the money judgment provided for is purely incidental to that purpose. Smith v. Ling, 68 Cal. 324, 9 Pac. 171. This is even more fully apparent when we consider that an accusation presented by the grand jury is not followed by any money judgment in case a conviction results, and also from the further fact that the entire sum goes into the pockets of the informer. In Woods v. Varnum, 85 Cal. 639, 24 Pac. 843, it is held that the accused is not entitled to a jury trial. If the case was one at law, involving more than $300, such a judgment could not stand. Aside from the money judgment provided by the section, the proceeding has no single element of a "case at law." It is in no sense a proceeding in the nature of quo warranto, as was held to be the nature of the action in People v. Perry, 79 Cal. 105, 21 Pac. 423. The subject of litigation in that case was title to the office. In all essentials, that was a case at law. A question of conflicting claims to an office was there presented, and usurpation was charged. There title was denied. Here title is admitted. It was not held in that case that, by reason of a $5,000 fine being authorized by the statute, therefore this court had appellate jurisdiction; but it was held that a money demand exceeding $300 being involved, and the action being substantially a quo warranto proceeding, and in its nature a case at law, therefore appellate jurisdiction was vested in this court. For the foregoing reasons, the appeal is dismissed.

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[1] For opinion on rehearing, see 43 Pac. 578.

We concur: HARRISON, J.; VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.

We dissent: BEATTY, C. J.; TEMPLE, J.

(110 Cal. xvii)

GUTTERY v. WISHON. (Sac. 74.)

(Supreme Court of California. Jan. 8, 1896.)

Department 1. Appeal from superior court, Tulare county: William W. Cross, Judge.

Action by Guttery against Wishon. Judgment for defendant, and plaintiff appeals. Appeal dismissed.

Daggett & Adams, for appellant. E. W. Holland, C. L. Russell, G. W. Zartman, and Davis & Allen, for respondent.

PER CURIAM. This is a motion to dismiss an appeal. Upon the authority of In re Curtis (Cal.) 41 Pac. 793, and Wheeler v. Donnell (L. A. 91), this day decided (43 Pac. 1), the appeal is dismissed.

(110 Cal. 598)

PEOPLE v. SHAUGHNESSY. (Cr. 40.)

(Supreme Court of California. Dec. 26, 1895.)

BUNCO GAME—LARCENY

1. One who obtains possession of another's money by inducing him to put it up on a lottery operated in a bunco game, and with the assurance that the money would be returned after a certain number of drawings, the owner not intending to part with his title, is punishable for larceny.

2. Though, on a trial for grand larceny committed in the execution of a bunco game, the court read to the jury section 332 of the Penal Code, which has reference to fraudulently obtaining money by device, trick, etc., the error was cured by following charges to the effect that the person obtaining money from another by fraud or artifice, with the intention of stealing it,—the owner not intending to part with his title,—is guilty of larceny.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

John Shaughnessy was convicted of larceny, and appeals. Affirmed.

A. B. Treadwell, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

SEARLS, C. An information was lodged against John Shaughnessy, the defendant and appellant here, by the district attorney of the city and county of San Francisco, charging him with the crime of grand larceny, alleged to have been committed at said city and county on the 1st day of September, 1894, by the felonious stealing, taking, and carrying away $2,080, etc., the personal property of one Charles Anderson. He was arraigned, tried, convicted, and sentenced to serve a term of four years in the state prison at Folsom, Cal. From this judgment, and from an order denying his motion for a new trial, the defendant prosecutes this appeal.

A general outline of the case, as made by the prosecuting witness, Charles R. Anderson, may be stated thus: In July, 1894, said Anderson made the acquaintance of the defendant, Shaughnessy, who professed to be familiar with games and gaming, and who was without money, while Anderson had, or professed to have, some $4,000. The prosecuting witness had a wheel of fortune manufactured, and there were negotiations between the parties looking to a trip to South America for gambling purposes; Anderson to furnish the capital, and defendant the skill, the profits to be divided. About the last of August a third man, a stranger named Sampson, appeared on the scene, made the acquaintance of the parties, and professed to come from South Africa, where he had made money. Defendant professed to have seen Sampson's funds, and to know that he had large means. Thereupon the three agreed to form a copartnership, to go to South Africa, open a saloon, and engage in gambling. An agreement was prepared, and on September 1st the parties started down town to execute this agreement. On Grant avenue they stopped at a saloon, at the request of Sampson, to take a drink, where said Sampson was informed he had drawn a prize in a lottery. The parties then went to the lottery office, Anderson objecting, but is induced by the others to go upstairs, and to the room where the lottery is carried on. They there find a man in charge, who informs Sampson he has drawn $112, of which sum he pays him $110, and, after some discussion, gives him lottery tickets for the $2, with which he draws a prize of some $20, receives more tickets which he divides with Anderson, and they proceed to another drawing, whereupon Anderson is informed he has drawn an "approximate prize" of $500, but that to make it absolute some five other drawings were necessary, and in the meantime, and as the drawings progressed, the lottery company had a right to demand that cer tain assessments be put up, as evidence of good faith, all of which assessments were to be returned to the player at the end of the drawings, together with the prizes won, if any. Special drawings were then had, during which the banker called upon Anderson for deposits. He seems to have been in doubt, but was assured by defendant and Sampson that they understood the game, and that it was "square and fair," and was assured by defendant that "it is all right. You won that $500, and you better stick to it." Again he was assured that the money he put up was to be returned in any event, and "that he need not have any fears on that score," etc., whereupon, after going out repeatedly for more money, he placed in all upon the table some $2,080, only to be told that at the sixth and last drawing, with but a single chance against him, he had lost. The lottery man refused to return his money, and, upon his attempt to regain it, he was seized by defendant and Sampson, and held while the banker secured it, they giving as a reason for so doing that they had seen one man killed in such an attempt, and did not wish to witness another such tragedy. We have not attempted a description of the modus operandi of the game, but refer to the description as given by an expert in People v. Rose, 85 Cal. 378, 24 Pac. 817, as conveying a fairly accurate delineation of the method pursued in the case at bar. We need not pursue the subject by showing the devices used by defendant and Sampson to prevent Anderson from calling in the police, and to lull him into silence until Sampson and the so-called banker left the city. It is sufficient to say there was evidence sufficient, if credited by the jury, to show a conspiracy on the part of defendant, Sampson, and the manager of the lottery, to cheat and defraud the prosecuting witness of his money by what is familiarly known as the "bunco game."

The contention of counsel for appellant is that defendant is informed against for larceny, under section 484 of the Penal Code, and that the evidence, if it shows the defendant to be guilty of any crime (which is not admitted), proves it to be that of fraudulently obtaining money by device, trick, etc., by the use of cards, as defined by section 332 of the Penal Code, and, while it is "punished as in case of larceny of property of like value," is not made larceny by the Code, and that a conviction of larceny cannot be had for a violation of said section. The question is not whether defendant could have been indicted or informed against under section 332, and convicted upon the evidence presented, but whether, under an information charging grand larceny in the usual form, he was properly convicted. There is a class of cases in which a party may properly be charged and convicted of either larceny, or under section 332 of the Penal Code. People v. Frigerio, 107 Cal. 152, 153, 40 Pac. 107. As was said by the court in People v. Tomlinson, 102 Cal., at page 23, 36 Pac. 506: "Where one honestly receives the possession of goods upon a trust, and, after receiving them, fraudulently converts them to his own use, it is a case of embezzlement. If the possession has been obtained by fraud, trick, or device, and the owner of it intends to part with his title when he gives up the possession, the offense, if any, is obtaining money by false pretenses. But where the possession has been obtained through a trick or device, with the intent at the time the party receives it to convert the same to his own use, and the owner of the property parts merely with the possession, and not with the title, the offense is larceny;" citing People v. Raschke, 73 Cal. 378, 15 Pac. 13; People v. Johnson, 91 Cal. 265, 27 Pac. 663; People v. Laurence, 137 N. Y. 517, 33 N. E. 547; Com. v. Lannan, 153 Mass. 287, 26 N. E. 858. This rule in reference to larceny prevails alike in England and the United States. In Reg. v. Russett, 2 Q. B. 312, decided in 1892, Coleridge, C. J., said: "If the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud, this is larceny." People v. Smallman, 55 Cal. 185, and People v. Rae, 66 Cal. 425, 6 Pac. 1, are to like effect. The evidence in the case at bar fully sustains the position that the prosecuting witness did not intend to part with his property in the money, and that it was obtained by the rankest kind of fraud. We repeat the testimony of Anderson: "All the money we would be called upon to put up during these drawings, at the end of the drawing, would be returned to us in full, in addition to any prizes we might win in the mean time,—would be paid over to us; but, if we failed to put up the money that the lottery company called for, that the company would not be called upon to pay, as that was all the percentage he had." At the end of the game, the witness says, "I saw that I was swindled, and jumped up and tried to grab for my money. Shaughnessy [defendant] and Sampson grabbed me by the arms, and pulled me back from the table, while the lottery man pocketed the coin." This testimony is without conflict, except that defendant testified that his motive was to prevent a difficulty.

Counsel also assigns as error the reading by the court below to the jury of the 332d section of the Penal Code. The court stated to the jury as follows: "The contention on the part of the people, as I understand it, is that this money, if taken at all from the prosecuting witness, was taken by fraud, trick, and device. The provision of our statute is as follows." The court then quoted section 332, Pen. Code. Had it stopped here, it would have been error, for the reason that the fraudulent obtaining of money by the methods specified in that section is not necessarily larceny; but we must read the instructions of the court together, and as a whole, and the court further instructed as follows: "The law is that when, by means of fraud or artifice, or any other kind of contrivance, the possession of property is fraudulently obtained from another, and the party obtaining this possession acquires it by means of this fraud and artifice, with the intention feloniously of stealing it when he gets possession of it, then the crime is larceny, provided the owner of the property, who has thus deposited and loses its possession, still remains the owner of the property, and has not parted with his title. One of the questions, therefore, for the jury to consider in this case, is whether there was a parting of the title on the part of the prosecuting witness. To state the rule again: If the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud, that is larceny. Gentlemen of the jury: I again inform you that you are the exclusive judges of the facts, of what has been proven in the case, and of the credibility of the witnesses. It is for you to say—First, whether an offense has been committed; and, secondly, whether the defendant had any part in the commission of it." When thus taken together, and in connection with the other instructions given in the case, the law was properly interpreted by the court. The instruction of the court upon the question of a reasonable doubt and a moral certainty are not open to just criticism. Upon the whole record, the defendant appears to have been fairly tried and properly convicted, and the judgment and orders appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

(110 Cal. 614)

BUTLER v. ASHWORTH et al. (No. 15,984.)[1]

(Supreme Court of California. Dec. 30, 1895.)

JUDGMENTS FOR SAME TORT—SATISFACTION—COSTS.

1. A landowner sued the city and the officers thereof, in separate actions, for damage to her land from a broken sewer, alleging, in the suit against the city, neglect to repair, and, in that against the officers, negligence in making the repair, but in both, as the efficient cause of damage, the same overflow of sewage from the broken sewer. Judgments for damages were had in both actions, that against the city being the greater. *Held*, that a satisfaction of the judgment against the city was a satisfaction of that against the officers, since they were for the same tort.

2. Where one has sued persons jointly liable for a tort in separate actions, and obtained judgments in both for damages and costs, one judgment being greater than the other, on satisfaction of the greater an order directing satisfaction of the lesser must include the amount awarded therein for costs; Code Civ. Proc. § 1023, providing that in such a case no costs can be allowed the plaintiff in more than one of the actions.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Hannah Butler against Thomas Ashworth and others, city officers, for damage caused by the overflow of a sewer. There was a judgment for plaintiff for damages and costs, and defendants moved to have the judgment declared satisfied by payment of a judgment obtained against the city for the same injuries. From an order directing satisfaction as to damages, but not as to costs, all parties appeal. Reversed, with directions.

Geo. B. Merrill, for plaintiff. John H. Durst, Humphreys & Welch, John T. Humphreys, W. C. Burnett, and L. G. Burnett, for defendants.

VAN FLEET, J. Plaintiff brought an action against the city and county of San Francisco alone, to recover damages to her property caused by a broken sewer. The complaint was in two counts,—the first upon the breaking of the sewer, and the neglect to repair the same, and the second upon the negligent and improper manner in which the break was repaired; the proximate and efficient cause of damage assigned in each count being the inundation of plaintiff's premises by the overflow from the broken and choked-up sewer, and the damages alleged in each count being identical as to time, manner, and extent. In that action plaintiff recovered a judgment for $1,190 and her costs of suit. Within two years after the bringing of that action, and before the satisfaction of the judgment therein, plaintiff brought the present action against the defendant Ashworth, as superintendent of streets of said city, and the other defendants, as his deputies, wherein, in a single count, exactly similar in all substantial respects to the second count in the first-named action, she sought damages accruing to her property through the breaking of said sewer, the immediate cause of damage assigned being the same overflow as that alleged in the previous action, and the damages alleged being as to time, manner of infliction, and in amount the same. In this action plaintiff also recovered a judgment for the sum of $800 damages, and $394 costs of action. Subsequent to the recovery of this last judgment, on the 1st day of August, 1893, the judgment in the said action against the city and county was fully paid, satisfied, and discharged. Thereafter the defendants in the present action moved the court below for an order restraining and enjoining the plaintiff therein from issuing or levying execution under the judgment therein, and that said judgment be ordered satisfied of record, upon the ground that plaintiff, by the payment and satisfaction of the judgment in her said action against the city and county of San Francisco, had been fully compensated for the identical injuries herein counted upon, and was entitled to no further relief in the premises; that both of said actions were brought for the same cause of action, and against several parties, who might have been joined as defendants in one action, and who were all openly within the state at the time of the commencement of the said first-named action. At the hearing of this motion, the facts substantially as above recited were made to appear, and the court made an order granting the motion as to the $800 damages recovered, but denied it as to the sum of $394 costs. Both parties excepted to the order of the court, and they both appeal,—the plaintiff from so much of the order as deprives her of the $800 damages, and the defendants from that part denying their right to satisfaction of the judgment as to the costs.

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[1] For modification of opinion, see 43 Pac. 386.

It is a just and well-established doctrine that there shall be but one satisfaction accorded for the same wrong. If one be injured by a tortious act, he is entitled to compensation for the injury suffered; and, if several persons are guilty in common of the tort, the injured one has his right of action for damages against each and all of the joint tort feasors, and may, at his election, sue them individually or together. But, when the injury arises from a single act, he cannot, by suing each wrongdoer alone, convert a joint into a several trespass, and thereby secure more than one compensation for the same injury. If he sue one alone, and is paid damages for the wrong, his remedy is at an end, and he is barred from further recovery against the others. 1 Suth. Dam. p. 214; Stone v. Dickinson, 5 Allen, 29; Urton v. Price, 57 Cal. 270; Tompkins v. Railway Co., 66 Cal. 163, 4 Pac. 1165.

But the plaintiff, in support of her appeal, claims that this wholesome rule has no application to this case, for the reason, as she contends, that the cause of action stated in her suit against the city and that stated against these defendants are not the same, and that the defendants in the two actions are in no sense joint tort feasors. That the act relied upon as producing the injury in the action against the city was the delay in making repairs to the sewer,—a mere omission; while these defendants are charged with an act of commission,—the making of repairs in such a negligent manner as to directly conduce to the injury complained of. While the second cause of action stated in the complaint against the city was the same as that relied upon in this case, it is claimed that the record shows that no issue was joined thereon, and that it was solely upon the first count that plaintiff recovered in that action. Assuming this last fact to be true, which the record, however, fails to show, it is, nevertheless, perfectly apparent that plaintiff's contention is more specious than sound, and that there exists in fact no real difference between the causes of action stated in the two actions. Formal differences there may be, but in matters of substance there are none. In both actions the inducing, proximate cause of damage and injury alleged is the invasion of her premises by the overflowing sewage, caused by the broken and choked condition of the sewer. That is the essential fact alleged alike in both counts of her action against the city, and in the complaint in this case. That is the fact constituting the gist of the action in both cases, and, as we have seen, it was one and the same overflow; in other words, the same fact which produced the alleged damage in both cases. The mere fact that the sewer broke produced no injury to plaintiff, nor did the fact that it was negligently repaired. It was in causing the sewage to overflow plaintiff's premises, and that alone, which induced the injury and gave plaintiff her cause of action. This was the fault of the city and the defendants, her officers, alike. Whether it was caused by their joint or several acts is immaterial. It would be subordinating substance to mere form to say that these two actions do not, under the circumstances, rest upon one and the same cause. This being so, and it appearing that plaintiff had been once compensated for the injury suffered, the court below was right in denying her a second award of damages for the same act.

But it follows, from this conclusion and the language of our statute, that the order of the court did not go far enough. Section 1023 of the Code of Civil Procedure provides: "When several actions are brought * * * for the same cause of action against several parties who might have been joined as defendants in the same action, no costs can be allowed to the plaintiff in more than one of such actions, which may be at his election, if the parties proceeded against in the other actions were at the commencement of the previous action openly within this state, but the disbursements of the plaintiff must be allowed him in each action." The facts bring this case strictly within that provision, and made it the duty of the court below to include the costs in its order directing satisfaction of the judgment.

The order appealed from is reversed, and the court below is directed to modify its order so as to direct and require the satisfaction of the judgment in full, including both damages and costs.

We concur: GAROUTTE, J.; HARRISON, J.

(5 Cal. Unrep. 231)

PEOPLE v. KNIGHT. (Cr. 42.)

(Supreme Court of California. Dec. 31, 1895.)

RAPE—WITNESS—CROSS-EXAMINATION—EVIDENCE—INSTRUCTIONS.

1. On a prosecution for rape, a physician who testified for the prosecution that penetration would produce the conditions of the parts discovered by his examination could be cross-examined as to whether all such conditions could not have been caused by other things, though he had stated that a certain instrument would cause certain of the conditions.

2. Where, on a prosecution for rape, prosecutrix testified that she was 7 years of age when she came to the state, and that at the time of trial she was 10 years of age, and on cross-examination stated that she did not know when she came to the state, she could be asked by defendant what she gave as her age to her school teacher after coming to the state.

3. Where, on a prosecution for rape of one who lived with defendant and his wife, prosecutrix testified that the reason she did not complain until several days after the offense was committed was because defendant had made her afraid of him by throwing things at her and scolding her, questions put to her by defendant to determine when this treatment commenced should have been allowed.

4. In such case she could be cross-examined as to whether defendant ever said anything to her about having intercourse with her.

5. In such a case, prosecutrix having testified that the wife went out and left her alone in the house with defendant, and that she was afraid of him, she could be asked on cross-examination why she did not go out with the wife.

6. On a trial for rape, under an indictment alleging several acts of intercourse with one who lived with defendant and his wife, after prosecutrix testified that she was compelled by threats of the wife to tell her of the offenses, and that the wife suspected it from finding her trembling, she could be cross-examined as to whether the wife saw her trembling after the first offense, or after the last, or how many times she saw her thus.

7. On a trial for rape of one who lived with defendant and his wife, where a physician who examined prosecutrix 12 days after the offense, testified that the hymen was entirely absorbed, and that, from indications, it might have disappeared long before, and prosecutrix testified that her only excuse for not making immediate complaint was her fear of defendant, prosecutrix could be cross-examined as to whether any person had intercourse with her before defendant,—especially where defendant claimed that the charge was concocted by his wife.

8. Where, on a prosecution for rape, defendant claims that the charge was concocted by his wife, it is error to exclude circumstantial evidence to support that claim.

9. On a prosecution for rape of a 10 year old child, an instruction asked by defendant on the question whether the child made any outcry at the time of the commission of the crime is properly refused.

Commissioners' decision. Department 1. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Jesus Knight was convicted of rape, and from the judgment and an order denying him a new trial he appeals. Reversed.

E. Rousseau and E. J. Emmons, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

HAYNES, C. Appellant was convicted of the crime of rape, and sentenced to imprisonment at Folsom for the term of 19 years; and he now appeals from said judgment, and from an order denying his motion for a new trial. The offense is charged to have been committed upon Felis Aldama, a girl of 10 years of age, the granddaughter of appellant's wife. Appellant complains of numerous rulings of the court below upon questions of evidence, and of alleged errors in instructions given and refused, and also specifies as a ground of reversal that the evidence was not sufficient to justify the verdict.

Drs. Rogers and Taggart made a physical examination of the prosecuting witness some time after the last alleged outrage, but how long after is uncertain. The examination was made on September 7, 1894. Trinidad Grijalba, the officer who arrested defendant, and who appears to have made the complaint, first heard of it, as he "guesses," on September 2d, but how long before that date the last of the four alleged acts of intercourse occurred is not precisely fixed. The girl testified upon the trial that she told her grandmother "about a week after the last time," but how long a time elapsed after she told her grandmother before it was communicated to Grijalba nowhere appears. Assuming that it was communicated to Grijalba at once, at least 12 days elapsed after the last of the four occurrences before the examination was made by the physicians. The physicians testified to certain conditions of the parts as they found them at the time of the examination, and both concluded that the producing cause must have occurred some time before the examination, but how long they could not tell. Dr. Rogers was asked by the district attorney whether penetration by a man would cause such bruises and inflammation as he found, and he answered, "Yes; on a child of that age." He was afterwards cross-examined by counsel for defendant, and that was followed by a redirect examination by the district attorney. Counsel for defendant, upon recross-examination, asked the following question: "All of the spots, and the disappearance of the hymen, and all the irritation you saw there, could have been made by various other things, could it not?" This question was objected to as being incompetent, irrelevant, and immaterial, and not proper cross-examination. The Court: "I think that question has been answered once. Let the objection be sustained. Gentlemen, you cannot cross-fire on a witness this way." It is true, some questions had been put to the witness partly covering the points of the above interrogatory. One went only to the red spots testified to by the doctor, and another to the use of a particular instrument,—the finger; and, as to the latter, the doctor replied that it would not cause the injuries. The question here, however, covered all the injuries and appearances, and embraced every instrument or means of producing the injuries, aside from that which the prosecution sought to prove by the witness had caused it. The objection to the question should have been overruled.

Felis Aldama, the prosecuting witness, testified that she was born in Lower California, where her parents still reside; that she was 7 years old when she left there; that since she came to this state she had lived part of the time with an aunt, and the remainder of the time with her grandmother; and that she was 10 years old. None of these facts, except her age, and that she lived with her grandmother, were brought out on the examination in chief, which was exceedingly brief, and which gave no hint of the time when the occurrences to which she testified took place,—not even the year in which they occurred. Under these circumstances, counsel for the defendant asked when she first came to Sumner, but she was unable to tell. She was then asked as to whether she went to school, and to whom she went, and, having named a teacher, was asked the following question: "What age did you give her as your age when you went to school,—when she took your age down?" An objection to this question was improperly sustained by the court.

The witness gave as a reason for not telling her grandmother what had occurred that she was afraid; that she was afraid of him before these occurrences; that "he was always scaring me and my grandma, and making us afraid"; "he was always scolding us and throwing things at us." She was then asked, "When did he first commence throwing things at you?" and to this question an objection was sustained. Several other questions, of a similar character, put for the purpose of ascertaining when the defendant's bad treatment commenced, were also excluded. "Q. Did he ever talk to you about having anything to do with you?" An objection to this question was also sustained. Again, the witness testified that her grandmother went out, and left her in the house with the defendant, and that she was afraid to stay with him, and was then asked, "Why did not you go out with your grandmother?" An objection to this question, and to others of similar import, were also sustained. She further testified, upon cross-examination, that she told nobody but her grandmother. "Q. Did she say anything to you that made you tell it? A. Yes, sir. Q. What did she say? A. She told me she mistrusted something, and why didn't I tell her, and she wanted me to tell her. Q. Did she threaten you? A. Yes, sir. Q. Did she take out a knife, and threaten to kill you with it? A. Yes, sir. Q. What did you do that made her think there was something wrong? A. Because she found me trembling in the kitchen. Q. Did she see you trembling that way after the first time?" To this question it was objected that it was incompetent, irrelevant, and immaterial, and calls for a conclusion. The Court: "It calls for a fact, but, whether the fact has any bearing on the case or not, let the objection be sustained. We must get through with this case sometime." Objections were also sustained to each of the following questions: "Did she ask you whether or not there was anything the matter with you after the first time? Did she discover there was anything the matter with you until after the fourth time? How many times did she say she found you trembling?" We think all these questions were proper, and that the rulings of the court were erroneous, and unreasonably restricted the cross-examination of the witness. An objection was also sustained to the following question to this witness upon cross-examination, "Had anybody else done so before?" It is true that, if the defendant had committed the act charged, the fact that some one else had done so before would be wholly immaterial. But Dr. Rogers had testified to certain conditions of her person, and, among other things, he was asked the following question: "In regard to no appearance of the hymen, would that indicate recent rupture, or a long time before? A. It was entirely absorbed, and that might have disappeared before. The indications are that it would have disappeared before. The margins of the rupture had entirely disappeared." So far as can be determined from the testimony of the girl, the alleged acts of intercourse with the defendant followed each other with intervals of only a few days; and, if viewed solely in the light of the evidence of the doctor, it is by no means clear that the question was either immaterial or irrelevant. Besides, she testified that she did not tell her grandmother because of her fear of the defendant; and if, in reply to the question, she had admitted that the defendant was not the first person who had intercourse with her, and she had not disclosed the fact, it would go far towards discrediting her statement of the reason for not informing her grandmother of defendant's conduct. Or if, on the other hand, she had disclosed such prior assault by another, and if the claim of defendant's counsel that this prosecution was incited by the grandmother of the child without cause, the condition of the child as found by the doctor, though produced by another, could readily be used to fasten the crime upon the defendant. In view of these facts which may have existed, and not because the prior crime of another absolved the defendant, if he were in fact guilty, the objection should have been overruled.

In regard to defendant's effort to introduce evidence that the charge against him was concocted by his wife, the grandmother of the child, the court and counsel seem to have misunderstood each other from the beginning to the end. Under some of the propositions of counsel, the evidence should have been admitted, and, under some of the statements of the court, it might have been admitted. The colloquy is too long to be stated here, but one or two paragraphs may be stated: At folio 142 counsel said: "We want to prove that the grandmother has concocted the story, and has trained this child to swear to it. We don't suppose we can prove all those things, but, from what we think we can prove, we want the jury to infer the rest." We suppose that counsel meant that he could prove certain circumstances, from which the main fact must or might be inferred. In other words, he confessed his inability to prove by direct evidence the ultimate fact, but that he expected to be able to prove it by circumstantial evidence. The fact itself being material and relevant, any evidence, whether direct or circumstantial, tending to prove the ultimate fact, was competent. In one of the statements of the court, reference was made to the question of a conspiracy between the grandmother and the child, but a subsequent statement shows that the court did not use the word "conspiracy" in the sense that the child aided in concocting the story. The court said: "If you state to the court that your intention is to connect this child with it, either as an active participant, or an instrument in the hands of the grandmother, I will permit that question. Mr. Rousseau: I will make this statement about it, that we cannot prove the actual training, but we can prove it from the circumstances only. The Court: Do you propose to show to this jury that the grandmother has educated the child up to this story? Mr. Rousseau: Yes; I cannot show the actual training. The Court: Then it is an inference you want the jury to draw? Mr. Rousseau: Yes; it is an inference. The Court: Let the objection be sustained." Other parts of the colloquy, which covers several pages of the transcript, show that, when counsel said he could not show the "actual training," he meant that he did not have direct or primary evidence of the fact. One step in the proposed evidence was the alleged jealousy of the grandmother, the wife of the defendant. What other facts counsel expected to show, tending to sustain the alleged training of the child, does not appear. His offer, however, embraced in his statements above quoted was proper, and he should have been allowed to introduce any competent evidence, whether direct or circumstantial, which tended to prove the ultimate facts stated.

In relation to the instruction requested by defendant touching the point whether the girl made any outcry, it need only be said that, being under the legal age of consent, her consent to the act could not change its character. If it were shown that she did cry out, it would, of course, tend to corroborate her story, while the failure to do so would not necessarily show that the defendant was not guilty, since her silence would, in the absence of other circumstances, only tend to show her consent. It may be said, however, that her condition, as testified to by the physicians, would render it highly improbable that these acts could have been perpetrated without producing such pain as to cause her to cry out, unless prevented by threats or other means; and, while such circumstances would furnish proper grounds for an argument to the jury, it is not perceived that any proposition of law is involved, making an instruction directly upon the point necessary, while all that could be properly said was covered by the more general instructions given.

Questions touching the affidavits presented in support of the motion for new trial need not be noticed, in view of the conclusion we have reached. The judgment and order appealed from should be reversed, and a new trial granted.

We concur: VANCLIEF, C.; SEARLES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

110 Cal. 621

SEHORN v. WILLIAMS, County Auditor.

(No. 18,356.)

(Supreme Court of California. Dec. 31, 1895.)

COUNTIES — CLAIMS — DUTY OF AUDITOR TO DRAW WARRANT.

1. County Government Act (St. 1891, p. 322), § 113, requires a county auditor to draw warrants for claims "legally examined, allowed and ordered paid by the board of supervisors," when he has received, as required by section 20, subd. 4, a properly certified list of the claims allowed. Section 45 requires warrants drawn by order of the county supervisors to specify the liabilities for which they were drawn, and when they accrued. *Held*, that it is the duty of a county auditor to draw his warrant for a claim on a certificate of supervisors giving the name of the claimant and amount of the claim, and stating that it has been duly allowed, though it does not state what the claim was for, nor when it accrued.

2. County Government Act (St. 1891, p. 311), § 41, requiring a claim against a county to be itemized, "giving names, dates and particular services rendered," before it can be allowed, is directed to the board of supervisors alone, and does not control the county auditor in drawing warrants for claims allowed.

Department 1. Appeal from superior court, Glenn county; Seth Millington, Judge.

Application by W. A. Sehorn against one Williams, county auditor, for writ of mandamus to compel defendant to draw a warrant for a claim duly allowed against the county. From a judgment allowing the writ, defendant appeals. Affirmed.

Charles L. Donohue, for appellant. Ben. F. Geis, for respondent.

HARRISON, J. The plaintiff presented to the board of supervisors of the county of Glenn a claim for $60, properly itemized and verified, for services rendered by him under a contract with the county for carrying meals to the county jail; and the same was allowed by the board at its session May 10, 1893, and ordered paid out of the common fund, and the auditor was directed to draw his warrant for said sum in favor of the plaintiff. Upon a demand by the plaintiff for said warrant, the defendant, who was the auditor of the county, refused to draw the same, and thereupon the plaintiff instituted this proceeding for a mandate compelling him to draw the warrant.

Section 113 of the county government act (St. 1891, p. 322) provides: "The auditor must draw warrants on the county treasurer in favor of all persons entitled thereto, in payment of all claims and demands chargeable against the county, which have been legally examined, allowed and ordered paid by the board of supervisors; provided, however, that the auditor must not draw a warrant on the county treasurer in favor of any person until said auditor shall have received from the clerk of the board of supervisors the certified list mentioned in subdivision 4, section 20, of this act." The "certified list" herein referred to, and which the clerk is required to deliver to the auditor, is a list "of all claims allowed and orders made for the payment of money, giving the name of the claimant or payee named in the claim or order, the amount and date of each claim or order, and the date of the allowance thereof." In the present case the clerk delivered to the auditor a list in which was given the name of the plaintiff and the amount allowed, in the following form:

Name of Claimant.	What for.	Amt. of Claim.	Amt. Allowed.
Sehorn, W. A.			$60.

Under the heading "What for" there had been written "Jailer," and under the heading "Amount of Claim" there had been written "$60." But before the list was delivered to the auditor these items had been erased, by drawing lines through the words.

It is contended on behalf of the auditor that he was not required to draw his warrant, for the reason that the list delivered to him by the clerk does not specify the liability for which the claim was allowed by the board of supervisors. The statute does not, however, require the clerk, in the list which he delivers to the auditor, to specify the liability for which the claim was allowed. The auditor is required by section 113 to draw his warrant in favor of every person whose claim "has been legally examined, allowed and ordered paid by the board of supervisors." If he has received from the clerk a properly certified list of the claims allowed, he must, upon demand, draw his warrant in favor of the claimant whose name is found therein. The provision in section 41 of the act, requiring the claim to be itemized, "giving names, dates and particular services rendered," before it can be allowed, is directed to the board of supervisors alone, and there is no provision in the county government act giving to the auditor a revisory control over their action. McFarland v. McCowen, 98 Cal. 329, 33 Pac. 113. The provisions of section 45 and section 114 do not justify the auditor in withholding the warrant merely because the clerk shall not have certified the items of the claim, or the liability for which it was allowed. These sections are as follows:

"Sec. 45. Warrants drawn by order of the supervisors on the county treasury for the current expenses during each year must specify the liability for which they are drawn, and when they accrued, and must be paid in the order of presentation to the treasurer."

"Sec. 114. All warrants must distinctly specify the liability for which they are drawn, and when it accrued."

The statute does not prescribe the mode in which the auditor shall ascertain the facts which will enable him to comply with the provisions of these sections relating to the form of the warrant; and, in the absence of any provision therefor, it is his duty to take such steps, or obtain such information, as will enable him to properly comply with the sections. In the present case he testified that after he had received the certified list, and before the plaintiff demanded his warrant,—being in doubt, by reason of the erasures in the list,—he ascertained by inquiry from the county clerk that the plaintiff's claim, as it appears on that list, had been allowed and ordered paid by the board of supervisors. Upon receiving this information, his duty to draw the warrant was clear. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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110 Cal. 651

Ex parte NICHOLS. (Cr. 81.)

(Supreme Court of California. Jan. 2, 1896.)

REFORMATORY SCHOOL—CONSTITUTIONAL LAW.

1. Act March 11, 1889 (St. 1889, pp. 100–106), entitled "An act to establish a school of industry," and providing for the detention therein of minors guilty of criminal offenses until majority, which may be a longer period than the term of imprisonment in the county jail provided for such offenses, is not unconstitutional as providing unequal punishments for the same offense.

2. The fact that Act March 11, 1889 (St. 1889, pp. 100–106), creating the Preston school as a reformatory for minors guilty of criminal offenses, provides for the transfer thereto from any state prison of minors under 18 years of age on recommendation of the prison directors and the approval of the governor, and gives such minors, when discharged from the school, the "benefits and immunities" of its other inmates, does not make the school a state's prison.

In bank. Ex parte proceedings by William Nichols for discharge on writ of habeas corpus from a reformatory. Writ dismissed.

N. S. Wirt, for petitioner. Atty. Gen. Fitzgerald, for respondent.

McFARLAND, J. The petitioner, William Nichols, asks, on a writ of habeas corpus, to be discharged from the custody of Carl Bank, superintendent of the Preston School of Industry, situated in Amador county. He was convicted in a justice's court of petit larceny, and, being under the age of 18 years, the justice adjudged that he was a fit subject for commitment to said school, suspended judgment, and committed him to said school until he should be 21 years old, unless sooner legally discharged. The commitment was approved by the superior judge of the county, as provided by section 16 of an act entitled "An act to establish a school of industry," approved March 11, 1889, under which act the proceedings here complained of were had. St. 1889, pp. 100–106. Petitioner assails the constitutionality of said statute mainly upon the grounds that it is unequal in its operation, because under it an adult can be punished for petit larceny by imprisonment in the county jail for only six months, while a minor may, for the same offense, be sent to said school for a much longer period; that a justice's court has no jurisdiction, in such a case, to impose imprisonment for more than six months; that the statute is a special law regulating jurisdiction of a justice's court, etc. These and similar objections to the statute are answered against petitioner's contention by the case of Ex parte Liddell, 93 Cal. 633, 29 Pac. 251. That case involved the validity of the act by which the Whittier Reform School was established (St. 1889, p. 111), and its provisions, so far as these questions are concerned, are similar to those of the statute here under review. In answer to similar objections there made, this court, in bank, through Patterson, J., said: "There can be no question as to the power of the legislature to provide for the detention and education of juvenile offenders, as it has done in this act; and the provisions of the act are not obnoxious to the criticism that it prescribes unjust or unequal penalties. It is true, the term of detention at the reform school may be made greater by the judgment of the court than the term of the imprisonment in the county jail or in the state prison for the same offense would be; but it cannot be said that the punishment inflicted is greater than could be put upon an adult for the same offense. The object of the act is not punishment, but reformation, discipline, and education. Pen. Code, § 12. While detained for a longer period, perhaps, than he would be if sent to state prison or the county jail, the conditions surrounding the child are vastly different. He is given the opportunity and instruction to learn a trade, and qualify himself for the duties of citizenship, so that at the end of his term he will go out prepared to take care of himself and those dependent upon him, without the odium which attaches to an ex-convict. There is no doubt of the power of the state to make and enforce provisions for the compulsory education of all children within the state; and it is equally clear that the state may arrest the downward tendency of those who have offended against its laws, and manifested a disposition to follow a criminal career, by placing them in an institution where they will receive the care, education, and discipline necessary to prepare them for honorable citizenship." It is contended that under a certain provision concerning the Preston school which is not contained in the act creating the Whittier school, sending the petitioner to the latter school was in fact sending him to a state prison, and thus making a felon of him, which the justice's court had no jurisdiction to do. But this contention cannot be maintained. The provision in question is that any boy under 18 years old who is serving a sentence in any state prison, and who shall be deemed a fit subject for training in said school, may, upon the recommendation of the board of prison directors, and the approval of the governor, be transferred to said school; and that said boy, "when honorably discharged from said school, as hereinbefore provided, shall be entitled to such benefits and immunities as are provided for the other inmates of the institution." Taking a boy out of the state prison and putting him in the school, with the "benefits and immunities" of its other inmates, is certainly not turning the reform school into a state prison. It is, in fact, a commutation by the governor; and the boys thus sent to the school, if honorably discharged, are "released from all penalties and disabilities resulting from the offenses or crimes for which they are committed." The petitioner is remanded, and the writ dismissed.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.; TEMPLE, J.; HENSHAW, J.

110 Cal. 632

VISALIA & T. R. CO. v. HYDE. (Sac. 52.)

(Supreme Court of California. Dec. 31, 1895.)

CORPORATE STOCK—ASSESSMENTS—TRANSFER—LIABILITY OF TRANSFERROR—ACTION ON ASSESSMENT—DEFENSES.

1. After a transfer of corporate stock has been duly made on the books of the company, the transferee becomes liable on assessments.

2. An assignment of corporate stock after the levy of an assessment on the same will not relieve the assignor from liability on the assessment, where no formal transfer was made on the books of the company.

3. Where a corporation is authorized to levy assessments to meet its outstanding obligations, a stockholder cannot defend an action on an assessment on the ground that the obligation was created before he became a stockholder.

4. It is no defense to an action against a stockholder by a corporation authorized to levy assessments to meet outstanding obligations, and whose directors were given discretion to require assessments or to resort to the corporate property in payment of such obligations, that the corporation had sufficient property to meet the obligations forming the basis of the assessment.

Department 1. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by Visalia & Tulare Railroad Company against R. E. Hyde on an assessment of corporate stock. Judgment for plaintiff, and defendant appeals. Affirmed.

Lamberson & Middlecoff, for appellant. Hannah & Miller, for respondent.

HARRISON, J. The plaintiff is a corporation under the laws of this state, for the purpose of constructing and operating a railroad between the city of Visalia and the town of Tulare, and was incorporated November 1, 1887, with a capital stock of $100,000, divided into 1,000 shares of $100 each, all of which was subscribed for, and upon each share of which stock there had been paid into the corporation the sum of $50. On March 28, 1894, the directors of the corporation levied an assessment of $10 upon each share of the capital stock, and, in the order levying the assessment, fixed a day on which the stock would be delinquent, and also a day for the sale of the delinquent stock. After the day specified for declaring the stock delinquent, and before the sale, the board of directors, by an order in that behalf, elected to waive and abandon further proceedings for the collection of the assessment by a sale of the stock, and to proceed by action to recover the amount that should be delinquent. November 29, 1890, the defendant became the owner of 100 shares of the capital stock, which had been originally subscribed for by Thomas Creighton, and on that day a certificate for said 100 shares of stock was issued to and received by him, and he was then registered on the books of the plaintiff as the owner thereof, and has since remained registered as such stockholder. The present action is brought to recover from him the amount of the assessment, by virtue of the provisions of section 349 of the Civil Code. The answer to the complaint does not question the regularity of the steps taken in levying the assessment, or in the election of the plaintiff to proceed by action to collect the same, or that the plaintiff was indebted in an amount greater than the amount of the assessment, but sets up as special defenses that, at the time the plaintiff incurred the liability for which he alleges the assessment was levied, he was not a stockholder; that, prior to the commencement of the action, he had sold, indorsed, and delivered the shares of stock to another person; and that, at the time of levying the assessment, the plaintiff had sufficient property with which to meet all of its obligations, without levying an assessment therefor. The plaintiff had judgment, and the defendant has appealed.

1. By purchasing the stock from Creighton, and causing a transfer thereof to himself to be entered upon the books of the plaintiff, the defendant was substituted for Creighton as a stockholder of the corporation, and thereafter held the shares on the same conditions and subject to the same obligations as did Creighton prior to the transfer. Mor. Corp. § 159; Cook, Stock & S. § 256; Hall v. Insurance Co., 5 Gill. 484; Railroad Co. v. Boorman, 12 Conn. 530; Upton v. Hansbrough, 3 Biss. 417, Fed. Cas. No. 16,801; Mining Co. v. Bagley, 14 Mich. 501. In the case last cited, the court say: "The very essence of a corporation consists in its corporate succession, which in stock companies is kept up by the substitution of one owner for another in the proprietorship of shares. If the original stockholders stand under different relations to the company from their assigns, the corporation itself loses some of its attributes by the substitution, or else becomes introduced into more complicated relations. It seems to be an unavoidable conclusion that every liability which attaches to a stockholder, as such, is inseparable from the ownership of the stock." And in Railroad Co. v. Boorman, supra, it is said: "The reasons for subjecting the original subscribers to personal liability apply with equal force to those who become stockholders by purchase. The relation of stockholder and company exists. A privity between them is created." The defendant did not divest himself of this liability by an assignment of the certificate to another subsequent to the levy of the assessment, especially as his assignee did not procure a transfer to himself upon the books of the corporation. For the purpose of ascertaining those who are liable to it for the amount of the assessment, the corporation can look only to the list of stockholders as their names are registered upon its books.

2. The liability of the defendant to the creditors of the corporation for his proportion of their claims against the corporation, and his liability to the corporation for the unpaid portion of his subscription, are entirely distinct, and rest upon different principles. The stockholder is liable to a creditor upon only such liabilities as were incurred during the time he has been a stockholder, but he is liable to the corporation for the unpaid portion of his subscription, whenever the corporation may choose to call it in; and while the creditor may enforce his claim against the corporation, and seek its entire satisfaction out of the corporate property, he can recover from the stockholder only his proportionate part of the claim. The corporation is authorized to levy an assessment for the express purpose of providing a fund with which to meet its outstanding obligations, and it is no defense to the assessment that the defendant was not a stockholder at the time the obligation was contracted or the liability incurred. Nor is it any defense that the corporation has sufficient property with which to meet its obligations. The liability of the defendant rests upon his contract of subscription, and the propriety or necessity of requiring him to

pay it for the purpose of meeting the corporate liabilities, rather than to resort to property in the hands of the corporation with which to meet such liabilities, has been placed in the discretion of the board of directors. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(110 Cal. 644)

BROWN v. CAMPBELL et al. (No. 15,937.)[1]

(Supreme Court of California. Dec. 31, 1895.)

COURTS — CONFLICTING JUDGMENTS OF SUPERIOR COURT — PLEADING — RES JUDICATA — ANOTHER ACTION PENDING—PRACTICE—INTERPLEADER.

1. The rule that the judgment of the court first acquiring jurisdiction will prevail over that of another court subsequently acquiring jurisdiction does not apply to judgments rendered by different departments of the superior court of the city and county of San Francisco, as all departments of such court, combined, form but one court.

2. The defense of former adjudication, to be available, must be pleaded.

3. The defense of the pendency of another action, to be available, must be pleaded.

4. Where a judgment is ineffectual to support a plea of res judicata, because the time for appeal therefrom has not expired, one pleading such judgment in bar, instead of pleading the pendency of the action in abatement until the judgment should become final, so that it could be set up by supplemental answer in bar, cannot have the second judgment set aside, or its enforcement perpetually stayed.

5. A stakeholder in a suit by a person claiming the money, after withdrawing his plea of interpleader, and defending against the claim of another person, made a party at his request, cannot complain that the judgment against him in favor of such other person may subject him to double liability.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by A. M. Brown against H. C. Campbell and others. One Priest was made a party on motion of defendants. From an order refusing to set aside a judgment for Priest, or to grant a perpetual stay of execution thereon, plaintiff and the other defendants appeal. Affirmed.

Jas. A. Waymire, H. C. Campbell, and W. T. Baggett (R. Percy Wright, of counsel), for appellants. T. Z. Blakeman, for respondent.

HARRISON, J. The case of Priest v. Brown et al., in which Joseph Brown and A. M. Brown were two of the defendants, was commenced in the superior court for the city and county of San Francisco April 13, 1887, and was tried in department 1 of that court, before the honorable T. K. Wilson, and judgment was rendered by him in favor of the defendants, and was entered November 24, 1888. The action was brought for the purpose of subjecting to sale, under the direction of the court, certain real property alleged to have been fraudulently conveyed by Joseph Brown to A. M. Brown, and the application of a portion of the proceeds thereof to the payment of a claim of the plaintiff against Joseph Brown. While that action was pending, Henry C. Campbell and Thaddeus B. Kent, two of the appellants herein, who held the legal title to the property, sold the same, and A. M. Brown commenced the present action, in the same court, to recover from them $2,549.50, the amount of certain surplus moneys in their hands, arising from the sale of said property. This cause was assigned to department 6 of that court. In their answer to the complaint, Campbell and Kent alleged that Priest claimed the money, and asked that he be made a party defendant, and that thereupon they be permitted to pay the money into court, and be discharged of all liability therefor. Priest was thereupon made a party defendant to the action, and filed an answer to the complaint of the plaintiff, and also a cross complaint, in each of which he alleged substantially the same facts as were alleged in the complaint in the action of Priest v. Brown. Thereafter the plaintiff united with the defendants Campbell and Kent in a motion to strike out this answer. This motion was granted May 9, 1889, and the case was afterwards tried before the honorable W. T. Wallace, who rendered judgment in favor of Priest, which was entered February 25, 1892. An appeal to this court was taken from each of these judgments, and the two appeals were heard together, and each of the judgments was affirmed December 30, 1893. Priest v. Brown, 100 Cal. 626, 35 Pac. 323; Brown v. Campbell, 100 Cal. 635, 35 Pac. 433. Upon filing the remittitur in the superior court in the present case, the appellants moved that court for an order setting aside the judgment, or granting a perpetual stay of execution thereon. In support of the motion they presented to the court the records and papers on file in the two actions, and urged as the grounds of the motion that inasmuch as in the case of Priest v. Brown judgment had been rendered in favor of A. M. Brown, the plaintiff herein, upon the same cause of action that is presented in this suit, and had been affirmed by the court, that judgment had become the final determination of the rights of the parties, and was not impaired by the subsequent judgment rendered in this action. The motion was denied, and the present appeal is from that order.

The rule invoked by the appellants, that the judgment of that court which first acquires jurisdiction of the subject-matter of a cause of action and of the parties thereto will prevail over the judgment of another court whose jurisdiction was subsequently acquired, has no application to the present case. That rule rests upon comity and the necessity of avoiding a conflict in the execution of judgments rendered by independent courts, either of distinct or concurrent jurisdiction. But the rule itself, as well as the reason for its exercise, has no existence in a case where the actions are brought in the same court, and the judgments are rendered by the same tribunal. There is but one superior court in the city and county of San Francisco, and all of the actions brought in that court are within the same jurisdiction. White v. Superior Court (Cal.; S. F. 118) 42 Pac. 480. The assignment of causes to different departments does not take place until after the court has acquired jurisdiction of the cause, and is made in order to expedite the business of the court, by apportioning them to the several judges for trial and judgment. The jurisdiction over a cause, after it has been assigned by the presiding judge to one of the other judges for trial, remains in the same court, and neither the judge to whom it has been assigned, nor the department over which he presides, has any jurisdiction over the cause distinct from that of the court in which the action is pending. The entire procedure, from the commencement of the action to the execution of the judgment, is in one court; and there is no opportunity for conflict of jurisdiction, either in pronouncing a judgment or in its execution after it has been rendered. When, therefore, a suit is commenced in that court upon a cause of action which is then pending before it in another suit, or which has already been carried into judgment, the procedure to be observed is the same as if the two actions were in a court with but a single judge, before whom all causes therein were to be tried. If the defense of a pending suit, or the estoppel of a former judgment, is not pleaded when such defense is available to the defendant, he cannot, after an adverse judgment, avail himself of this defense, which he neglected to plead when he had an opportunity to do so, any more than he could avail himself of any other defense which he had omitted to plead.

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[1] Rehearing denied.

When the present action was commenced, the action of Priest v. Brown was pending in the same court, and had not been tried. The main issue in that action was whether Priest had the right to subject the lands described in the complaint to the payment of his claim against Joseph Brown. After Priest had been made a defendant in the present action, at the instance of the appellants Campbell and Kent, he filed an answer, in which he pleaded the pendency of the former action, and the identity of the issues and parties thereto with those in the present action. There was thus presented to the court for determination the precise question involved in this motion; and if this issue had been tried, and found against the plaintiff, the judgment of the court would have been that the action should abate, and the rights of the parties would have been determined by the judgment in the former action. Instead of taking this course, the appellants asked the court, and the court at their instance struck this defense from the answer of Priest, and the cause was tried upon the same issues as were presented in the former action, without any objection to a re-examination of them by the court. It is too clear for argument that the appellants cannot, after an adverse judgment upon issues of their own selection and framing, interpose a defense to the enforcement of that judgment which they had an opportunity to present for the purpose of defeating the respondent's claim, but which they industriously sought not to have presented to the court for its judgment thereon.

When this cause was here upon the former appeal, the appellants urged the reversal of the judgment because of the prior judgment in the case of Priest v. Brown, which they had pleaded as a bar to any further litigation of the issue then determined. In holding that this plea of a former judgment was unavailing, for the reason that the judgment had not become final, the court said: "But while the judgment in Priest v. Brown was not, for the reason stated, a bar to the cause of action alleged in the cross complaint, still the pendency of that action would have been a good ground for the continuance of this until the final determination of the former action, or would have been a sufficient basis for an order dismissing the present action upon motion of the plaintiff, notwithstanding the affirmative relief demanded by the defendant Priest in his cross complaint, and the refusal of the court to have granted either of such motions, would perhaps have been erroneous; but no such motion was made by the plaintiff, and the trial proceeded without objection, the plaintiff still insisting upon the judgment in Priest v. Brown as an estoppel, and as ground for a judgment in his favor." In Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589, it was said: "Where a judgment is ineffectual as evidence in a plea of former adjudication until the time for an appeal therefrom has expired, the true course of a defendant in such a case would be to plead the pendency of the former action in abatement, until the judgment therein became final, when a supplemental answer averring the proper facts in bar of the action would be in order."

The appellants Campbell and Kent urge that, as they are mere stakeholders, they are liable to suffer by reason of the different judgments in the two causes. If, however, they had retained their position as stakeholders, and had complied with the offer made in their original answer to the complaint of the plaintiff by paying the money into court, they would then have been entitled to a judgment discharging them from further liability therefor; but, after Priest had been brought into the action at their instance, they abandoned their position as stakeholders, and defended against his right to receive any of the money. Having thus assumed a position antagonistic to Priest, they cannot claim any of the consideration due to a stakeholder, but are in the position of any other litigant who has failed to sustain his defense. The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(110 Cal. 627)

KEENER v. EAGLE LAKE LAND & IRRIGATION CO. (Sac. 13.)[1]

(Supreme Court of California. Dec. 31, 1895.)

SUMMONS—SERVICE ON CORPORATION—AFFIDAVIT—MECHANIC'S LIEN—COMPLAINT.

1. An affidavit of service of summons reciting that the summons was served "personally" on the managing agent of the "above-named defendant" corporation, instead of on the corporation, sufficiently shows service on the corporation, the agent not being a party defendant.

2. Act March 31, 1891 (St. 1891, p. 195), requires corporations to pay laborers and mechanics wages due weekly or monthly, on such day in each week or month as shall be selected by the corporation; and section 2 gives mechanics and laborers a lien for wages so due and not paid. *Held*, that a complaint in an action to establish a lien under section 2 must show that the wages for which the lien is sought to be enforced were payable weekly or monthly.

Department 1. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by one Keener against the Eagle Lake Land & Irrigation Company on a claim for services, and to have the same declared a lien. From a judgment for plaintiff, defendant appeals. Affirmed in part, and in part reversed.

Goodwin & Goodwin, for appellant. Shinn & Shinn and F. A. Kelley, for respondent.

HARRISON, J. The plaintiff, under an employment by the defendant, performed labor upon certain reservoirs, dams, and ditches belonging to the defendant at different times between May 27, 1892, and June 23, 1893, amounting in the aggregate, according to the agreed rate of compensation, to the sum of $868.75, of which he was paid the sum of $378.82. He brings this action to recover from the defendant the balance thereof, viz. $488.93, and to have that sum adjudged to be a lien upon the property of the defendant. Judgment by default was rendered in his favor, and the defendant has appealed.

1. The appellant urges that the judgment is void by reason of there being no proof of service of the summons upon the defendant. The service was made by a private individual, and in his affidavit he states that "he personally served the same upon J. H. Elledge, the managing agent of the above-named defendant, Eagle Lake Land and Irrigation Company, a corporation, on the 13th day of January, 1894, by delivering to said J. H. Elledge, the said managing agent of said defendant [corporation], personally, in the county of Lassen, state of California, a copy of said summons, attached to a true copy of the complaint, * * * and that he knows the person so served to be the person acting as managing agent for said defendant [corporation] named in said action." It is objected that this affidavit merely shows that the service was made upon Elledge, and does not show that it was made upon the corporation. It would be sacrificing substance to form to hold that this service was not made upon the defendant. It sufficiently appears from the complaint that the defendant is a corporation, and the corporation is the only defendant in the action. The affidavit of service upon one who is named the managing agent of the corporation is prima facie proof that he was such officer, and the statute authorizes the service to be made upon him for the corporation. Rowe v. Water Co., 10 Cal. 442; Golden Gate Min. Co. v. Superior Court, 65 Cal. 187. If Elledge had been a codefendant with the corporation, and the return of service had shown that only one copy of the summons had been delivered to him, there would be some reason for holding that it was a personal service upon him alone; but, as the corporation is the sole defendant, that reason does not exist.

2. The appellant does not contest the amount for which judgment was given, but contends that the judgment was erroneous in declaring that the plaintiff is entitled to a lien therefor upon its property. The plaintiff relies in support of the judgment upon the act passed March 31, 1891 (St. 1891, p. 195). That act is as follows:

"Section 1. Every corporation doing business in this state shall pay the mechanics and laborers employed by it the wages earned by and due them weekly or monthly, on such day in each week or month as shall be selected by such corporation.

"Sec. 2. A violation of the provisions of section 1 of this act shall entitle each of the said mechanics and laborers to a lien on all the property of said corporation, for the amount of their wages, which lien shall take preference over all other liens, except duly recorded mortgages or deeds of trust."

By the terms of the first section of this act, it does not apply to all corporations, but only to those who, while doing business in this state, employ laborers and mechanics by the week or month, whose wages, under the terms of their employment, are payable weekly or monthly. It does not purport to impose upon those corporations any duty or liability towards all the mechanics or laborers whom it may employ, or to create a right in favor of those of its employés whose wages are not earned or payable by the week or by the month. As the remedy sought to be enforced herein exists only by virtue of the statute, it was incumbent upon the plaintiff to bring himself within the terms of the statute, and to show that the wages earned by him were "due weekly or monthly." His complaint is, however, defective in this respect, and contains no allegation concerning the times at which the wages were payable, or that he was employed at weekly or monthly wages; and, from the allegations in reference thereto, it would seem that there was no agreement upon this point,—the greater part of his labor being computed by the day, and at different rates per day for different periods during the year. The plaintiff did not acquire any right to enforce a lien by reason of the notice of mechanic's lien filed by him. As he was employed by the corporation, if he would rely upon the lien given by the provisions of the Code of Civil Procedure, his notice of lien should have been filed within 30 days after the completion of the work or improvement on which he had expended his labor. As it appears from the notice of lien attached to his complaint that the works were incomplete at the time it was filed, his notice was premature, and failed to confer a right of lien. Davis v. McDonough (Cal.) 42 Pac. 450. It is conceded by the plaintiff that this notice of lien was insufficient, within the requirements of the mechanic's lien law, but he contends that his lien exists by virtue of the act of 1891. That act, however, makes no provision for filing a claim of lien, but purports to create the lien upon the violation by the corporation of section 1. As the plaintiff is not entitled to avail himself of the provisions of the act of 1891, that provision of the judgment allowing him counsel fees was unauthorized. The judgment in favor of the plaintiff for the sum of $488.93 and costs of suit is affirmed. That portion of the judgment awarding counsel fees, and declaring that the plaintiff is entitled to a lien upon the property of the defendant, and directing a sale of such property, is reversed.

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[1] Rehearing denied.

We concur: GAROUTTE, J.; VAN FLEET, J.

(110 Cal. xvii)

RIGGS v. EAGLE LAKE LAND & IRRIGATION CO. (Sac. 14.)[1]

(Supreme Court of California. Dec. 31, 1895.)

Department 1. Action by one Riggs against the Eagle Lake Land & Irrigation Company for services rendered, and to establish a lien. From a judgment for plaintiff, defendant appeals. Affirmed in part, and in part reversed.

Goodwin & Goodwin, for appellant. Shinn & Shinn and F. A. Kelley, for respondent.

PER CURIAM. Upon the authority of Keener v. Irrigation Co. (Sac. 13; this day decided) 43 Pac. 14, the judgment in favor of the plaintiff for the sum of $526.25 and costs of suit is affirmed, but that portion of the judgment awarding counsel fees, and declaring that the plaintiff is entitled to a lien upon the property of the defendant, and directing a sale of such property, is reversed.

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[1] Rehearing denied.

(111 Cal. 3)

PEOPLE v. STERNBERG. (Cr. 65.)[1]

(Supreme Court of California. Jan. 13, 1896.)

"PURITY OF ELECTIONS LAW"—PROCURING FALSE REGISTRATION—EVIDENCE—ACCOMPLICES—CORROBORATION—CHARGING ON FACTS.

1. On a prosecution for procuring a certain person to falsely register as a voter in a precinct, others may testify that defendant also procured them to falsely register.

2. Persons who falsely registered as voters in a precinct at defendant's procurement are not for that reason accomplices of his in the procurement of another to so register.

3. Testimony of one that defendant procured him to falsely register as a voter in a precinct is corroborated by evidence that defendant was present when such person made his false affidavit, afterwards stated that he anticipated trouble because of his connection with such registration, and tried to suppress such person's testimony, paying him money to go away.

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[1] **Rehearing granted.**

4. The "Purity of Elections Law" (St. 1893, p. 24), making "every person who willfully causes, procures, or allows" false registration punishable, applies as well to a private citizen as an officer; and therefore the charge that defendant, "as deputy register," committed the offense, is surplusage, and need not be proved.

5. That in a civil case, under Pol. Code, § 1109, against the clerk, to procure cancellation of votes alleged to have been illegally placed on the voting register, one testified that he was deputy register, without testifying as to any offense, does not protect him from prosecution for procuring, "as deputy register," one to falsely register as a voter, in violation of "Purity of Elections Law" (St. 1893, p. 24, § 22), under section 32, declaring that one testifying against a person offending against section 22 shall not himself be prosecuted for the offense with reference to which his testimony was given.

6. Defendant cannot complain that an instruction declaring that a certain person was an accomplice, and that, therefore, there could not be a conviction on his uncorroborated testimony, was error, as charging on facts; it not only having been invited by him, but also being harmless.

7. Though a judge may not instruct on a matter of fact, he may declare to a jury that certain persons were not accomplices where there is no evidence that they were.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Louis Sternberg appeals from a conviction. Affirmed.

C. W. Cross, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. By information, defendant was charged with procuring and allowing A. Gutman to be registered as a voter in the precinct register of a precinct in which he was not entitled to be registered. The prosecution was had under and by virtue of the provisions of the "Purity of Elections Act" (St. 1893, p. 24). The offense charged comes within the purview of section 22 thereof. Gutman, called by the prosecution, testified that defendant requested him to register from the Baldwin Hotel, so that he could vote for Mahoney. At the time of the request he resided and was registered in another precinct, and these facts were known to defendant. Witness acceded to defendant's request, and together they went to the New City Hall. The witness there told a registrar clerk in attendance that he desired to change his residence to the Baldwin Hotel. Asked by the clerk what floor his room was on, he answered the fourth, when the defendant, standing by, corrected him, and said the fifth. The clerk then asked the number of his room, and, as the witness did not know, defendant again answered for him. Henry Burton was the registrar clerk. He identified the affidavit of registration as being in his handwriting; remembered the circumstances of defendant's presence with Gutman at the time it was made; did not remember defendant making answer to any of the questions propounded to Gutman; but would not accept the answers of any one except the affiant under such circumstances. It was shown that Gutman did not reside at the hotel, and that he did reside at 172 Clara street, in San Francisco, and was registered in the precinct to which that number belonged. Gutman further testified that after the election he met defendant in a saloon, and defendant urged him, Samuel Lust, and David Newman, who were present, to leave town, and save him and themselves from getting into trouble. He offered the three of them $20 for this purpose. Lust and Newman, after demurring to the amount, accepted the money, and witness was then given $5, with which he was to come to Oakland, where he was to remain for a few days. The "trouble" which defendant anticipated was punishment for procuring the false registration of voters at the Baldwin Hotel. Lust and Newman were allowed to testify, over objection, that they too had falsely registered from the hotel at the instance and procurement of defendant. Defendant also informed these witnesses that warrants were issued for their arrest. The evidence was properly admitted.

1. Against the judgment it is first urged that the witness Gutman was defendant's accomplice in the alleged offense, and that as there is no corroborative evidence in the case which, independent of Gutman's testimony, tends to connect defendant with the commission of the offense, a new trial must be granted. This position is not tenable. There is first the fact testified to by Burton that defendant was present at the making of the false affidavit. While this fact isolated and considered alone is of small moment, since an innocent man might have occupied the same position, yet, when viewed in the light of later occurrences, it becomes a circumstance of serious significance. Those are the admissions of anticipated trouble by defendant because of his connection with the registration of Gutman, testified to by Lust and Newman, his effort to suppress or eloign Gutman's evidence, and his payment of money for that purpose. One of the commonest forms of inculpatory evidence is testimoney of just such acts by a defendant. It is always admissible, and affords distinct and independent corroboration of the accomplice's statements. People v. Hong Tong, 85 Cal. 173, 24 Pac. 726; People v. Clough, 73 Cal. 352, 15 Pac. 5; People v. Grundell, 75 Cal. 310, 17 Pac. 214; People v. McLean, 84 Cal. 482, 24 Pac. 32; People v. Dixon, 94 Cal. 258, 29 Pac. 504. Nor is this evidence open to the objection that Lust and Newman were themselves accomplices. It is true that a conviction may not be had upon the uncorroborated testimony of an accomplice; and a sufficient and independent corroboration is required, whether the principal evidence be that of one accomplice or of many. Three or thirty accomplices may not convict a man by their unsupported evidence more readily than may one; but the fact

that, by the evidence of Newman and Lust, it appeared that each was an accomplice of defendant in a similar crime against the registration laws, did not make them accomplices in the particular offense under investigation. In other words, conceding that the evidence showed that Newman had falsely registered from the Baldwin Hotel at the procurement of defendant, and that Lust had done the same, not the slightest evidence was offered to show that these acts were other than separate and distinct crimes, in no way connected with the false registration of Gutman. Neither Lust nor Newman is shown to have participated in, or even to have had foreknowledge of, the Gutman affair; and under such circumstances, while each was an accomplice with defendant in the crime attending his own false registration, neither was an accomplice with defendant and Gutman in the particular offense for which the former was under trial.

2. The information charged that defendant was a deputy registrar of voters, "and as such deputy registrar of voters, as aforesaid, did willfully, feloniously, and unlawfully procure and allow one A. Gutman to be registered," etc. Defendant offered in evidence the record in the case of Stilwell v. Evans, then still pending and partly tried in the superior court of San Francisco, to show thereby that in a civil action defendant was called as a witness, and without objection answered to questions put him that he was a deputy registrar of voters. Stilwell v. Evans was a civil action to procure the cancellation of several thousand names alleged to have been illegally and improperly placed upon the voting register. Pol. Code, § 1109. The contention here is that defendant is charged with having committed the offense in his official capacity, viz. as deputy registrar; that in the action of Stilwell v. Evans he had been called, and testified that he was, in fact, a deputy registrar; that, by section 32 of the purity of elections act (St. 1893, p. 26), proof of these facts constitutes a bar to this prosecution. It is as follows:

"Sec. 32. A person offending against any provision of sections nineteen, twenty, twenty-one, twenty-two, twenty-five, twenty-six, twenty-seven, twenty-eight, thirty and thirty-one of this act is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding or lawful investigation or judicial proceeding in the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying shall not thereafter be liable to indictment or presentment by information, nor to prosecution or punishment, for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly, in bar of such indictment, information or prosecution."

This section was subjected to elaborate analysis, and a full exposition of its meaning was made, in Ex parte Cohen, 104 Cal. 524, 38 Pac. 364. It affords to one testifying immunity from prosecution or punishment for the offense with reference to which his testimony was given. In Stilwell v. Evans, Sternberg does not appear to have been testifying concerning any offense, much less the one with which he is here charged; and the statement by him that he was a deputy registrar had no more significance than would his answer that his true name was Louis Sternberg. Moreover, the charge in the information that, "as deputy registrar," defendant committed the offense, is the merest surplusage. It was meaningless in averment, and unnecessary in proof. The statute is not directed against official misconduct, nor limited in its application to public officers. "Every person who willfully causes, procures or allows" false registration is punishable under it. Every act embraced within its terms may be done by a private citizen as well as by a public officer, and the official character of the offender under this law is of no possible importance.

3. In instructing the jury, the judge said: "I instruct you, gentlemen, that Gutman, the man whom it is charged here Sternberg procured to falsely register, is an accomplice in this case." Elsewhere he said: "Now, you are instructed further, as I have already stated, that Gutman is, according to his own testimony, an accomplice in the crime here charged against Sternberg." This language, it is claimed, is violative of defendant's constitutional right that the judge shall not charge the jury with respect to matters of fact, but may state the testimony and declare the law. Const. art. 6, § 17. In People v. Sansome, 98 Cal. 235, 33 Pac. 202, this court said, discussing an instruction, that "to have gone further, and have told them that Kelly was an accomplice, would have been clearly a charge with respect to matters of fact, which is not allowed." In the case at bar the language quoted is part of instructions given by the court declaring the law to the jury upon the propositions that the testimony of an accomplice is to be viewed by them with distrust, and that a conviction cannot be had upon such evidence alone. The instructions are full upon the question, and the language criticised, so far from being injurious to defendant, is more favorable than he was entitled to; for, if Gutman was not an accomplice, the jury could have convicted without corroborating evidence, and were not required to view his evidence with distrust. By stamping him as an accomplice, the court, to the advantage of defendant, put his evidence under all the disabilities which attach to testimony of that character. It is clear, then, that no injury could have resulted to defendant. We need not, however, uphold the language for this reason alone. So much has been said to show that injury

could not have resulted from the error claimed, but, in addition, the error was expressly invited by defendant himself. This was natural, since the declaration was entirely favorable to him. He asked the court to instruct, and at his request the court did instruct, the jury, that they could not find defendant guilty "unless there was evidence, other than the evidence of Gutman, which in itself, and without the aid of the testimony of said Gutman, tended to connect Sternberg with the commission of the offense charged." This is itself a declaration to the jury that Gutman was an accomplice; and, for error thus invited, defendant has no just ground of complaint. Nor does the imputation that a crime has been committed, contained in the use of the word "accomplice," afford, under the circumstances, a legal grievance.

4. The court further instructed the jury as follows: "I repeat to you, gentlemen, that neither Lust nor Newman is an accomplice; neither one of them is an accomplice; and their testimony is not subject to the rule which I have mentioned as applicable to the testimony of accomplices." This language is excepted to upon the same ground, that it is an invasion of the jury's exclusive province of determining facts. Were there evidence, even slight evidence, tending to show that Newman or Lust was in fact an accomplice, this objection would be well founded, and the error and injury would be manifest. That Newman and Lust were not accomplices has already been said, but, nevertheless, there is no evidence in the record which tends in any way to establish their complicity in the Gutman crime. Had the court been asked to give instructions upon the law of accomplices as affecting the testimony of Lust and Newman, it would have been its duty to refuse them. In saying to the jury that these men were not accomplices, it did no more than to declare that there was no evidence before them tending to show that they were accomplices. While a judge may not instruct upon a matter of fact, he is not forbidden, if the record justifies the assertion, in declaring to a jury that there is a total absence of evidence upon a given proposition. Such are the circumstances of this case.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

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111 Cal. 11

PEOPLE v. STERNBERG. (Cr. 66.)

(Supreme Court of California. Jan. 13, 1896.)

CRIMINAL LAW—ORAL ADMISSIONS—ACCOMPLICE TESTIMONY—CORROBORATIVE EVIDENCE —INSTRUCTIONS.

1. Under Code Civ. Proc. § 2061, subd. 4, declaring that evidence of the oral admissions of a party is to be viewed with "caution," it is not error to refuse an instruction that it be viewed with "distrust."

2. A requested instruction that the evidence of an accomplice is to be viewed with "caution and distrust" is not bad, though Code Civ. Proc. § 2061, subd. 4, declares only that it should be viewed with "distrust."

3. A requested instruction that "by corroborative evidence is meant additional evidence of a different character to the same point," following with precision the definition of "corroborative evidence" (Code Civ. Proc. § 1839), cannot be refused as being abstract.

4. A defendant is entitled to have a definition of corroborative evidence given the jury, though they are instructed in the language of Pen. Code, § 1111, that evidence of an accomplice is not sufficient to convict, unless he is corroborated by other evidence, which in itself, and without his testimony, tends to convict defendant of the commission of the crime.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Louis Sternberg appeals from a conviction. Reversed.

C. W. Cross, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. This case, while possessing many features in common with the case of People v. Sternberg (Cr. No. 65; this day decided) 43 Pac. 198, differs from it in certain essentials which demand consideration.

Sternberg is here prosecuted for procuring the false registration of David Newman. Newman testified to the circumstances of his false registration at the solicitation of defendant. Lust bore like testimony, he having been present at the time Sternberg induced Newman to commit the crime. Sternberg, when the three were together, asked them both to register from the Baldwin Hotel. They went to the registrar's office for that purpose, Sternberg accompanying them, and there did his bidding. They recounted the later occurrences and conversation at the saloon, when $20 was given them by defendant with which to get out of town, and in this they are corroborated by Gutman.

The court instructed the jury that Newman and Lust were accomplices with Sternberg. This declaration was asked by defendant in an instruction proposed by him, and was a more favorable instruction than he was entitled to. For the reasons given in People v. Sternberg, the defendant cannot complain of it.

The court likewise instructed the jury that Gutman was not an accomplice. Not the slightest evidence in the case indicated that he was. This contention has also been passed upon in the other case.

Certain instructions proposed by defendant were refused by the court; but the substance of them was fairly embraced and expressed in those given, and no injury could have resulted to defendant.

The following instructions proposed by defendant were refused by the court: "(1) The jury is instructed that it is their duty to view with distrust evidence of the oral admissions of defendant. (2) The jury is instructed that the evidence of an accomplice is to be viewed by a jury with caution and distrust. (3) By corroborative evidence is meant additional evidence of a different character to the same point." The principles of law which these instructions undertake to express are all found in the Code. The first is at variance with the Code provision which declares that evidence of the oral admissions of a party is to be viewed with caution. Code Civ. Proc. § 2061, subd. 4. The distinction between caution and distrust is broad enough to justify the court's refusal. The second tells the jury that the evidence of an accomplice is to be viewed with caution and distrust. The Code provision is that such evidence is to be viewed with distrust. Id. The proposed instruction is not vitiated by the use of the additional word. If the evidence is to be viewed with distrust, it is certainly to be received and viewed with caution, while the converse might not be equally true. To view with distrust, caution must or should be exercised; while to view with caution does not necessarily demand distrust. The third instruction, refused as being abstract, follows with precision the Code definition of "corroborative evidence." Id. § 1839. The language is necessarily in the abstract, since it defines a term of abstract meaning with the brevity and generality necessary to legal phraseology. The maxims, rules, and definitions of law in this sense are all abstract, but are none the less proper to be given to a jury for this reason. Members of a jury might be in excusable ignorance of the legal definition of "corroborative evidence," and yet possess (or, at least, they should) intelligence enough to comprehend what was meant when they were told that it was additional evidence of a different character to the same point. The second and third proposed instructions are correct in law. They were not covered by any that were given, and should have been declared, if applicable to the case. That they were applicable no doubt can be entertained. The evidence of accomplices was before the jury. It was defendant's right that his triors should know that it was a duty imposed upon them by law to receive this evidence with distrust. The question of the support of such testimony by corroborative evidence was a vital one for their determination. They were instructed in the language of the Code (Pen. Code, § 1111) that they could not convict unless there was corroborative evidence. Defendant was plainly within his right in asking that they be told what corroborative evidence is. That the jury was instructed, in the language of section 1111 of the Penal Code, that the evidence of an accomplice is not sufficient to convict unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to convict defendant with the commission of the crime, informed them of the amount and kind of corroborative evidence required; but they were still left without enlightenment as to what in law constituted this character of evidence. The direct injury worked by the refusal to give the second proposed instruction is shown from the following: The court, in its instructions, said: "When you become satisfied that it is so corroborated, then you take up the testimony of the accomplices, and judge it as you do the testimony of all others; that is, remembering still who they are,—remembering who each of the witnesses is, because you will not forget, of course, that they are accomplices,—you will not forget that in weighing their testimony, even though you be satisfied that there is sufficient corroboration to enable you to look at it." Had the court informed the jury that the evidence of accomplices must be viewed by them with distrust, the direction that they were to judge it as they did the testimony of all others, taken with what follows, could have been construed as a declaration that it was to be viewed as the testimony of all others, subject to the lack of full credibility which attached to it, and subject to their duty of viewing it with distrust. Not having been so instructed, the foregoing is tantamount to informing them that, when they shall believe that the testimony of the accomplices has been corroborated, such testimony stands upon the same plane with that given by witnesses to whose statements full credibility attaches. It is therefore not easy to see why the instructions were refused, and it is made more difficult by the fact that they were given at defendant's request in the former case.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; TEMPLE, J.

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110 Cal. 658

PARKE & LACY CO. v. WHITE RIVER LUMBER CO. et al. (No. 18,280.)

(Supreme Court of California. Jan. 10, 1896.)

SURETY—DISCHARGE OF MORTGAGE—ESTOPPEL.

1. Where a surety gives a mortgage to secure performance of a contract and also payment of a note in no wise connected with the contract, an alteration of the contract, discharging the mortgage as to it, will not discharge it as to the note.

2. Where a surety gives a mortgage to secure payment of a note and also payment of $3,064, according to terms of an agreement attached to and made part of the mortgage, by which the mortgagee makes a sale to the principal, in the form of a lease, of certain enumerated articles, and the principal agrees to pay $3,064 therefor, the mortgagor is not estopped by recitals of the mortgage that the principal is justly indebted in the sum of $3,064, "agreed to be paid as rent * * * for [certain enumerated articles] in accordance with the lease, * * * of which a copy is attached hereto and made a part hereof," to assert that thereafter the lease was materially altered as to what was to be done by the mortgagee, and that, consequently, no indebtedness accrued "in accordance with the lease."

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Parke & Lacy Company, a corporation, against the White River Lumber Company, a corporation, and others. From a judgment for defendant Hilton, plaintiff appeals. Modified.

H. A. Powell, for appellant. Garber, Boalt & Bishop and L. M. Hoefler, for respondents.

VANCLIEF, C. On June 12, 1889, the respondent Hilton executed to appellant a mortgage on real estate to secure payment of a promissory note of the same date made jointly by the White River Lumber Company and W. D. Parson, for $650 and interest, payable to the order of plaintiff nine months after date, and also to secure the further sum of $3,064, payable to plaintiff according to the terms of a written agreement of same date, attached to and made a part of the mortgage, of which the following is a copy: "The Parke & Lacy Company of San Francisco, Cal., lessors, hereby lease unto the White River Lumber Company and Warren D. Parson, of Tulare county, Cal., lessees, the following property for the period of nine (9) months, from the 15th day of June, 1889, to wit: One (1) 54-inch x 16-feet horizontal stationary tubular boiler, No. 3,155, with fittings (T. M. Nagle's make). One (1) 16-inch x 20-inch Phœnix engine, No. 674, with a Gardner governor. One (1) 11-foot x 16½-inch pulley, made in halves of suitable weight. One (1) No. 3 Valley bucket pump, and merchandise described in the list attached hereto. Said property is to be used only at Arbor Vitæ, Tulare county, state of California, and said lessees are to pay to said lessors, at San Francisco, for the use of said property, the sum of three thousand and sixty-four ($3,064) dollars, payable as follows: All on the 15th day of March, A. D. 1890. Said lessees agree that they will pay the rent at the times and in the manner aforesaid; that they will not permit said property, nor any part thereof, to be affixed to real estate, nor removal from where it is to be used aforesaid, nor deliver the same to any one, nor suffer it to be taken away by any one except lessors, nor in any manner transfer or attempt to transfer this lease, or any interest therein or in said property, without the written consent of lessors; that they will keep said property in good condition and repair, and pay all expenses relating to said property hereafter incurred, including transportation and insurance thereof, in the name of lessors, and all damages to said property suffered by lessors. It is further agreed that time is of the essence of this agreement, and that upon the failure of the lessee strictly to keep and perform any of the covenants or provisions hereof, by them agreed to be performed, then and thereupon, without any notice, this instrument shall be deemed to be canceled and of no further effect as against lessors, and all right and interest of lessee in or to said property shall cease, and all rent by lessee theretofore paid shall belong to lessors as full payment for the prior use of said property, and lessors shall be entitled to take into their possession all said property. Said lessors further agree that upon strict performance by lessee with all the foregoing covenants and provisions by them to be kept and performed, they shall then (but not otherwise) have the right to purchase said property by the prompt payment to the lessors of the sum of three thousand and sixty-four ($3,064) dollars. Witness the hands and seals of the parties hereto, this 12th day of June, 1889. [Signed] Parke & Lacy Company. B. T. Lacy, Pres. [Seal.] White River Lumber Company, by W. D. Parson, Pres. [Seal.] W. D. Parson. Witness: Osgood Hilton, W. F. Aldrich." The conditions of the mortgage are that if default be made in the payment of said sums of money, or any part thereof, as provided in said note or agreement, the mortgagee may sell the mortgaged property and apply the proceeds, etc. The mortgagor, Hilton, was not interested in the transactions between plaintiff and the other defendants, but executed the mortgage merely for the accommodation of the White River Lumber Company and Parson, to whom he or his mortgaged property stands in the relation of mere surety, of which the mortgagee had notice at the time the mortgage was executed, and it is not disputed that he is entitled to all the rights and favor accorded by law to a surety; that is to say, "when property of any kind is mortgaged or pledged by the owner to answer for the default or miscarriage of another person, such property occupies the position of a surety or guarantor, and anything which would discharge an individual surety or guarantor who was personally liable will, under similar circumstances, discharge such property." Brandt, Sur. § 34 et seq.

This action was commenced February 7, 1891, to recover from the White River Lumber Company and W. D. Parson the sum of $650 and interest, alleged to be due on said promissory note, and the further sum of $3,064 and interest, alleged to be due on said written agreement, and also to foreclose the Hilton mortgage. The defendants White River Lumber Company and W. D. Parson, having failed to answer the complaint, a personal money judgment was rendered against them by default for the full amount demanded. The material substance of the very verbose separate answer of the defendant Hilton is that, without his consent, said written agreement was altered materially, after the execution of the mortgage, by a verbal agreement between plaintiff and the other defendants, at the instance and request of plaintiff, and that the agreement as written was never substantially performed on his part by the plaintiff. The alleged alterations of the contract consisted in substituting for the "Gardner governor" and the "11-foot x 16½-inch pulley, made in halves of suitable weight" an inferior, defective, unsafe governor known as a "Waters Governor," and an inferior, defective pulley, smaller in size than that described in the written contract, and of insufficient weight. Besides the above, Hilton's answer contained a denial of the alleged indebtedness of the White River Lumber Company and Parson to the plaintiff. The court below found in favor of the defendant Hilton on all the issues of fact, and, as conclusions of law, found that the defendant Hilton and the mortgaged property had been exonerated and discharged from all liability on the mortgage, and that the mortgage should be canceled of record; and thereupon judgment was rendered accordingly. From this judgment, and from an order denying his motion for a new trial, the plaintiff has appealed.

The identical written contract herein above set out was construed by this court in the case of Parke & Lacy Co. v. White River Lumber Co., 101 Cal. 37, 35 Pac. 442, and held not to be a lease, but a sale, either absolute or conditional. Although that decision is not the law in this case, the law announced therein is applicable to the construction of the contract, unless the construction may be aided and changed in this case by circumstances different from those appearing in that; but I perceive no difference affecting the construction of the contract. But the construction given in that case can be applied in this case only to the extent that the contract is not a lease, since that decision goes only to that extent. By whatever name the contract may be properly designated, or however classified, it was wholly executory by both parties thereto, the promise of each party being the only consideration for the promise of the other; and the first act to be performed, the delivery of the property described to the White River Lumber Company and Parson (miscalled lessees), was to be performed by the plaintiff. The defendant Hilton mortgaged his property to secure performance, on the part of the White River Lumber Company and Parson, of this contract, and not to secure their performance of any other or materially different contract. If, therefore, the contract was altered by the parties thereto in any material particular after the execution of Hilton's mortgage, without his consent, the mortgaged property was thereby exonerated from all liability as security. Civ. Code, §§ 2844, 2819; Brandt, Sur. §§ 397, 399, and cases there cited, especially Bragg v. Shain, 49 Cal. 131, Truckee Lodge v. Wood, 14 Nev. 293, and U. S. v. Corwine, 1 Bond, 339, Fed. Cas. No. 14,871. The court below found that the contract was materially altered, as alleged in Hilton's answer, and without his consent; and this finding is justified by the evidence. The only conflict of the evidence applicable to this finding is found in that part of it relating to the question whether Hilton consented to the alteration; and, as to this, the conflict is substantial to a degree which precludes this court from disturbing the finding on the ground that it is not justified by the evidence, even though it should seem from the transcript of the evidence that a preponderance thereof is against the finding.

It is contended by appellant, however, that respondent is estopped from denying the recital in the mortgage that the lumber company and Parson "are justly indebted" to appellant in the sum of $3,064 as rent on machinery. But such is not the recital. It is recited in the mortgage that the White River Lumber Company and Parson are justly indebted to the Parke & Lacy Company in the sum of $650 on a certain promissory note (setting out a copy of the note) "and in the further sum of $3,064, agreed to be paid as rent by said White River Lumber Company and Warren D. Parson to said Parke & Lacy Company for the boiler, engine, and other machinery, in accordance with the lease this day executed, of which a copy is attached hereto and made a part hereof." The whole lease, as well as the note, must be read as a part of the recitals, and when so read will not estop Hilton from alleging that the lease was altered by the parties thereto without his consent, after the execution of the mortgage, and that the covenants therein on the part of the plaintiff were never performed, and, consequently, that no indebtedness of the lumber company and Parson to plaintiff ever accrued "in accordance with the lease." The lease, being the principal part of the recitals, shows that the indebtedness referred to did not exist at the date of the recital, and could be only such as might thereafter accrue in accordance with its terms. Therefore, the averments that the lease was afterwards altered, and that no indebtedness ever accrued in accordance with its original terms, are nowise inconsistent with the recitals in the mortgage.

I conclude that, as to the alleged indebtedness of $3,064, founded upon the written agreement called a "lease," a foreclosure of the Hilton mortgage was properly denied by the trial court; but I think the court erred in denying a foreclosure of the mortgage as a valid security for the payment of the promissory note for the sum of $650 and the conventional interest thereon. That note is entirely distinct from the so-called lease, and there is no pretense that it has been altered in any respect. It appears that the consideration for it was a loan by plaintiff of $650, and that no part of the principal or interest had been paid when judgment was rendered against the other defendants. "Where a surety is bound by one bond for the performance by the principal of two distinct things, and the contract is varied as to one of the things to be performed, the surety is discharged as to the matter concerning which the contract has been changed, but is not discharged from that as to which it has not been changed." Brandt, Sur. § 398, and cases there cited. I think the cause should be remanded, with instructions to modify the judgment according to this opinion.

We concur: BRITT, C.; SEARLS, C.

PER CURIAM. For the reasons stated in the foregoing opinion, the cause is remanded, and the court below is instructed to modify the judgment in accordance with said opinion.

(110 Cal. 667)

KIEFER v. LAVENTHAL et al. (L. A. 89.)

(Supreme Court of California. Jan. 10, 1896.)

DEPOSIT—ACTION TO RECOVER—COMPLAINT.

Plaintiff's assignor sold all the goods in his saloon for $60 in hand paid, the purchaser further agreeing to deposit with defendant $300, to be paid the seller on the procurement of the right to carry on the business in such saloon. *Held*, that plaintiff's complaint, in action for the $300, should allege that the purchaser had procured the right to carry on the business, or that he could carry it on without the procurement of a right, or that, by his own neglect or default, he had failed to secure the privilege.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by O. H. Kiefer against E. Laventhal and others. Judgment for defendants. Plaintiff appeals. Affirmed.

King & Harmon, for appellant. Graff & Latham and J. W. Mitchell, for respondents.

HENSHAW, J. Appeal from the judgment entered after demurrer sustained to plaintiff's second amended complaint, plaintiff refusing further to amend. The facts pleaded are that Brown and Beaslin entered into an agreement (set forth in full in the complaint) by which Brown sold to Beaslin, for the sum of $60, to him paid, certain personal property. This property consisted of "all of the goods in, and owned by me in, my place of business in the town of Azuza," a retail liquor saloon. "As a further and separate agreement between the parties," Beaslin agreed to deposit with the firm of Laventhal & Sons (defendants herein) $300, "to be paid to the party of the first part upon the procurement of the right to sell and carry on the business at the place above named; that is, the retail or liquor business within the same." Beaslin deposited the money with Laventhal & Sons, who hold it. Brown assigned his interest and rights "as per agreement" to Kiefer. Kiefer, after demand upon Laventhal & Sons, commenced this action to obtain the $300, making Tappeiner, who claimed by assignment from Beaslin, one of the defendants. The complaint nowhere avers that Beaslin procured the right to carry on the business of retail liquor dealer, or that he could carry on the business without procurement of a right (presumably a license), or that by his own neglect or default he had failed to secure the privilege. These averments lay at the foundation of plaintiff's right of action, and should have been alleged in one or another of the modes indicated. From the agreement alone, it may reasonably be inferred that Beaslin paid Brown $60 for such personal property as Brown owned in the saloon, agreeing to pay him $300 more when and if he obtained a license to conduct the business. If he succeeded, his liability to pay was complete. If he failed, then he owned the property for which he had paid $60, and the transaction was at an end. Judgment affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

(110 Cal. 669)

PIERCE et al. v. BIRKHOLM et al. (No. 15,464.)[1]

(Supreme Court of California. Jan. 10, 1896.)

GRANT OF NEW TRIAL—APPEAL—EFFECT ON JUDGMENT.

1. Pending appeal from an order granting a new trial, an appeal will lie from the judgment.

2. An order granting a new trial does not vacate the judgment, until the order becomes final by failure to appeal, or its being sustained on appeal.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by one Pierce and others against one Birkholm and others. There was a judgment for defendants, and from an order granting a new trial they appeal, pending which plaintiffs appeal from the judgment. On motion to dismiss plaintiffs' appeal. Denied.

Morrison & Foerster, Constantine E. Foerster, Parker & Eells, and William H. Jordan, for appellants. W. S. Goodfellow, for respondents.

VAN FLEET, J. Judgment was entered in the action in the court below in favor of defendants on August 15, 1892, but subsequently, on August 26, 1892, the court, on motion of plaintiffs, made an order granting a new trial. From the order granting a new trial defendants, on October 24, 1892, appealed to this court. After the taking of the appeal from said order, the plaintiffs, on May 10, 1893, took an appeal from the judgment.

We are asked by the defendants to dismiss the appeal from the judgment, upon the ground, as contended, that the effect of the order granting defendants a new trial was to vacate and set aside the judgment, and that, consequently, when the appeal from the latter was taken, it had ceased to have any existence, and there was no judgment to appeal from. This view cannot, in our judgment, be sustained, for obvious reasons. The operation of an order granting a new trial is, unquestionably, expressing it in general terms, to ultimately vacate the judgment; that is, it

[1] Rehearing denied.

sets aside the findings upon which the judgment rests, and the latter necessarily falls. But this implies a valid and subsisting order, remaining in full force and effect. Here the order had been appealed from, and that appeal was pending and undisposed of at the date of the appeal from the judgment. The effect of the appeal from such order was to suspend the operation of the latter, and render it ineffectual until the determination of such appeal, either by a dismissal thereof, or by an affirmation of the order. Pending such appeal, the judgment remained subsisting, and, for the purposes of an appeal therefrom, stood as if no order for a new trial had ever been made. The position of defendants, in effect, is that an order granting a new trial becomes effectual immediately upon its entry, and that the judgment is thereby and at once absolutely wiped out of existence; that the effect of an appeal from such order is not to resurrect or restore the judgment for any purpose, whatever deterrent effect it may exert upon the operation of the order in other respects. Manifestly, this position cannot be maintained. If such was the effect intended for the order, it was idle for the legislature to provide an appeal therefrom, since, whatever the result of such appeal, the judgment would be gone, and there would be no method of reviving it except as a result of another trial. Being absolutely dead, it could not be otherwise restored to existence. Furthermore, if such were its effect, it would logically follow that the trial court could proceed, notwithstanding the pendency of an appeal therefrom, and try the case anew: but this, it has been held from a very early day in this state, cannot be done. Ford v. Thompson, 19 Cal. 120. But such is not the effect of the order. While its ultimate effect, if unappealed from, or if sustained upon the appeal, where one is taken, is to vacate the judgment, and require another trial of the action, such result does not follow until the finality of the order is determined in one or the other modes suggested. In this respect it is not distinguishable from any other order or judgment from which an appeal is given. Pending an appeal therefrom, it is suspended, and set at large, and the rights of the parties stand unaffected thereby, excepting in so far as their prosecution may be stayed by virtue of the provisions of the statute. That the effect of the order is not to destroy the judgment, ipso facto, upon its entry, is made clear when we regard the effect of a reversal of the order on appeal. In such case the law does not provide for entering a new judgment in the court below upon the going down of the remittitur as would be required had the judgment wholly ceased to exist, but the judgment as originally entered in that court stands as the judgment in the action, and has effect from the date of such original entry. "The reversal of an order denying a new trial reverses the judgment, but the reversal of an order granting a new trial leaves the verdict and judgment standing." Hayne, New Trials & App. § 299. And see, also, Brooks v. Railway Co. (Cal.) 42 Pac. 570.

In support of the view contended for by them, defendants cite us to the following cases from this court: Walden v. Murdock, 23 Cal. 549; Thompson v. Smith, 28 Cal. 528, 530; Kower v. Gluck, 33 Cal. 401; Wittenbrock v. Bellmer, 62 Cal. 558; Wheeler v. Kassabaum, 76 Cal. 90, 18 Pac. 119. And it is claimed that those cases settle the law in accordance with the position now taken by them. An examination of those cases, however, shows that they fall very far short of sustaining any such view. They do sustain the general proposition, not questioned, that the effect of an order granting a new trial is to set aside the judgment; and that is the only question, so far as anything affecting a consideration of this case is concerned, that is involved in the determination of any of those cases. That proposition is found stated in a general way in various forms, and in one or two instances in language somewhat too broad and loose, and such as, perhaps, to lend some color to the position now taken by defendants. But, when the cases are read with reference to the questions before the court, they will be found, in each instance, we think, not inconsistent with the views we have expressed. In all those cases the court would seem to have used the expressions there found with reference to the effect of such an order, treated as a finality, and a consideration of the question as to when the order becomes final does not appear in any of them to have been involved. In none of them was the question here involved—the effect upon the order granting a new trial of an appeal therefrom, and, consequently, the status of the judgment pending such appeal—under consideration. It is true that, in the case of Kower v. Gluck, supra, most strongly relied upon by defendants, there was, as here, an order granting a new trial, from which an appeal had been taken, and subsequently an appeal from the judgment. The two appeals were considered together, and the court, determining that the appeal from the order must be affirmed, holds that the effect of the order granting a new trial being to set the judgment aside, the appeal from the judgment became inconsequential, and should be dismissed. This is all that is determined by the case, and to that extent it is obviously correct. If the language, which does not seem to have been carefully chosen to express the meaning of the court, implies anything further, it is not authoritative, because unnecessary to the determination of the question involved. The other cases cited need not be specially reviewed, as we regard them as sufficiently disposed of by what is generally said above. None of them, when properly considered, go to the length contended for by defendants, or necessary to sustain this motion. To sustain the doctrine urged by defendants would, not only in this, but in most instances of the kind, deprive the party of an opportunity to take advantage of the right of appeal clearly afforded by the statute, and that upon grounds which to us seem wholly unsupported by either reason or authority. The motion is denied.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; HENSHAW, J.; TEMPLE, J.

HARRISON, J., being disqualified, did not participate in the foregoing decision.

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115 Cal. 105

EVERETT et al. v. LOS ANGELES CONSOL. ELECTRIC RY. CO.

(L. A. 62.)

(Supreme Court of California. Jan. 9, 1896.)

ELECTRIC STREET RAILWAYS—LIABILITY FOR NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

1. It is contributory negligence per se to ride on a bicycle between the tracks of an electric street railway without watching for the approach of cars from behind.

2. Decedent was riding on a bicycle between the tracks of the defendant electric railroad company, at the rate of six miles an hour, without watching for the approach of cars from behind. As the car by which decedent was killed approached from behind, at the rate of ten miles an hour, the motorman sounded the gong when 20 to 40 feet from him, and cried out for him to get off the track, to which decedent paid no attention. Thereupon the motorman, when 10 or 20 feet from decedent, reversed the current, and attempted to stop the car, but was unable to do so in time. There was no evidence that the rails of the track were not on a level with the ground between the tracks, and decedent was seen when about a block and a half ahead of the car to pass from the north track, on which he had been riding, to the south track, to escape a north-bound car. *Held*, that a nonsuit should have been granted.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Amanda P. Everett and others against the Los Angeles Consolidated Electric Railway Company. There was a judgment for plaintiffs, and defendant appeals. Reversed.

John D. Pope, for appellant. W. J. Hunsaker, for respondents.

VAN FLEET, J. Verdict and judgment were for plaintiffs, and defendant appeals from the judgment and an order denying its motion for a new trial.

The action was by the widow and minor child of one Charles E. Everett, deceased, to recover damages for the death of the latter, caused by his being run over by an electric car operated by the defendant on its street railroad in the city of Los Angeles, and alleged to have been through defendant's negligence. At the conclusion of plaintiff's evidence in chief, defendant moved the court for a nonsuit, on the grounds, substantially, that the evidence wholly failed to show negligence on the part of the defendant, but did establish affirmatively that deceased came to his death through his own negligence, contributing directly and proximately thereto. The court denied the motion, to which ruling defendant excepted, and this exception constitutes the only material question in the case.

The evidence in behalf of plaintiffs tended to show that the deceased, at the time of the accident resulting in his death, which was on October 17, 1894, was 40 years of age, in good health, and in full possession of his faculties, having good eyesight and unimpaired hearing.

He was an experienced rider of the bicycle, had owned one of those vehicles three or four years, and used it every day. On the date in question, about 1 o'clock in the afternoon, or a little thereafter, deceased was on his bicycle, riding along McClintock avenue, in a suburb of Los Angeles, known as "University," on a portion of the street where ran a double line of defendant's railway, one line used for south-bound and the other for north-bound cars. He was going south at the time, and traveling at the rate of about six miles an hour. Following him, and going in the same direction on the south-bound track, was a train of defendant's cars, consisting of an electric motor car and a trailer, heavily loaded with passengers going out to the race track. This train was running at its ordinary rate of about ten miles an hour. When deceased was first observed by those on the train, he was between a block and a half and two blocks ahead of the train, and was riding between the rails of the north-bound track.

He continued on this track for some distance, when he crossed over to the south-bound track, apparently to avoid an approaching car going north, and continued on his course, riding between the rails of the latter track. At this time he was something over half a block in advance of the south-bound train, but the latter was rapidly overtaking him; and when the north-bound car passed him, which was at a point a short distance south of where the south-bound train then was, passengers on the former, evidently noting the rapid approach of the train, called out a warning to deceased to apprise him of danger; and at about the same time, when the train was within from 20 to 40 feet from him (the estimates of the witnesses varying on this point), the motorman on the latter rang his gong, and, together with several of the passengers, cried out to deceased to "get off the track," "look out," and other words of like import. These warnings, although distinctly heard by a witness standing on the street some four or five times as far from the train as deceased then was, were either unheard by him, or totally unheeded, as he was not observed to look back or turn his head, or attempt to turn or increase the speed of his bicycle. Thereupon the motorman, when within about 10 to 20 feet of deceased, reversed the current, and applied the brakes, and endeavored to stop the train, but did not succeed in time to avoid running deceased down; and he was struck by the motor, and killed. At no time from the time he was first seen riding ahead of the train was deceased observed to turn his head or look back, until just as the train was upon him, when he partly turned his head, and turned his wheel a little to the right, but not sufficient to get out of the way. University is a settled suburb of Los Angeles, laid out in blocks, crossed and intersected by public streets, and the point where deceased was killed was at the intersection of McClintock avenue with Thirty-Seventh street. Deceased was not a resident of Los Angeles, but had been there for about a week, more or less, before the accident, stopping at the house of a relative on Thirty-Ninth street, off McClintock avenue, south of Thirty-Seventh street and the point where he was killed. During his sojourn he had been in the habit of riding back and forth to and from the city on his bicycle, and, when on McClintock avenue, would ride on the railroad tracks, as it was smoother for travel between the rails than on the outside, where the space was narrow and rough and a poor road for the bicycle, by reason of the condition of the street. At points on McClintock avenue the soil was sandy, and had receded somewhat from the rails, so as to leave the latter in places standing a little above the surface of the street; but what the condition was in this respect at or in the immediate vicinity of the accident was not made to appear. At the date in question, races were in progress at the race track, situated south of the scene of the deceased's death; and, owing to the increased travel, extra cars were being run by defendant, and at shorter intervals than at other times; but whether the train which killed deceased was an extra or running on regular time was not shown. The motorman in charge of the train had been in the employment of defendant about two weeks. For the first ten or twelve days he was under instruction from an experienced motorman, and was then put in charge of a motor, and had been so employed some four or five days at the time of the accident. The statements of the witnesses vary considerably as to how far the train was from deceased when the motorman commenced ringing his alarm gong. A number of them show no recollection on the subject, but, taken as a whole, the evidence tends strongly to indicate that the gong was being sounded before the motorman and passengers commenced to call out to deceased to get out of the way. There is a like difference as to just when the brakes were applied, and whether the speed of the train was slackened any before the deceased was struck. The head end of the motor passed the point where deceased was struck between 20 and 30 feet before the train came to a full stop, and the evidence tended to show that it could have been stopped in a shorter distance. There was also some evidence tending to show that the wind was coming from the southeast; at what velocity does not appear, but that it was calculated to deaden to some extent any sound in deceased's rear.

This is substantially the case made by the evidence in behalf of plaintiffs upon the points material for our consideration. It can scarcely be made a question in the case—indeed, we do not understand it to be seriously controverted—but that the conduct of the deceased under the circumstances narrated constituted negligence on his part in the highest degree, and such as, standing alone, would necessarily preclude a recovery for his death. In walking or riding along a line of railway where cars or trains are passing, or likely to pass, at short intervals, one, while in a position to be endangered by such vehicles must pay attention to his surroundings, and employ his natural faculties, and exert due diligence to avoid such danger. He must listen and look to ascertain whether danger is threatened by his situation, and a failure so to do constitutes negligence per se. This principle is settled by a practically unbroken line of decisions in this and other states. One or two of the latest expressions upon the subject by this court, in cases where the rule is fully discussed and authorities cited, may be given as aptly stating and applying the doctrine. In Kenna v. Railroad Co., 101 Cal. 26, 35 Pac. 332, it is said: "It is a fixed rule that it is the duty of any one when attempting to cross a railroad track upon a highway to be vigilant, to look and to listen before attempting to cross, and a failure to do so is regarded as such negligence on his part as to preclude a recovery. Glascock v. Railroad Co., 73 Cal. 137, 14 Pac. 518. With greater reason does the principle of this rule apply to one who is traveling laterally along the route of a railroad, and knows that engines will soon follow. 'It is negligence for a person to walk upon the track of a railroad, whether laid in the street or upon the open field; and he who deliberately does so will be presumed to assume the risk of the perils he may encounter,' "—citing a large number of cases. In Holmes v. Railway Co., 97 Cal. 161, 31 Pac. 834, where the person for whose death it was sought to recover was killed while walking along the railroad track near a station, while waiting for the train which ran him down, and when it appeared that deceased did not look out for the approach of the train, which he could have seen in time to get out of the way, the court say: "A railroad track upon which trains are constantly run is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to it to be struck by a passing train, without the exercise of constant vigilance, in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such a person so situated, with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses, in order to avoid the danger incident to such situation, is negligence per se. The following are a few of many cases which might be cited to sustain this proposition: Harlan v. Railway Co., 64 Mo. 480; Id., on rehearing, 65 Mo. 22; Railroad Co. v. Depew, 40 Ohio St. 121; Kelley v. Railroad Co., 75 Mo. 138; Glascock v. Railroad Co., 73 Cal. 137, 14 Pac. 518." Nor is there any distinction, in the application of this doctrine, between an electric or cable line operated upon the public streets of a city, and that of an ordinary steam railway operated upon the right of way of the corporation. While the deceased had the undoubted right to a reasonable use of the public street, notwithstanding its occupancy by defendant's tracks, he could not ignore or disregard the rights of the latter in the premises, nor neglect to take reasonable precautions for his own safety. If he chose to make use of the part of the street occupied by the tracks, it was his duty to look out for and endeavor to avoid the dangers incident to such use. In Haight v. Railroad Co., 7 Lans. 11, speaking of this rule, the court say: "It is said by counsel for plaintiff that, while this may be the rule in regard to steam railways, it cannot be applied to street railways." In Carson v. Railway Co., 147 Pa. St. 219, 23 Atl. 369, it was held that failure to look for approaching cars on the part of one about to drive across the tracks of an electric street railway company is such contributory negligence as will prevent his recovery for injuries received by colliding with a car. The court said: "If, by looking, the plaintiff could have seen and so avoided an approaching train, and this appears from his own evidence, he may be properly nonsuited." In Ward v. Railway Co. (Sup.) 17 N. Y. Supp. 427, it appeared that plaintiff's intestate was fatally injured while attempting to drive across a street-railway track. There was evidence that, at any time before reaching the track, deceased, by a glance, could have informed himself of the approach of the car, but that he drove onto the track without looking in either direction. It was held that he was guilty of contributory negligence. In Creamer v. Railway Co., 156 Mass. 320, 31 N. E. 391, the supreme court of that state held that where a person stepped from a horse car at the junction of two streets, and immediately started to cross the track of an electric road, without looking or listening, and was run over by the electric car running at the rate of 15 miles an hour, there could be no recovery, because the deceased was not exercising due care. We see no more reason for applying the rule that one must look and listen before crossing the tracks of a steam railway than that one must look and listen before crossing a street-car track upon which the motive power is electricity or the cable. See, also, Bailey v. Railway Co. (No. 16,004; decided by this court December 10, 1895) 42 Pac. 914. When the evidence discloses a failure to take such reasonable precautions for one's own safety, it constitutes negligence in law, and is not a question to be submitted to the jury.

This brings us to the only other consideration arising: Does the evidence tend to show such negligence on the part of defendant, contributing to the death of deceased, as would in law authorize a recovery, notwithstanding the negligence of the deceased? We find nothing in the evidence to sustain this view. The case is not like one where the injured party is discovered in time lying or standing upon a railroad track, under such circumstances as to make it doubtful whether he can or will get out of the way; or where one is seen attempting, either on foot or otherwise, to make a crossing, or passing along or on its track over a bridge or narrow causeway, or in a deep cut or tunnel, where to turn aside would be either dangerous or impossible; or under other circumstances of similar character. In such instances it may be conceded that the driver of the engine or motor would not be justified in law in proceeding without effort to stop his vehicle up to the point of collision. Persons cannot be recklessly or wantonly run down on a railroad track, however negligent themselves, where the circumstances are such as to convey to the mind of a reasonable man a question as to whether they will be able to get out of the way. But the evidence has no tendency to make such a case. Here the deceased was in full and open view of the approaching train for several blocks, and had perfect opportunity and ability to apprise himself of its coming. He was upon a swift and noiseless vehicle, which, as a matter of common knowledge, can be made with very little effort, under a rider of ordinary strength and experience, to attain a much higher rate of speed than that with which the cars were progressing, and which, furthermore, is susceptible, by a mere pressure of the hand, to turn aside instantly,—in much less time, indeed, than a pedestrian could step aside,—so as to completely avoid an object no wider than a street car. He was upon level ground, and, assuming that the surface was too rough or the space too narrow outside the railroad tracks for him to safely turn that way, there was nothing, so far as appears, to prevent his return to the other track or to the space between the tracks. In fact, he had but a few moments before crossed from one track to the other, to avoid a like danger, and had been seen to do so by the motorman on the train. Under these circumstances, we think it perfectly clear that the latter was justified, reasoning in the line we have suggested, in keeping on his course, and assuming that the deceased, obeying the most ordinary dictates of prudence, had made himself aware of the approach of the train, and would either increase his speed or turn aside in time to avoid the danger which threatened him. In Holmes v. Railway Co., supra, it is said: "As the deceased was a man of mature years, and nothing to indicate that he was not able to take care of himself,—as he was in fact,—the engineer might reasonably believe that he knew of its approach, and would, in obedience to the ordinary instinct of self-preservation, move away from the track before being overtaken by the engine. Railroad Co. v. Miller, 25 Mich. 279." See, also, Campbell v. Railroad Co. (Kan.) 40 Pac. 997. The motorman was not required to assume that the deceased would continue his negligent conduct to a point which would endanger his life or limb, and it was not negligence in the driver, under the circumstances, to indulge the presumption that the deceased would get out of the way, up to the last moment. There is nothing in the circumstances to indicate any wantonness or recklessness on the part of the engineer, or that he did not take all the precautions to warn the deceased and to stop his train that would have been suggested to one more experienced, or to any other reasonable mind.

But, were it to be conceded that the evidence disclosed a case tending to show negligence on the part of defendant's servants, the plaintiffs could not recover under the circumstances of this case. The rule which renders a defendant liable for injuries, notwithstanding some negligence on the part of the plaintiff or the person injured, can only apply "in those cases where such negligence was the remote, and not the proximate, cause of the injury, that is, where the negligent acts of the parties are independent of each other, the act of the person injured preceding that of the defendant." Holmes v. Railway Co., supra. In that case, quoting from O'Brien v. McGlinchy, 68 Me. 552, it is said: "But in cases falling within the foregoing description, where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have avoided by the use of ordinary care at the time by the defendant. This rule applies usually in cases where the plaintiff or his principal is in some position of danger from a threatened contact with some agent under the control of the defendant, when the plaintiff cannot and the defendant can prevent the injury. * * * But this principle cannot govern where both parties are contemporaneously and actively in fault, and, by their mutual carelessness, an injury ensues to one or both of them." See, also, Hager v. Southern Pac. Co., 98 Cal. 309, 33 Pac. 119; Esrey v. Southern Pac. Co., 103 Cal. 541, 37 Pac. 500. The rule can never apply to a case where, as here, the negligence of the party injured continued up to the very moment of the injury, and was a contributing and efficient cause thereof; for it is apparent that, by the slightest care and effort on the part of the deceased, he could have put himself out of danger up to the last moment before he was struck.

Our conclusion is that the plaintiffs did not make out a case entitling them to recover, and that the refusal of the trial court to grant the motion for nonsuit was error. It may be added that an examination of the evidence on the part of the defendant serves only to strengthen the case as to the negligence of the deceased, and the absence of negligence on the part of the defendant, and makes it clear that the court should have granted defendant's request to instruct the jury to find for the latter. It follows that the judgment and order must be reversed, and it is so ordered.

We concur: HARRISON, J.; GAROUTTE, J.

EVERETT et al. v. LOS ANGELES CONSOL. ELECTRIC RY. CO.

(L. A. 62.)

(Supreme Court of California. Jan. 9, 1896.)

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Amanda P. Everett and others against the Los Angeles Consolidated Electric Railway Company. There was a judgment for plaintiffs, and defendant appeals. Heard on motion to strike out portions of respondents' brief. Denied.

John D. Pope, for appellant. W. J. Hunsaker, for respondents.

PER CURIAM. Motion to strike out a portion of respondents' brief, because not pertinent to anything contained in the record, and therefore improper. In view of the conclusion reached on the merits of the appeal, whereby the judgment and order denying a new trial are reversed (see opinion this day filed, 43 Pac. 207), the purpose of the motion becomes inconsequential; and for that reason the motion is denied.

110 Cal. 614

BUTLER v. ASHWORTH et al. (No. 15,984.)

(Supreme Court of California. Jan. 29, 1896.)

TORT—INDEPENDENT ACTS—SEPARATE ACTIONS—COSTS.

1. Where neglect of a city to repair a sewer, and of its officers to properly repair it, combine to cause sewage to overflow land, though the landowner can have but one satisfaction in damages, since she must sue each separately, she is not within Code Civ. Proc. § 1023, prohibiting recovery of costs in more than one action where defendants, sued separately, "might have been joined as defendants in the same action."

2. Where a single injury is caused by independent acts of different parties, though the injured party is entitled to but one satisfaction, he must sue each party separately.

For former opinion, see 43 Pac. 4.

PER CURIAM. The opinion and judgment heretofore rendered herein are modified by striking therefrom the two last paragraphs thereof, and inserting in lieu thereof the following:

It does not result from this, however, that the plaintiff is not entitled to her costs in the present action. While one may have a cause of action against two or more persons for the same act, it does not follow, necessarily, that he can sue them jointly. "There must be something more than the existence of two separate causes of action for the same act or default, to enable him to join the two parties liable in the single action." The injury suffered must be in some sense the result of their joint work. Pom. Rem. § 308. Here, while the injury was from one common cause, it cannot, we think, be said to have been produced by the same fault or act of the city and Ashworth. The act of the former which conduced to the cause of injury was the neglect to repair the broken sewer; while the act of the latter was the negligent repair and stopping up thereof. These two acts produced the cause from which plaintiff suffered, but they were not joint in a sense which would make the city and Ashworth joint tort feasors, and liable to be sued in a common action. While plaintiff had a right of action therefor, against each separately, she could not sue them jointly; and, while she can have but one satisfaction in damages, the case is not within section 1023 of the Code of Civil Procedure, which prevents the recovery of costs in more than one action, where the defendants, sued separately, "might have been joined as defendants in the same action."

We think the order of the court below was right in both respects appealed from, and it follows that it should be affirmed, each appellant to pay his own costs on appeal. It is so ordered.

(5 Cal. Unrep. 250)

BROKER v. TAYLOR. (No. 19,429.)

(Supreme Court of California. Jan. 24, 1896.)

APPEAL—JUDGMENT ROLL.

Where an appeal from an order denying a new trial is dismissed for want of an undertaking, only such questions can be considered as arise upon the judgment roll.

In bank. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by Henry Broker against John Taylor, administrator, etc. Plaintiff had judgment, and defendant appeals. Affirmed.

Paris & Allison, for appellant. Bledsoe & Hutchins and Rolfe & Rolfe, for respondent.

PER CURIAM. Defendant appealed from the judgment and an order denying a new trial. The appeal from the order was, on motion of respondent, dismissed, for want of an undertaking to support it. The questions subject to our review, therefore, are such only as arise upon the judgment roll. No such questions are presented in appellant's briefs, the points there discussed being such alone as would arise on an appeal from the order denying a new trial. We have examined the record, and are satisfied that the complaint states a cause of action, and that the findings are sufficient to support the judgment in favor of plaintiff. The suggestion made at the oral argument that the judgment should not have been against Papenhausen, as executor, is, we think, without substantial merit. The court found that he had the fund in his hands as executor; and the judgment was, in effect, that it be paid over to plaintiff in due course of administration. Technically, perhaps, the theory upon which the plaintiff recovered was that the property did not belong to the estate; but, being in defendant's hands, we cannot see wherein his rights are in any way prejudiced by the form of the judgment, and the objection may therefore be disregarded. The judgment appealed from is affirmed.

(111 Cal. 1)

HENRY v. MERGUIRE. (Sac. 51.)[1]

(Supreme Court of California. Jan. 10, 1896.)

APPEAL—TIME OF TAKING.

The running of the year from entry of judgment, within which Code Civ. Proc. § 939, provides appeal from the judgment must be taken, is not suspended by an order granting a new trial, and appeal therefrom resulting in reversal of the order.

In bank. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by Henry against Merguire. Judgment for plaintiff. Defendant appeals. Dismissed.

J. M. Walling and W. H. Chickering, for appellant. Thos. S. Ford, for respondent.

VAN FLEET, J. Motion by respondent to dismiss appeal from the judgment. One of the grounds of the motion is that the appeal was not taken within one year from the entry of judgment, and is therefore too late. The judgment was entered November 2, 1893, and the appeal was taken April 27, 1895. Section 939 of the Code of Civil Procedure provides that an appeal from the judgment must be taken within one year from the entry of the judgment; and it has been uniformly held that an appeal taken after that time is ineffectual, and must be dismissed. To avoid the effect of the limitation in this case it is claimed by appellant that the time within which he was otherwise required by the statute to take his appeal was suspended by the fact that the lower court, on February 19, 1894, made an order granting a new trial, which order was appealed from, and such appeal not determined until February 25, 1895, when the order was reversed. The contention of appellant is that the effect of the order granting a new trial was to vacate the judgment, and that until the reversal of the order there was no judgment in existence from which to appeal; that by reason of that fact the time intervening the making of said order and the reversal thereof should be excluded in computing the year given by the statute in which to appeal from the judgment. This position is untenable. In the first place, the period fixed by the statute is an express and peremptory limitation within which the right given must be exercised, and is not a flexible rule to be varied by extrinsic circumstances. Bornheimer v. Baldwin, 42 Cal. 31. In the second place, it is held by this court in Pierce v. Birkholm (No. 15,464, this day decided) 43 Pac. 205, that, while the ultimate effect of the order granting a new trial is to vacate and set aside the judgment, an appeal from such order operates to suspend its functions, and leave the judgment subsisting, for the purposes of an appeal therefrom, pending the appeal from the order. There was, therefore, nothing to prevent appellant from taking his appeal from the judgment within the year given for the purpose. The motion is granted, and the appeal dismissed.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; HENSHAW, J.; TEMPLE, J.

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[1] Rehearing denied.

(110 Cal. 674)

POTTER v. AHRENS et ux. (L. A. 92.)[1]

(Supreme Court of California. Jan. 11, 1896.)

SALE OF BUSINESS—COVENANT AGAINST ENGAGING IN BUSINESS—EVIDENCE OF OWNERSHIP—LIQUIDATED DAMAGES.

1. Evidence that a woman was assisting her husband to carry on a business, that they were apparently conducting it together, that the property had all been acquired after their marriage and with community funds, and that she joined her husband in executing a contract of sale thereof, is sufficient to sustain a finding, in an action on their covenants not to re-engage in such business, that she had an interest in the property and business.

2. A sum which a contract of sale of a business and good will provides the sellers shall pay "as liquidated damages," in case they re-engage in the business, cannot be held a penalty.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Anson H. Potter against Fred Ahrens and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Henry Bleecker and Anderson & Anderson, for appellants. Leon F. Moss, for respondent.

VAN FLEET, J. The court found, substantially as alleged in the complaint, that on the 2d day of May, 1893, the defendants were engaged in the business of preparing, dealing in, and vending all kinds of foreign and domestic delicacies for the table, such as prepared meats, breads, cakes, pies, canned goods, and other household supplies of the kind, and were on said date the owners of a stock of such goods, together with furniture, ranges, etc., used by them in said business, at their place of business in the city of Los Angeles. That on said date defendants sold to plaintiff and one Andrew Wood their said stock of goods, furniture, etc., and the good will of the business, for the consideration of $3,000. That upon the payment of said sum, and in consideration thereof, the defendants executed and delivered to said purchasers their certain contract in writing, wherein it was provided that "the said F. Ahrens and Cresence Ahrens covenant and agree with the said Anson H. Potter and Andrew Wood that neither of us will engage in or carry on a like business in the city of Los Angeles, nor work for or assist anyone to engage in or carry on a business of the same kind or like nature; and in case of a dissolution of the partnership of the said Potter & Wood, this covenant shall inure to the benefit of the remaining partner, with like effect as though there had been no dissolution of partnership; and this covenant shall, in case of a sale of the business by said Potter & Wood, inure to the benefit of their assigns, with the same like force and effect as it would be to the said Potter & Wood had no sale been made; and, in case of a violation of this covenant, the said F. Ahrens and Cresence Ahrens agree to pay to the said Potter & Wood, or to their assigns, the sum of three thousand dollars ($3,000) as liquidated damages. This covenant shall be binding for the space of six years from the date of the consummation of the said sale." That plaintiff and said Wood carried on said business for a time, but thereafter, on June 10, 1893, they dissolved partnership, and Wood sold and delivered to plaintiff his interest in said stock, business, and good will, and the latter has since continued said business at the same place. That on November 28, 1894, the defendant Fred Ahrens, disregarding his said agreement, opened a store in said city, near plaintiff's place of business, and began conducting a like business to that referred to in said contract. That by reason of the premises plaintiff had suffered damages in the sum of $3,000. The court further found against defendants upon a special defense, made by them, that said Cresence Ahrens had no interest, at the date of said sale, in said business, stock of goods, or good will, and that her signature to said agreement had been procured by fraud. Judgment was entered on the findings in favor of plaintiff in the sum of $3,000, and defendants appeal therefrom, and from an order denying them a new trial.

1. It is contended that there is no evidence to support the findings, in so far as they are to the effect that the defendant Cresence Ahrens was interested in the sale of the business or good will; and that since a contract in restraint of trade can only be competently made by one who sells the good will of a business (Civ. Code, §§ 1673, 1674) the contract in question must be held void as to her. Independently of the question as to whether this defendant is estopped to deny her interest or title, by the written contract of sale executed by her, which we think she clearly is (2 Whart. Ev. § 1147), there is sufficient evidence in the record to sustain the findings of the court in this respect. It appeared that she was the wife of her codefendant, and assisted him in carrying on the business, that they were apparently conducting it together, and that the property in question had all been acquired during the married life of the defendants, and with community funds. Furthermore, the execution by Mrs. Ahrens with her husband of the contract of sale was in itself evidence of ownership in her. The testimony of the defendants, therefore, that she was not interested in the property or the sale, simply tended to raise a conflict upon the point, which it was the province of the trial court to determine.

2. It is further contended that plaintiff was not entitled to the amount of damages found by the court. No evidence was put in by plaintiff to establish any actual damages suffered, but, relying upon the stipulation on that subject contained in the contract of sale, plaintiff contented himself with showing a breach of the latter, and rested.

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[1] Rehearing denied.

As we have seen, the contract provided that for a violation of their covenant to refrain from engaging in a like business the defendants agreed to pay to the purchasers, or to their assigns, "the sum of $3,000 as liquidated damages." Defendants contend that this provision was in the nature of a penalty, notwithstanding the amount therein designated is termed "liquidated damages," and that plaintiff was required to prove the actual damage suffered by him, and be confined in his recovery to the amount so shown. This contention is clearly untenable. While the definition of the parties in contracts of this character is not the invariable and controlling guide for construction, the subject-matter of the contract in this case was such as, in its very nature, in case of a breach, to render the proof of damages extremely difficult, if not impossible, and to manifestly make a case for liquidated damages. Norman v. Wells, 17 Wend. 136; 1 Suth. Dam. p. 507. Indeed, the difficulty arising in fixing the actual damages in instances of this kind has been generally recognized in the law, and is so recognized by our Code, which makes provision by which parties may in such cases obviate the difficulty. By section 1671 of the Civil Code it is provided that "the parties to a contract may agree therein upon the amount which shall be presumed to be the amount of damages sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage." It is perfectly obvious, from the terms of the agreement here, that the parties, in making the stipulation in question, had in view the very obstacle above provided against, and intended to avoid it by fixing the amount of damages the purchasers should be deemed to have suffered in the event of a breach. This purpose is clear and unmistakable, and, the purpose being competent, the intention must be held effectual. Streeter v. Rush, 25 Cal. 68. In 1 Suth. Dam. p. 507, the author says: "The damages for breach of contract for the purchase of the good will of an established trade or business are so absolutely uncertain that courts have recognized the fullest liberty of parties to fix beforehand the amount of damages in that class of cases. In the decision of such cases the strongest expressions are to be found to the effect that the intention of the parties must govern, and that courts have no power to defeat that intention on the pretext of relieving from a bad bargain." In view of the subject-matter and terms of the contract under consideration, we would not be at liberty to put a construction upon the contract so absolutely at variance with the manifest intention of the parties thereto as to hold that the stipulation here was a mere penalty. None of the authorities relied upon by the defendants tend to support such a view. The plaintiff was therefore entitled to stand strictly upon the terms of the covenant, and, having shown a breach, he was properly awarded the amount fixed by the parties as his just redress.

3. There is nothing in the point that plaintiff is not the proper party entitled, under the covenant, to recover the damages therein fixed for its breach. The only construction that provision of the contract will bear is that the damages are to be paid, in the event of breach, to the purchasers, or to either one remaining in the business in case of dissolution of their partnership, or to their assigns in the event they shall sell to third parties. The clause cannot be limited, as contended by defendants, to a stipulation to pay Potter & Wood, jointly, or the "assigns" of both of them. It inures by its terms to the remaining partner in case of dissolution of the firm, and plaintiff is clearly the "remaining partner" within the terms of the instrument.

4. The other points made are even less plausible of merit than the foregoing, and we deem it unnecessary to consider them separately or at length. It is sufficient to say that we have not overlooked them, and that they involve no error. The judgment and order are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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110 Cal. 682

ANDERSON v. HINSHAW. (No. 16,020.)

(Supreme Court of California. Jan. 11, 1896.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

1. Where plaintiff sues for injuries received because of negligence of defendant in changing a guy rope to a derrick while plaintiff was on the mast, and there was evidence that he did undertake so to do, a verdict finding him guilty of negligence will not be disturbed.

2. Instructions not excepted to cannot be considered.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Hans Anderson against H. H. Hinshaw. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Chas. L. Weller, for appellant. Shadburne & Herrin, for respondent.

HAYNES, C. This action was brought to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant. A jury trial was had, and a verdict returned for the plaintiff, assessing his damages at $1,000. Appellant contends for a reversal principally upon the ground that the evidence is insufficient to justify the verdict.

The plaintiff was employed by the defendant as a farm hand, and while so employed he ascended a derrick mast, used in hoisting hay, for the purpose of adjusting a block and tackle. While so engaged, the mast fell, as plaintiff alleges and contends, through the careless and improper interference by the defendant and his foreman with the guy ropes by which the mast was kept in position; the fall resulting in breaking defendant's leg above the knee. The evidence is far from satisfactory as to the immediate cause of the fall of the mast. At the time the plaintiff ascended the mast it was supported by two guy ropes, a third rope hanging loose from the top of the mast. Mr. Albert, the defendant's foreman, directed the plaintiff to fasten the third guy rope to a stake before ascending; but defendant said it was not necessary, as the mast was supported by the other two ropes, and he wished to use the hanging rope to climb the mast. The plaintiff was a sailor, and had followed that occupation for six years, and found no difficulty in reaching the top of the mast. After doing some work at the top, he descended a few feet, and seated himself on the cross-arm, and sat there while Mr. Albert went to a building a hundred yards or more away, to obtain a small rope. The defendant was not present when he went up the mast, but returned with Mr. Albert. The plaintiff testified that the defendant and his foreman pulled over the derrick mast, causing it to fall; that Mr. Hinshaw went over to the loose rope that he had used in climbing the mast, and took it over to where one of the guy ropes was fastened to a post; that Hinshaw and the foreman both took hold of the loose rope, and pulled the mast right down; that both were pulling on the rope when the mast fell, but for what purpose they pulled the rope he did not know; and that Mr. Albert was trying to untie the knot from the stick that was down in the ground. The defendant and his foreman denied having pulled upon the rope, or that they did anything to cause the mast to fall; that Mr. Albert did not touch the taut part of the guy rope at any time; that he was engaged in untying a small rope from the end of the guy rope, and not interfering with the knot by which it was secured to the post. The defendant testified that he knelt down and held the guy rope that was fastened to a fence post, but did not pull it or work with it, and that he did not at any time take hold of the loose guy rope, or walk with it to the fastened guy near which he and his foreman were standing when it fell. They further testified that the mast fell away from the point where they were standing, and insist that, if the mast had fallen in consequence of their pulling upon the rope, it would have fallen towards them, instead of away from them. The evidence is by no means satisfactory as it appears in the record. It is not stated that either of the two guy ropes that sustained the mast when the plaintiff went up were either broken or untied. And it would appear that, if the mast was sufficiently supported to enable the plaintiff to climb to the top, work there for some time, and then sit on the mast-arm for 10 or 20 minutes, that there must have been some cause operating at the time the mast fell to cause its fall, other than the plaintiff's position upon the mast. C. W. Jones, a witness for the plaintiff, but who was not present at the time of the accident, testified that he had a conversation with the defendant after the accident, and asked him how it happened; that the defendant said: "They concluded [meaning himself and foreman] to move a certain guy rope that was in the corral, and I asked him whether Joe, the plaintiff, objected to moving the rope, and he said that he did not know that Joe should talk to him and Horace about the rope, as they were supposed to know more about it than Joe did, as he was up there and they were down below; but said that they had concluded to move the rope that was in the corral. They were afraid that the mules would run against it. He did not say that they had moved the rope at all." The mast supported by the two guy ropes must have leaned in a direction opposite to the points at which the guy ropes were fastened. If these ropes remained fastened, and the fall of the mast was caused by pulling upon the loose rope in the direction of one of the guy ropes, the mast must have fallen across the line drawn between the points where the guy ropes were fastened. The fall of the mast in the opposite direction shows conclusively that the fall was not caused by pulling upon the loose rope in the direction that the plaintiff asserted; and it is equally clear that the mast could not have fallen in the opposite direction without one or both of the guy ropes breaking or being untied. The testimony of Jones tends strongly to show that the defendant and his foreman undertook to change one of the guy ropes, and that in doing so the mast fell.

The question, then, arises whether the defendant was negligent in attempting to change one of the two guy ropes by which the mast was sustained, and we think the jury were clearly justified in coming to the conclusion—if they found that the defendant did undertake to move one of the guy ropes in order to change its position, while the plaintiff was upon the mast, leaving it secured by but one rope, which could not hold it in position—that it was negligence. It is therefore the not unfrequent case of a conflict of testimony, which will not permit a verdict to be disturbed upon appeal. At the conclusion of the evidence defendant's counsel moved for a nonsuit, which was denied, and an exception taken. There was sufficient testimony to justify the court in overruling the motion and submitting the facts to the jury.

Appellant, in his brief, contends that certain instructions given by the court to the jury were erroneous. These instructions, however, were not excepted to, and cannot, therefore, be considered.

Another point made by appellant is that the jury disregarded and violated the instructions given by the court upon the question of negligence. The instruction is long, and need not be stated. It was certainly favorable to the defendant, but at the same time fairly left the question for the jury to determine the cause of the fall of the mast, and whether the defendant and his foreman had negligently caused its fall. Under these instructions, if the jury believed the testimony of the plaintiff, they could properly render a verdict in his favor.

It is also argued by appellant that the evidence of the plaintiff was so contradictory and unsatisfactory that the court below erred in denying the defendant's motion for a new trial. It does not appear to us from the record that the court abused its discretion in denying said motion, though, if the motion had been granted, we could not have disapproved the order. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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110 Cal. 687

McCARTHY v. MT. TECARTE LAND & WATER CO. (L. A. 84.)[1]

(Supreme Court of California. Jan. 13, 1896.)

Payment — Receipts — Prior Assignment of Claim—Copy of Account—Delivery to Adversary—Bill of Particulars—Motion to Exclude.

1. Where an account for goods sold to defendant was assigned to plaintiff with defendant's knowledge, and afterwards the assignor, in a settlement with defendant, gave a receipt in full for other accounts which, by mistake, included the one previously assigned, such settlement did not relieve defendant from its liability to plaintiff.

2. Where a copy of an account sued on was delivered 6 days after demand, but 40 days before the trial, such delivery complied with Code Civ. Proc. § 454, requiring a party to deliver to his adversary such a copy within 5 days after demand, or be excluded from giving evidence thereof.

3. When a bill of particulars is objectionable, and defendant intends to object to the introduction of evidence, he must, before the trial, move for an order to exclude it.

Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by D. O. McCarthy against the Mt. Tecarte Land & Water Company to recover on an account for goods sold and delivered. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Jas. E. Wadham and F. W. Stearns, for appellant. McDonald & McDonald and Gibson & Titus, for respondent.

HENSHAW, J. Appeals from the judgment and from the order denying a new trial. Plaintiff averred that between the 21st day of August and the 24th day of November, 1891, the firm of J. Harvey McCarthy & Co. had, at the request of defendant, sold and delivered to it goods, wares, merchandise, and moneys of the value of $2,500; that the interest of the firm in and to said claim and account had been assigned to plaintiff upon November 24, 1891; that thereafter defendant paid to plaintiff on said account the sum of $250, and no more. Judgment was asked for the unpaid amount, with interest. Defendant answered, denying that it ever ordered or received the merchandise or moneys, or any part thereof. It also denied that it had paid $250, or any other sum. The court found in accordance with the complaint that goods, etc., of the value of $2,500 had been delivered to defendant, and this finding is not attacked. It found the payment by defendant to plaintiff of $250, and no more. This finding is attacked. The basis of attack is evidence of a settlement had between defendant and J. Harvey McCarthy, a partner of the firm, which settlement, it is claimed, included all of the items, matters, and things here in controversy. It appears that J. Harvey McCarthy had an action pending against this defendant for goods and merchandise sold, in which he demanded judgment for $1,200. A settlement was had between him and the company, and upon a bundle of accounts (some of which embrace the items here in litigation) he signed this receipt: "Payment and full satisfaction of balance due on within accounts, and also of all other demands included in the complaint in the action entitled 'J. Harvey McCarthy vs. Mt. Tecarte Land and Water Company, No. 6,811.'" But McCarthy testified that he did not examine the bills; that he thought the settlement embraced only the items in litigation in the action; and that he so expressed himself to the defendant's attorney, saying at the same time that he had previously assigned to his father (this plaintiff) a claim for $2,500. The language of the receipt is not at variance with this evidence. Moreover, this settlement was had in 1892. The assignment to plaintiff was executed in 1891, and the directors of the defendant corporation were informed of it at one of their regular meetings shortly after it was made. Under these circumstances a settlement with J. Harvey McCarthy would not relieve defendant from its liability for the debt previously transferred to plaintiff. Gilman v. Curtis, 66 Cal. 116, 4 Pac. 1094; Works v. Merritt, 105 Cal. 467, 38 Pac. 1109. There is thus sufficient evidence to sustain the finding of the court.

On the 15th day of December, 1894, defendant made demand on plaintiff for a bill of particulars. Six days thereafter, on December 21st, the bill was served. More than 40 days thereafter trial was commenced. Upon the trial, defendant, without objection then or previously made to the sufficiency of the account as furnished, opposed the reception of any evidence upon the ground that it had not been delivered within five days after demand. Section 454 of the Code of Civil Procedure provides that a party must deliver to his adversary within five days after demand a copy of an account sued upon, or be precluded from giving evidence thereof. It is for a rigid construction of this section that appellant contends, insisting that its provisions are mandatory, and leave the court no discretion in the matter. But this view finds no support in the reason which called the section into existence. In the simplification of pleadings it is designed to protect the adverse party from embarrassment upon the trial, by enabling him to demand and obtain in advance a detailed statement of the items charged against him. If the demand is not complied with then, for the refusal or gross neglect the prescribed penalty may be exacted. If the demandant receives the copy long enough before the trial to enable him to examine it and prepare his defense, so far as he is concerned the statute has fulfilled its usefulness. It would be to the last degree oppressive to hold that a plaintiff must lose his cause of action because, though he had furnished the copy of his account more than 40 days before the trial, he had served it upon the sixth, instead of the fifth, day after demand. The circumstances of this case will serve to illustrate the injustice and oppression which would follow so drastic a rule. The plaintiff delivered the copy of his account to defendant more than 40 days before the trial. No objection was made to its sufficiency. Defendant's secretary compared the account with plaintiff's books. At the trial no item of the account was attacked, no word of evidence offered in dispute of its correctness. The court found that $2,250 was justly due to plaintiff, and yet defendant would seek to avoid payment because the copy was served, not so late as to embarrass his defense, but a day later than the statute contemplates. A court would be reluctant to adopt a construction which would lead to such results, and we are not compelled to do so. We are referred to no authority construing the provisions of such a statute as mandatory; but, upon the other hand, it is uniformly held that the language serves but to name a penalty, vesting the discretionary power of exacting it or not in the sound discretion of the trial judge. Robbins v. Butler, 13 Colo. 496, 22 Pac. 803. In Graham v. Harmon, 84 Cal. 185, 23 Pac. 1097, it is said that the penalty only applies where the party refuses to furnish the copy; and in Conner v. Hutchinson, 17 Cal. 279, it is held that, if the bill of particulars is for any reason objectionable, and the adverse party proposes to object to the introduction of evidence, he may not wait until the trial, but previous to the trial must move for and obtain an order excluding the evidence. Such is also the rule laid down in Kellogg v. Paine, 8 How. Prac. 329, and in Isham v. Parker, 3 Wash. St. 774, 29 Pac. 835. This defendant failed to do, and for that additional reason his objection was properly overruled.

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[1] Rehearing denied.

Objection was also made to the admission in evidence of certain original books of entry of the firm of J. Harvey McCarthy & Co. To set forth the evidence given as the foundation for their admission would be profitless. Suffice it to say that it was sufficient to warrant the court's ruling. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

110 Cal. 46

MERCED COUNTY v. FLEMING. (Sac. 73.)

(Supreme Court of California. Jan. 21, 1896.)

ORDINANCE—VALIDITY—BURDEN OF PROOF—PROHIBITORY TAX—QUESTION OF LAW.

1. The introduction of the ordinance book, containing a certain ordinance, and showing its passage by the board, with the vote thereon, and the proper authentication thereof, together with evidence, as to its due publication, is prima facie proof of its validity, though the regularity of the proceedings was denied.

2. Whether an ordinance imposing a license tax on liquors is in fact prohibitory is a question for the court, to be determined from the ordinance itself; and evidence that it was prohibitive is not admissible.

Department 1. Appeal from superior court, Merced county.

Action by Merced county against C. E. Fleming to recover a liquor license tax. Plaintiff had judgment, and defendant appeals. Affirmed.

Geo. Baker and C. Michener, for appellant. F. G. Ostrander, for respondent.

VAN FLEET, J. This is an appeal from a judgment in favor of plaintiff, and an order denying a new trial, in an action to recover a liquor license imposed by an ordinance of the board of supervisors of the plaintiff county.

1. It is claimed that the court below erred in admitting in evidence the ordinance under which the action is prosecuted, and holding that it was regularly adopted, because it was not shown that it was adopted at a regular session of the board. The regular ordinance book of the board was produced from the custody of the clerk,—the official in whose keeping it belonged,—and duly identified, and the ordinance in question was found therein regularly and properly recorded. It contained the recital, at the end thereof: "The foregoing ordinance was passed and adopted by the board of supervisors of said Merced county, at a regular session of said board, this, the eleventh day of January, in the year of our Lord one thousand eight hundred and ninety-five, by the follow-

ing vote: Ayes: Supervisors C. C. Nelson, G. P. Kensey, J. H. Edwards. Noes: J. W. Haley, R. Shaffer." This was followed by a proper authentication by the signature of the chairman of the board and attestation of the clerk. Evidence was also introduced showing the due publication of the ordinance. This was sufficient to establish a prima facie case of regularity in the adoption of the ordinance, and entitle it to be admitted in evidence. That the ordinance was passed at a regular session was one of the presumptions afforded by the prima facie showing made, and, if defendant desired to overcome that presumption by showing that in fact it was not so passed, the burden was upon him. San Diego Co. v. Seifert, 97 Cal. 599, 32 Pac. 644; Code Civ. Proc. §§ 1963, subd. 15; Id. § 1918, subd. 5; Id. § 1920; Dill. Mun. Corp. (3d Ed.) § 422. "Proof of the existence and identity of the ordinance offered should by rights be all that is required of the prosecution in any case, until some showing has been made that there was irregularity in the enactment of the ordinance, in which case it becomes necessary to prove that it was properly enacted, in order to sustain a conviction or judgment. If no such question is raised, the presumption that the ordinance was properly passed becomes conclusive." Horr & B. Mun. Ord. 161. No attempt was made to rebut or overcome the prima facie showing by plaintiff in this case. The regularity of the proceedings for the adoption of the ordinance was denied in the answer, but this did not shift the burden of proof in relation thereto, and no evidence was offered to establish any irregularity. The validity of the ordinance was therefore sufficiently shown. There is nothing in the case of People v. Dunn, 89 Cal. 228, 26 Pac. 761, contravening this doctrine. The foregoing suggestions and authorities answer alike the kindred objection that it was not made to appear that in passing the ordinance the ayes and noes were entered in the minutes of the board.

2. It is further objected that the court erred in excluding the evidence offered by defendant to show that the effect of the ordinance in question, if enforced, is virtually to prohibit the retail traffic in liquors in the county of Merced. It is perfectly true that the power to regulate for the purposes of revenue is not the power to prohibit, and that an attempt to accomplish the latter object under a pretense of regulation cannot be upheld. In other words, the right to prohibit the sale or traffic in intoxicating liquors is entirely separate and distinct from the power to regulate and impose a license tax thereon for revenue purposes; and an ordinance which in terms proceeds under the latter power, but in its effect amounts to an exercise of the former, will not stand. Merced Co. v. Helm, 102 Cal. 159, 36 Pac. 399; Black, Intox. Liq. § 227. But the question here is, how is such effect to be determined? It cannot be that this question can be made to depend upon the effect of the regulation on the business of the defendant, as was the purport of the evidence offered in this case. That could afford no proper or reasonable test as to the general effect of the regulation. We think the answer is well stated in the opinion of the learned judge of the court below, wherein it is said: "There are many objections to the admission of such evidence. The discretion is committed to the board of supervisors, and they are presumed to act with good motive; and it is not to be supposed that, while pretending to fix the tax for revenue, they will make it so large as to prohibit the business. So soon as the courts hear evidence to decide whether a license tax be so high as to be prohibitory, they take upon themselves the exercise of a discretion which the laws have confided to the legislative body. If evidence is to be heard, the court might find the facts to be prohibitive to some dealers in the county by reason of the small amount of business done by them, and not prohibitive to their better patronized competitors. I find a practical unanimity of opinion that whether an ordinance be reasonable or not is a question for the court, and it seems that the same rule should apply to an ordinance claimed to be prohibitory." Such an objection is, like any other, directed to the reasonable character of the regulation,—a question to be determined from the face of the ordinance; and the provision must be upheld unless, as matter of law, the court can say that it is so unreasonable in character as to transcend the proper exercise of the right by the lawmaking power. It is not a question of fact, to be determined upon the varying circumstances of each particular case. In re Guerrero, 69 Cal. 88, 10 Pac. 261. "Whether an ordinance be reasonable and consistent with the law, or not, is a question for the court, and not the jury, and evidence to the latter on the subject is inadmissible." Dill. Mun. Corp., § 327. See, also, Ex parte Frank, 52 Cal. 610. We think the evidence was properly excluded. The judgment and order are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

111 Cal. 16

KAUFMAN v. SHAIN et al. (No. 16,006.) [1]

(Supreme Court of California. Jan. 14, 1896.)

RECORD MINUTES—AMENDMENT AFTER JUDGMENT—DISCRETION OF COURT—VACATION OF JUDGMENT—EVIDENCE TO WARRANT.

1. It is within the discretion of the trial court, on satisfactory evidence, outside the record, that the record minutes incorrectly set forth its orders, to direct an amendment thereof at any time after judgment.

2. Where judgment is entered in conformity to record minutes incorrectly directing it, on amendment of the minutes to conform to the actual order of the court, the judgment must be set aside.

[1] Rehearing denied.

3. The record minutes, on hearing, in October, 1890, of one demurrer to a complaint, pending another, directed that the demurrer be sustained and the action dismissed, and judgment was accordingly entered March 14, 1894. On motion by the other demurrant, May 4, 1894, to amend the minutes, it appeared the neither his own nor plaintiff's counsel were present at the hearing on the demurrer, and, by the affidavit of the shorthand reporter, that the court, after sustaining the demurrer, on counsel requesting judgment, said: "The demurrer is sustained. I haven't allowed any amendment. If you desire it, let judgment be entered dismissing the action. I say that must follow as matter of course; but I simply sustain the demurrer here." In the calendar notes of the judge, following the title of the cause, appeared: "Demurrer sustained. Action dismissed, if counsel are present." The only evidence contravening this was the record itself. *Held*, that an amendment of the minutes, by elimination of the order directing judgment of dismissal, and setting aside the judgment, was proper.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by one Kaufman against Shain and others. In accordance with the record minutes, judgment dismissing the complaint on demurrer of defendants Herrlich and Hanlon, pending a demurrer of defendant Davis, was entered; and from an order sustaining a motion of defendant Davis to set aside this judgment, and to amend the minutes to conform to the order actually made by the court, plaintiff appeals. Affirmed.

Garber, Boalt & Bishop, for appellant. Frank Shay, for respondents.

HARRISON, J. An amended complaint was filed in this action May 16, 1890, to which a demurrer was filed by the defendants Herrlich and Hanlon May 23d, and by the defendant Davis June 4th. October 10, 1890, the demurrer of Herrlich and Hanlon came on for argument, and was sustained by the court; and thereupon the clerk made the following entry in his minutes, under the title of the cause: "In this case the demurrer of the defendants Julie Herrlich and John F. Hanlon to the second amended complaint coming on regularly this day to be heard, it is by the court ordered, on motion of counsel for said defendants, that said demurrer be, and the same is hereby, sustained. It is further ordered by the court that this cause be, and the same is hereby, dismissed." Thereafter, on the 14th of March, 1894, a judgment was entered by the clerk in accordance with said entry, dismissing the action, and in favor of the defendants for their costs. May 4, 1894, the defendant Davis, in accordance with a previous notice to the plaintiff therefor, moved the court for an order amending the above minute entry, by striking therefrom the clause, "It is further ordered by the court that this cause be, and the same is hereby, dismissed," upon the ground that said entry upon the minutes was not the order made by the court, and was not authorized or directed to be entered by the court, and also that the judgment be amended by limiting its effect to the defendants Herrlich and Hanlon; and in support of his motions presented the affidavit of the shorthand reporter of the court, setting forth what had transpired in court on the day the order sustaining the demurrer was made. After hearing the motions and the evidence offered in support thereof, the court made an order, August 20, 1894, directing that the minutes be amended by striking out the words, "It is further ordered by the court that this cause be, and the same is hereby, dismissed," and that the judgment entered on the 14th of March be set aside. From this order the plaintiff has appealed.

Every court of record has the inherent right and power to cause its acts and proceedings to be correctly set forth in its records. The clerk is but an instrument and assistant of the court, whose duty it is to make a correct memorial of its orders and directions; and whenever it is properly brought to the knowledge of the court that the record made by the clerk does not correctly show the order or direction which was in fact made by the court at the time it was given, the authority of the court to cause its records to be corrected in accordance with the facts is undoubted. In re Wight, 134 U. S. 136, 10 Sup. Ct. 487; Balch v. Shaw, 7 Cush. 282; Fay v. Wenzell, 8 Cush. 315; Frink v. Frink, 43 N. H. 508; Crim v. Kessing, 89 Cal. 486, 26 Pac. 1074. In the exercise of this power the court is not, however, authorized to do more than to make its records correspond to the actual facts, and cannot, under the form of an amendment of its records, correct a judicial error, or make of record an order or judgment that was never in fact given. Egan v. Egan, 90 Cal. 15, 27 Pac. 22. The power to change its judgment, as well as the time within which such change may be made, depend upon different principles; and it was held in this state, until a different rule was prescribed by statute, that this power could not be exercised after the adjournment of the term in which the judgment had been entered. Baldwin v. Kramer, 2 Cal. 582; Morrison v. Dapman, 3 Cal. 255; Carpentier v. Hart, 5 Cal. 406; Lattimer v. Ryan, 20 Cal. 628; Willson v. McEvoy, 25 Cal. 169; Casement v. Ringgold, 28 Cal. 335. The history and development of the procedure in this state upon this subject is set forth in Brackett v. Banegas, 99 Cal. 623, 34 Pac. 344. In Branger v. Chevalier, 9 Cal. 172, the same rule was applied to an order revoking the settlement of a statement, on the ground that, by being filed, the statement had become a part of the record. In De Castro v. Richardson, 25 Cal. 49, the rule was applied to an order amending a previous order granting time within which to prepare a statement on motion for a new trial. But in Spanagel v. Dellinger, 34 Cal. 476, the court held that it had erred in making such application; that, notwithstanding the adjournment of the term after judgment had been entered, the court had jurisdiction to correct or amend orders made in proceedings for a new trial, for the reason that such orders did not form a part of the "record" which had become final by the adjournment. And in Willson v. Cleaveland, 30 Cal. 192, it was held that the adjournment for the term did not affect the jurisdiction of the court over its orders made during that term, unless final judgment in the case had been entered. The same question was argued by counsel in Hegeler v. Henckell, 27 Cal. 491, but, as it did not appear from the record that any order amending the minutes had been made, the point was not passed upon by the court.

Whether the clerk has correctly recorded an order made by the court, or whether an amendment of the entry shall be made, so that the minutes shall correctly express what was done or directed, is to be determined by the court in which the motion is made; and the evidence that may be offered in support of the motion must be satisfactory to the judge of that court. The motion to correct a minute entry is eminently addressed to the court in which the entry is made, and its determination upon any conflict of evidence concerning the order that it had made is not open to review. "The amount and kind of evidence requisite to satisfy that court as to what was the real order of the court, and what was the proper entry on the docket or extended record, must rest with that court." Fay v. Wenzell, supra. In acting upon the motion, the judge is in the exercise of one of the functions of his judicial office, and will not direct the amendment unless the evidence is such as will clearly satisfy him that the entry does not correctly express the order which was made. If the motion is made upon the day succeeding the entry, his own memory of what he had directed might be sufficient; whereas, if there had been a great lapse of time between the making of the entry and the motion for its amendment, he would naturally require more explicit evidence that the entry was incorrect. See Porter v. Vaughan, 22 Vt. 269.

The court is not precluded from correcting the entry merely because the "record" does not show that it is itself incorrect. The rule at common law, that the record can be amended only when there is something in the record to amend by, was applied when it was sought to amend a judgment at a term of the court subsequent to that in which it had been signed and enrolled; but it has no application to the amendment of matters that do not form a part of the judgment roll or "record." Until the entry of the judgment the record was in the breast of the court. Afterwards, it was in the roll. It was only the "record" thus made up which imported absolute verity. "The making up of the judgment roll is the equivalent, under our practice, of the entry of record at common law." De Castro v. Richardson, 25 Cal. 49. So long as the matters remained "in paper,"—that is, before the record had been enrolled on parchment,—it was not a matter of record, but was subject to amendment upon mere suggestion. 1 Tidd. Prac. 697, 711. Mere entries in the minutes of the court are not, properly speaking, matters of record. Weed v. Weed, 25 Conn. 344. They become so only by being incorporated into bills of exception, and thus made a part of the judgment roll. In Spanagel v. Dellinger, supra, the original entry in the minutes of the court gave the appellant time within which to prepare a "statement on appeal," and after the adjournment of the term the court directed an amendment of the entry by causing it to read, "a statement on motion for new trial." There was no record or minute entry that such an order had been made, and the amendment was allowed upon a showing by the affidavit of the attorney that such was the order that had been made. In Crim v. Kessing, 89 Cal. 478, 26 Pac. 1074, an order, of which there was no entry in the minutes, was made and entered nunc pro tunc upon "proofs to the satisfaction of the court." In Rousset v. Boyle, 45 Cal. 64, after the judgment had been affirmed by the supreme court, it was amended in matter of substance, upon a showing, by matters outside of the record, that it did not conform to the judgment which had been in fact rendered. In Weed v. Weed, supra, it is said: "It is often the case that the court announces in open court the decision which it has made, without furnishing the clerk with any writing upon the subject. Were the latter to make a mistake in entering up the judgment, the injured party would be remediless, unless the mistake could be corrected upon the testimony of the judge who made the decision, and the counsel and others who were present and heard it announced." In Frink v. Frink, supra, the court said: "We think it clear, upon the authorities, that the court may make such amendments upon any competent, legal evidence, and that they are the proper judges as to the amount and kind of evidence requisite in each case to satisfy them what was the real order of the court, or actual proceeding before it,—what was the proper entry to be made upon the docket, and how the record should be extended." See, also, Gillett v. Booth, 95 Ill. 183; Bank v. Seymour, 14 Johns. 219; Hunt v. Wallis, 6 Paige, 375. This power of a court to amend its records so that they may correspond with the fact, and correctly express what was done by the court, may be exercised at any time. Crim v. Kessing, 89 Cal. 486, 26 Pac. 1074; Egan v. Egan, 90 Cal. 21, 27 Pac. 22; Frink v. Frink, 43 N. H. 508; Balch v. Shaw, 7 Cush. 282; Fay v. Wenzell, 8 Cush. 315; Hart v. Reynolds, 3 Cow. 42, note. "No lapse of time will divest the court of its power, or absolve it from its duty, to supply deficiencies in the records of its own proceedings, where justice and the truth of the case require it." Lewis v. Ross, 37 Me. 230. In

Cradock v. Radford, 4 Mod. 371, the court ordered the roll to be brought in and amended 20 years after the judgment had been signed. In Frink v. Frink, supra, the amendment was allowed after a lapse of 12 years, and in Balch v. Shaw a still longer time had intervened between the entry and the amendment. In Crim v. Kessing, supra, the court, in January, ordered a nunc pro tunc order to be made as of the previous March, prior to the trial of the cause. In Rousset v. Boyle, supra, the court permitted the amendment several years after the entry of the judgment, and after it had been affirmed in the supreme court.

In view of the foregoing principles the order of the superior court must be affirmed. From the affidavit of the shorthand reporter it appeared that, when the demurrer was called for argument, there was no appearance on behalf of the plaintiff, and that the demurrer was sustained, on the motion of the attorney for the demurring party, without argument; and that when, upon the direction of the court that the demurrer be sustained, the attorney asked for judgment, the court replied: "The demurrer is sustained. I haven't allowed any amendment. If you desire it, let judgment be entered dismissing the action. I say that must follow as a matter of course; but I simply sustain the demurrer here." It may be conceded that the remarks of the court are not entirely free from ambiguity; but, for the purpose of resolving this ambiguity, and determining what order was then made, the court was justified in holding that the final statement, "I simply sustain the demurrer here," was to be taken as qualifying the prior announcement to the attorney that judgment would be entered dismissing the action, if he desired it, and as declaring to him that, before such order would be entered, some additional motion must be made by him. In addition to this affidavit, there was before the judge, at the hearing of the present motion, the calendar and notebook kept by him, upon which was the following entry written by him: "Kaufman vs. Shain et al. Demurrer of J. F. Hanlon and Julie Herrlich to second amended complaint. Demurrer sustained. Action dismissed, if counsel are present." Through the words "if counsel are present" a pencil mark had been drawn, but it did not appear when or by whom it was drawn. There was another demurrer to the complaint in behalf of other defendants pending before the court, and none of the counsel for either the plaintiff or any other party to the action was present. This showing on behalf of the respondent was sufficient to sustain a finding by the judge that there had been no order made by him directing a dismissal of the action, and to authorize the minutes to be corrected accordingly. The plaintiff presented no evidence contravening the above showing, and introduced only the minute entry itself, and the judgment roll containing the judgment subsequently entered thereon.

That portion of the order setting aside the judgment must also be affirmed. Such an order necessarily followed the order amending the minute entry. The objection upon the ground of lapse of time has no application, for the reason that the motion to amend, as well as the order amending the judgment, were made within less than six months after the judgment was entered. It was not necessary that the minute entry should have been actually amended in accordance with the order therefor, before it was available upon the motion to amend the judgment. The direction for its amendment was, for the purpose of that motion, equivalent to its actual amendment. Upon the amendment of the minute entry, the premises upon which the judgment rested, and which were recited therein, fell; and, as it appeared to the court that a judgment had been entered by the clerk without any direction therefor, the court was authorized to set it aside at any time within six months after its entry, even upon its own motion, and without any request therefor. Whether the judgment had been entered at the request of the respondent, or not, was immaterial. If the clerk had no authority to enter it, it could not be binding upon him, even though it purported to be a judgment in his favor; and he was not precluded from seeking to have it set aside, even if it had been entered at his request. The order is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

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111 Cal. 25

CITY AND COUNTY OF SAN FRANCISCO v. BUCKMAN. (No. 15,897.)

(Supreme Court of California. Jan. 14, 1896.)

MUNICIPAL CORPORATIONS—RESOLUTIONS—PUBLICATION—OBSTRUCTION OF STREETS—NUISANCE—INJUNCTION BY CITY.

1. Under Worley's Consolidation Act, p. 16, § 68, requiring every resolution of the board of supervisors, granting any privilege, to be published in some newspaper five successive days before final action thereon, a resolution granting property holders the privilege of grading the street in front of their premises, which was never published, never became operative.

2. Digging into and tearing up a street, thereby obstructing free passage, without authority, is a nuisance, within Civ. Code, § 3479, providing that anything which unlawfully obstructs any public street is a nuisance.

3. A municipal corporation created by the state legislature has the same right as the people to pursue all ordinary civil remedies for enjoining a public nuisance in its streets.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the city and county of San Francisco against A. E. Buckman to restrain him from digging into, tearing up, or in any way obstructing, the roadway of Market street, in said city. From an order denying his motion for a new trial, defendant appeals. Affirmed.

Wm. H. Chapman, for appellant. H. T. Creswell, for respondent.

BELCHER, C. This is an appeal from an order denying the defendant's motion for a new trial. The action was brought to obtain a decree restraining the defendant, his agents, servants, and employés, from digging into, tearing up, or in any way interfering with, the roadway, roadbed, sidewalks, or grade of Market street, between the points of its junction with Valencia street and Seventeenth street, in the city and county of San Francisco. The defendant, by his answer, admitted that he had commenced, with a large force of men, to grade a portion of Market street between the points named; and, to justify his right to do so, he set up an order (No. 2,318) passed by the board of supervisors of said city and county in December, 1890, "changing and establishing grades on Market street, southwesterly from Valencia street," and a resolution (No. 4,498, third series) passed by the said board in January, 1891, granting permission to certain property owners on Market street, between Valencia and Seventeenth streets, to grade said street in front of their property to the center line thereof. And he alleged that under a contract with the said property owners, and a permission duly obtained from the superintendent of streets, he was proceeding to grade the street to the official grade, for and on behalf of the property owners, and was lawfully performing said work, when restrained by the order of the court below. The case was tried, and the court found that, at all the times mentioned, Market street was, and still is, one of the public streets of the city and county of San Francisco; that at the time of the commencement of the action the defendant was engaged, with a large force of men in his employment and under his control, in digging, tearing up, removing, and otherwise destroying and obstructing, the roadway of said street, between Valencia and Seventeenth streets, in such a manner as to obstruct the free passage and use of the same, and to destroy the roadway thereof for the use and purposes of a street and thoroughfare, and threatened to continue said acts; that all of said acts of defendant were done without the consent or permission of plaintiff, or any of its officers or agents, and contrary to the express commands of plaintiff; and, as conclusions of law, that the said acts of defendant constitute a public nuisance, and plaintiff is entitled to a writ of injunction to restrain the further continuance thereof. A decree was accordingly entered granting the plaintiff the relief prayed for.

The principal question presented for decision is, were the findings of the court justified by the evidence? It was proved on behalf of the plaintiff that on July 26, 1887, an order (No. 1,924) was passed by the board of supervisors establishing the grade of Market street between Valencia and Seventeenth streets, and it was admitted by defendant that, prior to the passage of order No. 2,318, the said street had been graded to the official grade as so established. It was further proved that resolution No. 4,498 (third series) was never passed to print, but was introduced at a meeting of the board held on January 2, 1891, and was then and there, on a vote taken by the board, declared to be adopted, and no other or further action thereon was ever taken, and also that on February 2, 1891, a resolution (No. 4,672, third series) expressly repealing resolution No. 4,498 was adopted by the board. It was also proved that on January 19, 1891, an order (No. 2,388) expressly repealing order No. 2,318 was passed by the board. The general street law of 1885, as amended in 1889 (St. 1889, p. 157), contains very full and complete provisions for work upon public streets. The general rule is that the work is to be done by contract, and to be paid for by assessments of the expense upon the adjoining property owners, in the proportions fixed by the statute. The only exception to this rule is found in subdivision 10 of section 7 of the act, whereby it is provided that "it shall be lawful for the owner or owners of lots or lands fronting upon any street, the width and grade of which have been established by the city council, to perform at his or their own expense (after obtaining from the council permission so to do, but before said council has passed its resolution of intention to order grading inclusive of this) any grading upon said street to its full width, or the center line thereof, and to its grade as then established," etc. And in section 68 of the consolidation act it is provided that "every ordinance or resolution of the board of supervisors, providing for any specific improvement, the granting of any privilege * * * shall, after its introduction in the board, be published, with the ayes and nays, in some city daily newspaper at least five successive days before final action by the board upon the same," etc. Worley's Consolidation Act, p. 16. From the foregoing provisions of the statutes, it is evident that the owners of lots fronting on Market street had no right to proceed to grade the street, or to contract with any one else to grade it, until after they had obtained permission from the board of supervisors to do so, and that such permission was a privilege, which could only be granted in the mode prescribed, namely, after publication for at least five days. It must follow, therefore, as resolution No. 4,498 was never published, that it never became operative, or authorized the lot owners to grade, or in any way to disturb, the street, in front of their premises, and that their contract with appellant to do work which they had no right to do was void and of no effect.

But, if this be so, it still is claimed for appellant that the "proof shows, at best, only a naked trespass, and against such a trespass equity will not grant an injunction." This proposition cannot be maintained. The proofs show that appellant was committing more than a mere trespass. He was unlawfully obstructing the free passage or use, in the customary manner, of a public street of the city, and this, under the provisions of the Code, constituted a public nuisance. Civ. Code, §§ 3479, 3480. And the Code of Civil Procedure expressly provides that a nuisance may be enjoined or abated, and damages therefor recovered, in the same action. Section 731. In People v. Holladay, 93 Cal. 248, 29 Pac. 54, it is said: "The city and county of San Francisco is a municipal corporation created by the legislature of the state, and has conferred upon it by the state full power and jurisdiction over the public squares within its territorial limits, with the right to sue and be sued; and this necessarily includes the authority to maintain and defend all actions relating to its right to subject to the public use such squares or land claimed by it to have been dedicated for such purposes. * * * A municipal corporation is, for many purposes, but a department of the state organized for the more convenient administration of certain powers belonging to the state [citing authorities]; and such corporations, in their management and control over streets and squares within their limits, and in actions for the vindication and preservation of the public rights therein, exercise a part of the sovereignty of the state. Accordingly, it has been held that a city has the same right to maintain an action to prevent the unlawful obstruction of a street as would the people of the state. [Citing authorities.]" It will be observed that the law seems to be settled that a city, as the representative of the state, has the right to pursue all the ordinary civil remedies for enjoining or abating a public nuisance upon its streets or squares; and the only question in this case is, does it appear that the defendant was justified in his action? We are satisfied that no sufficient justification was shown, and therefore advise that the order appealed from be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(111 Cal. 39)

LEWIS v. TERRY et al. (No. 15,934.)[1]

(Supreme Court of California. Jan. 21, 1896.)

SALE OF DEFECTIVE ARTICLES—LIABILITY TO PERSON INJURED.

One who, knowing an article to be defectively constructed, represents it to be safe, and sells it to a person who has no knowledge of the defect, is liable in damages to one who, without fault on his part, was injured while lawfully using the same.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Grace E. Lewis against Joseph T. Terry and others for damages. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

H. M. Clement, for appellant. Geo. E. Lawrence, for respondents.

BRITT, C. It is alleged in the complaint in this case, among other things, that defendants were engaged as copartners in the business of selling household furniture, and that among the wares dealt in by them were certain folding beds, which were represented and warranted by defendants to their customers and the public to be safe for use; that defendants, in the course of said business, sold and delivered one of said beds to a Mr. Apperson and his wife, and expressly represented and warranted to them that such bed was so constructed that it would stand upright against the wall during the daytime, inclosing necessary bed furniture, and at night its front could, with little effort, be lowered to a horizontal position, by means of hinges at the bottom; that a solid piece of iron inclosed in framework at the back of the bed acted as a balance to the front part while being lowered, and rendered it easy to raise or lower the same with perfect safety; that, as soon as the front part was lowered, the legs of the same would automatically descend, and securely lock themselves, so that the outer end of the bed would be firmly supported in its horizontal position upon its said legs. It is further alleged that there was an inherent and latent defect in said bed, so that the said legs would sometimes fail to adjust and secure themselves, with the result that, if any weight should be placed on the bed, the heavy upright frame would be precipitated with such force upon the lowered portion of the bed as to crush, wound, and even kill anyone reclining thereon, and that such defect rendered the bed dangerous to all who might use it; that defendants, with full knowledge of such defect and of such danger, sold the bed to the Appersons, without warning them thereof, and assured them that it was perfectly safe; that plaintiff rented a room from the Appersons, and, on the day the bed was purchased from defendants by them, it was placed in such room for plaintiff to sleep on; that a few days later the plaintiff, being about to retire for the night, opened and let down the bed, and, the legs thereof being apparently secure, she, in the course of her preparations for retiring, leaned with her left arm upon the side of the bed; and, while she was in this attitude, the heavy upright framework of the bed fell forward and downward, upon the horizontal part, and upon the plaintiff, breaking her arm, and otherwise injuring her, to her damage, etc. A demurrer to this complaint, on the ground that it fails to state facts sufficient to constitute a cause of action, was sustained, and judgment passed for defendants.

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[1] Rehearing denied.

The complaint is faulty in not stating directly that the fall of the bed was caused by the latent defect described, but, as the argument of the parties has proceeded on the theory that such was the fact, we may join in that assumption. Schubert v. J. R. Clark Co., 49 Minn. 335, 51 N. W. 1103. We agree that the action cannot be sustained on the ground of any privity of contract between plaintiff and defendants, for there was none. If a tradesman sells or furnishes for use an article actually unsound and dangerous, but which he believes to be safe, and warrants accordingly, he is not liable for injuries resulting from its defective or unsafe condition to a person who was neither a party to the contract with him, nor one for whose benefit the contract was made. Coughtry v. Woolen Co., 56 N. Y. 127; Heizer v. Manufacturing Co., 110 Mo. 605, 19 S. W. 630; Winterbottom v. Wright, 10 Mees. & W. 109 (the leading case); Shear & R. Neg. § 116; 1 Bevan, Neg. p. 60 et seq. But when the seller, as in the case made by the complaint before us, represents the article to be safe for the uses it was designed to serve, when he knows it to be dangerous, because of concealed defects, he commits a wrong independent of his contract, and brings himself within the operation of a principle of the law of torts. "It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other who is not himself in fault." Wellington v. Oil Co., 104 Mass. 64, per Gray, J.; Schubert v. J. R. Clark Co., 49 Minn. 331, 51 N. W. 1103; Elkins v. McKean, 79 Pa. St. 493; Shear. & R. Neg. § 117. See Civ. Code, §§ 43, 1708. The liability of the willful wrongdoer in like instances is recognized in several cases cited in support of the judgment. Longmeid v. Holliday, 6 Exch. 765; Heizer v. Manufacturing Co., 110 Mo. 605, 19 S. W. 630.

The fact insisted upon by respondents that a bed is not ordinarily a dangerous instrumentality is of no moment in this case. If mere nonfeasance or perhaps misfeasance were the extent of the wrong charged against defendants, that consideration would be important (Thomas v. Winchester, 6 N. Y. 397); but the fact that such articles are in general not dangerous would seem to enhance the wrong of representing one to be safe for use when known to be really unsafe, for the danger is thus rendered more insidious.

Nor is the further point that the chain of causation implicating defendants in the injury was broken by the intervention of the Appersons, as the persons who furnished the bed immediately to plaintiff, available to defendants on this appeal. To have that effect, it must appear that the Appersons knew of the defect in the structure of the bed, and so were a culpable intervening cause, and this does not appear on the face of the complaint. Pastene v. Adams, 49 Cal. 87; 1 Bevan, Neg. 76. The judgment should be reversed, with instructions to the court below to overrule the demurrer.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with instructions to the court below to overrule the demurrer.

111 Cal. 88

SHANKLIN v. GRAY et al. (No. 15,971.)

(Supreme Court of California. Jan. 21, 1896.)

MINING CORPORATIONS—DIRECTORS' LIABILITY—FAILURE TO HAVE REPORTS VERIFIED.

1. Act April 23, 1880 ("An act for the better protection of stockholders of corporations formed for * * * conducting the business of mining"), section 1, declares it the duty of the mine superintendent to file weekly and monthly accounts and reports, verified under oath, showing receipts, disbursements, number of employés, and wages paid, reports to be kept in the office of the company, open to inspection of stockholders. Section 3 declares that, in case of the failure of the directors to have the reports and accounts made and posted as provided in section 1, they shall be liable to an action by any stockholder, who, on proof of the failure, shall recover judgment for $1,000 liquidated damages. *Held* that, the statute being remedial, and there being no ambiguity in it, recovery could be had of the directors for failure to have the accounts and reports of the superintendent verified by him, though they were full, true, and correct, and there was no one within many miles of the mine who could administer oaths, and the directors acted in good faith, and had been advised by counsel that it was not necessary to have them verified.

2. Under such statute, it is not necessary to prove damages. They will be implied from its violation.

3. Pendency of an action for violation of such statute will not prevent action for a violation thereof occurring after commencement of the first action, nor will recovery in the first action bar recovery in the second.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Edwin S. Shanklin against H. W. Gray and others. From an order granting plaintiff a new trial, defendants appeal. Reversed.

C. W. Cross and Jas. A. Hall, for appellants. Gear & Gear, for respondent.

HAYNES, C. This action was brought to recover the sum of $1,000, liquidated damages, and costs of suit, under the provisions of an act of the legislature of this state, approved April 23, 1880 (St. 1880, p. 134; Deering's Civ. Code, pp. 148, 149), requiring the directors of mining corporations formed under the laws of this state to make, and cause to be made and posted in the office of the company, certain statements and reports. The defendants were directors of the Gray Eagle Mining Company, a corporation, at the time the alleged cause of action arose, and the plaintiff was and is a stockholder in said corporation. The complaint alleges a failure of the directors to make and post in the office of the corporation, on the 1st Monday of November, 1892, a balance sheet, or itemized account, of the receipts and disbursements for the month of October, with other matters required by the statute, and also charging that they had failed and neglected to have or require the superintendent of the company to file with the secretary thereof an itemized account, verified under oath, showing all the receipts and disbursements made by him for the previous month, and that the superintendent had not made any such account verified under oath. The action was tried by the court without a jury, findings were filed, and judgment thereon entered for the defendants. Upon plaintiff's motion an order was made granting a new trial, and from that order defendants appeal.

The court found that the directors made the itemized account or balance sheet, required by the first section of said act, for the month of October; that it was duly verified; and that it was made at the time, and posted in the office, as required by said act. As to the account and reports of the superintendent, the court found they were made, and filed in the company's office, and were kept in a conspicuous place, as required by law, but that they were not verified by the superintendent, nor by any one; that they were full, true, and correct; that the company's mine was in a remote part of the country, many miles from any officer competent to administer an oath; that the duties of the superintendent require his presence at the mine, and for those reasons said reports were not verified; that the defendants acted in good faith; that the plaintiff and all stockholders had access to all the itemized accounts and reports, and the books and papers of the corporation, and had the means of knowledge of every fact pertaining to its receipts and disbursements, and its indebtedness and liabilities, as fully as could be known from any data in the possession or control of the corporation; and that neither the plaintiff nor any stockholder had been injured in any respect.

It was contended by the plaintiff that the account, made, verified, and posted by the president and secretary, was, on its face, a balance sheet for the period of 40 days, namely, from September 21 to October 31, 1892, and therefore did not comply with the law, and especially, as he contended, that it was impossible to tell therefrom what balance was on hand on October 1st, or what disbursements were made in either of those months. The good faith of the defendants in making this report was not impugned, and, as it appears upon its face to have been intended as a compliance with the requirements of the statute in that regard, the defect, if it be such, would not justify the visitation of the statutory penalty upon them. The special grounds of objection to it, therefore, need not be further considered.

It was admitted in the answer that the statement of receipts and disbursements by the superintendent, and other reports made by him, were not sworn to by that officer; and the facts found by the court, as hereinbefore stated, were alleged in justification of his failure to make the required verification. If these facts were not sufficient to excuse the failure to verify said statements and reports, the findings were not sufficient to sustain the judgment in favor of the defendants, and the order granting plaintiff's motion for a new trial was right. The act in question is entitled "An act for the better protection of stockholders in corporations formed under the laws of the state of California for the purpose of carrying on and conducting the business of mining." Section 1, so far as it relates to the superintendent's reports in question here, is as follows: "It shall be the duty of the superintendent, on the first Monday of each month, to file with the secretary an itemized account, verified under oath, showing all receipts and disbursements made by him for the previous month, and for what said disbursements were made. It shall also be the duty of the superintendent to file with the secretary a weekly statement, under oath, showing the number of men employed under him and for what purpose, and the rate of wages paid to each one. * * * All accounts, reports and correspondence from the superintendent shall be kept in some conspicuous place in the office of said company, and be open to the inspection of all stockholders." Reports of the discovery of ore were required to be made as they occurred. Section 3 of said act, among other things, provides: "In case of the failure of the directors to have the reports and accounts current made and posted as in the first section of this act provided, they shall be liable, either severally or jointly, to an action by any stockholder, in any court of competent jurisdiction, complaining thereof, and on proof of such refusal or failure such complaining stockholder shall recover judgment for one thousand dollars, liquidated damages, with costs of suit."

The only question is whether the facts alleged (and found to be true) were sufficient to excuse the failure of the superintendent to verify his reports; it appearing that the directors had informally instructed him that it was not essential, or, at least, they had not required him to make his reports under oath, and had received his previous reports without such verification, and without objection. It is doubtless true, and I assume that it is so, that the directors failed to make the positive requirement that the superintendent should verify all his reports, and had accepted them without such verification, without any evil purpose, and because of the inconvenience it would impose upon the superintendent of going "many miles" to an officer competent to administer oaths, and because such absence interfered with the discharge of his duties at the mines. It was also shown, upon the trial, that the reports in question were in fact true, and hence furnished all the information as to the several matters contained in them required by the statute. It is contended, in effect, that, as the statute is penal, it must be strictly construed, and, inasmuch as the reports were made, and were in fact true, the penalty should not be inflicted upon the defendants. The statute, however, is remedial as well as penal (Eyre v. Harmon, 92 Cal. 580, 28 Pac. 779), and "where the intent is plain it will be carried into effect. It will not be evaded or defeated on the principle of strict construction. The principle will be adhered to that the case must be brought within the letter and spirit of the enactment; but the intent of a criminal statute may be ascertained from a consideration of all its provisions, and that intent will be carried into effect. Such statutes will not be construed so strictly as to defeat the obvious intention." Suth. St. Const. § 356, and cases cited in note 1, p. 439. In Eyre v. Harmon, 92 Cal. 589, 28 Pac. 779, in discussing the construction of this statute, it was said: "But it is a general rule, applicable to the construction of penal as well as other statutes, that no word is to be eliminated from a section by the court if a sensible meaning can be given to it, unless by giving such word its meaning the real object of the statute would be defeated. With much greater reason is the court required to give effect to each word in a sentence when not to do so is to deprive the law of the vitality necessary to secure respect for its commands."

Appellants' contention would eliminate from the statute the word "verified," as used in defining or qualifying the reports required to be made by the superintendent, unless the circumstances under which these reports were made were sufficient to justify the omission. If the legislature had no beneficial or remedial purpose in requiring them to be verified little would be required to excuse the omission, and courts would be slow to visit a severe penalty upon an omission to comply with an unessential requirement. At the time of the enactment of this statute it was matter of common report, if not of common knowledge, that concealments and false reports were resorted to to affect the value of mining stocks upon the market, and it was also not unfrequently charged that superintendents, for the purposes of private gain, made false reports of their receipts and expenditures, carried "dummies" on their pay rolls, obtained rebates or commissions upon supplies purchased for the corporation, and in other ways misappropriated the funds of the corporation; and it was for the purpose of compelling such reports to be made as would inform the stockholders of the financial condition of the corporation and its management, the development of its property, the discoveries made in its mines, and, generally, of all matters which would enable them to estimate the value of their stock, and to prevent false reports, and give assurance of reliability, these reports were all required to be verified by the oath of the superintendent; and, if this requirement may be voluntarily omitted, it is obvious that the whole purpose of the act might be defeated at the will of the directors.

But it is urged that the directors acted in good faith, and did not willfully or intentionally violate the law. If by this is meant that the omission to require the superintendent to verify his reports was not because they intended in any manner to withhold information from the stockholders, or injure them in any way, it is doubtless true. An evil intention is not essential to such violation of the statute as requires a visitation of the penalty. The statute imposes upon the directors the duty of requiring the superintendent to make his reports under oath, and an omission of that duty is necessarily willful and intentional, at least where it is shown that they considered the matter and concluded that it was not necessary. The mere inconvenience imposed upon the superintendent of going five miles to verify his report is not a sufficient excuse to justify the omission, and his ordinary duties at the mine could not excuse the performance of the duty imposed by the statute. His absence could be provided for by the temporary supervision of a foreman, or other person designated by himself or by the board. It is also urged that the advice of counsel that verification of these reports was not necessary should relieve the defendants. The advice so given was by a member of the board, and it may be doubted whether the opinion so expressed was not the opinion of a director merely, instead of the opinion of an attorney who had no personal interest, and whose duty and obligation was to carefully examine the question submitted to him, and advise according to his unbiased judgment. It is not necessary, however, to decide that question. If the statute were ambiguous, and its construction doubtful, the defendants would be entitled to the benefit of the doubt, without the plea that they acted upon the construction given it by counsel. In Chase v. Railroad Co., 26 N. Y. 523, 525, a statute imposing a penalty for charging more than a certain rate per mile for carrying passengers was considered. The court said: "The great leading rule for the construction of statutes is to ascertain fairly the intention of the legislature in enacting the statute. In statutes giving a penalty, if there be a reasonable doubt of the case, made upon the trial or in the pleadings, coming within the statute, the party of whom the penalty is claimed is to have the benefit of such doubt." Or, as said by Sutherland, in his work on Statutory Construction (page 444): "If there is such ambiguity in a penal statute as to leave reasonable doubts of its meaning, it is the duty of the court not to inflict the penalty." None of the cases we have found go further. The intention of the legislature is to be collected from the words they employ, and where there is no ambiguity in the words there is no room for construction. Here there is no ambiguity, —no room to doubt that the statute requires these reports to be verified; and in such case an opinion of counsel to the contrary cannot relieve from the penalty. If the motives of the defendants in not requiring these reports to be verified were a material issue in the case, the advice of counsel might tend to show the absence of an evil intention; but such advice cannot raise a doubt as to the construction of the statute here involved. It is also urged that the recovery is not as a fine, or penalty, or forfeiture, but as liquidated damages, and that, therefore, some detriment or damage should be shown. As this statute is intended for the benefit of stockholders, its violation necessarily implies an injury.

Prior to the time when this cause of action accrued, the plaintiff commenced an action, under the statute here in question, against W. E. Lamb, A. Searles, and Martin Devereux, who were directors of said corporation prior to September 21, 1892, at which last-named date they ceased to be directors, and were succeeded by the defendants in this case. That action was commenced October 27, 1892, alleging the failure of the defendants to make and file similar reports for the months of May, June, July, and August, 1892. This action was commenced on November 11, 1892, for the failure to make the reports on the first Monday of November for the preceding month of October; and the defendants herein pleaded the pendency of the former action in bar. That plea is not good. It is true that but one recovery of $1,000 can be had for any number of delinquencies occurring before the suit is brought; but neither the pendency of such action, nor a recovery therein, is a bar to an action for a delinquency occurring after the former action was commenced. This cause of action did not accrue until the first Monday in November, and therefore did not exist when the former action was commenced. That there can be but a single penalty for past delinquencies, see Loveland v. Garner, 71 Cal. 541, 12 Pac. 616; but that a recovery for past delinquencies is not a bar to an action for a delinquency occurring afterwards, see Schofield v. Doray, 89 Cal. 55, 26 Pac. 606. The fact that judgment in the former action had not been rendered does not operate to relieve them from delinquencies occurring during its pendency, as, otherwise, they would be relieved from any observance of the statute by the mere pendency of the action. Besides, the action is not against the corporation, but against the individual; and these defendants, who became directors after the delinquencies charged in the former suit, could not be made liable therefor, nor could persons who ceased to be directors in September be held liable for the delinquencies of their successors. The order granting a new trial should be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

111 Cal. 31

PHILBROOK v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 267.)

(Supreme Court of California. Jan. 16, 1896.)

DISBARRED ATTORNEY—RIGHT TO PROSECUTE ACTION.

Where, after an action had been commenced, the plaintiff therein assigned his claim in good faith to one who had been disbarred from practicing as an attorney at law, and an order was made continuing said action in the name of said plaintiff for the benefit of the assignee, the assignee may personally prosecute the claim.

In bank. Petition for mandamus by Horace W. Philbrook to the superior court of the city and county of San Francisco. Writ issued.

Horace W. Philbrook, in pro. per. S. O. Houghton, for respondent.

HENSHAW, J. Samuel W. Latz commenced an action in the superior court of the city and county of San Francisco against Louisa A. Greenhood, executrix, appearing therein in person, and not by attorney. After this action was at issue and ready for trial, Horace W. Philbrook, petitioner herein, presented to the judge of the court a written transfer and assignment by Latz to himself of Latz's interest and cause of action in said suit, and applied to the court for an order substituting himself in place of Latz as plaintiff therein. In response to this application, an order was made, as permitted by the Code, continuing said action in the name of Latz for the benefit of Philbrook. Code Civ. Proc. § 385. Thereafter, the cause coming on for trial, petitioner herein appeared in person, asserting the right in his own interest and on his own behalf to conduct the case of the plaintiff in the action so being prosecuted for his benefit. The court, upon objection made by defendant's attorney, refused to allow him to do so; and, the case coming thus to a standstill, it was continued to await a determination of the question. It is under these circumstances that application is made to this court for a writ of mandate. The refusal of the trial judge, as fully appears by the transcript of the proceedings had in his court, and here made a part of his answer, was based solely upon what he deemed to be his duty in the premises under the judgment of this court suspending said Philbrook from his office of attorney at law. In re Philbrook, 105 Cal. 471, 38 Pac.

511, 884. In making that refusal the judge said: "A few days ago you came here with a written assignment from Mr. Latz to yourself, from which it appears that you are the assignee and owner of the claim,—a claim for services on behalf of Mr. Latz originally. I accept that assignment as made to you, as I have stated before, in perfect good faith that you are the owner of that claim, and, in conformity with the Code of this state, upon your motion, I made an order that this action should be prosecuted under the name of Mr. Latz, but for your benefit as the assignee. Now, you attempt here to present this case on your own behalf, as you say; and the suggestion is made by Mr. Houghton, as an attorney of this court, * * * that you cannot present this matter as an attorney. I think he is right about it. I think I should be in contempt of the supreme court myself if I allowed such an evasion of their judgment. If the action was in your own behalf, as I suggested a moment ago, if you had met with personal injury to yourself, say, a year ago, and you were suing the railroad company, for instance, you would have a right, and the disbarment proceedings would not affect you. If money was due you,—owing to you,—you would have a right to present the case. But I don't think that you have a right to buy claims that are in process of litigation, and come in here, and present before the court and jury a cause of action in that form. If that were so, it would enable you to do indirectly what the supreme court says you cannot do directly. In other words, you are evading the decision of the supreme court against you; and therefore I do not think that I should permit you to appear." It thus appears that the order of refusal was not based upon any finding in fact, or, in effect, that the assignment was not made in good faith, or that, as between the parties, it was a simulated transfer, not meant to carry title. Upon the contrary, it was made after declared recognition and acceptance by the court of the good faith and sufficiency of the assignment.

Under the facts thus presented, the court mistook the scope of the judgment of suspension. That judgment did not, and did not attempt to, limit petitioner in the exercise of any rights formerly enjoyed by him, saving those pertaining to the office of attorney at law. One acts as an attorney at law only when he represents another, not when he appears for himself. Petitioner, having the undoubted right lawfully to acquire any form of property, has equally the right to its perfect enjoyment, and, as a necessary incident to that right, the full power accorded to all of appearing in person to prosecute or defend all actions for its protection or preservation. And this power is not, as the court held, limited to the prosecution or defense in person of property rights owned by this petitioner at the time of the commencement of any action affecting them. His right to acquire a chose in action, and to protect in person his property in it when acquired, is not cut off by the fact that it may, at the time of acquirement, be already the subject of litigation.

What has been said presupposes a bona fide transfer of the chose in action, such a transfer as the court assumed or found to exist. It by no means follows, however, that petitioner's right to appear in person would be determined, as he argues, by the fact that the transfer is such as to leave to defendant no valid ground of objection to the substitution. A defendant's right is to have a cause of action prosecuted against him by the real party in interest. But, as has been elsewhere pointed out, his concern ends when a judgment for or against the nominal plaintiff would protect him from any action upon the same demand by another, or when, as against the nominal plaintiff, he may assert all defenses and counterclaims available to him were the claim prosecuted by the real owner. Giselman v. Starr, 106 Cal. 651, 40 Pac. 8. It matters not to the defendant whether, in truth, the transfer be genuine or simulated, so long as in law it is sufficient to protect him. But the concern of the trial court, under the circumstances, is quite different. It is bound to give due effect to the judgment of this tribunal. Its duty, therefore, is not alone to determine whether or not the transfer is such as will protect the defendant, but equally to determine whether the transfer be genuine or simulated to evade the judgment of this court. To a genuine transfer, as has been said, the judgment of this court has no application. But a simulated transfer would carry no interest, and, under such circumstances, a party would be asking a substitution that he might prosecute or defend in person rights which in fact belonged not to him, but to another. In such a case, therefore, the trial court should satisfy itself—First, that the rights of the adverse party would be protected under the substitution asked; and, second, that the transfer is not simulated and in evasion of the judgment of this court; and only when so satisfied should it make its order permitting the substitution.

A writ of mandate should issue directing the superior court of the city and county of San Francisco, and the judge of department 7 thereof, to permit plaintiff herein to conduct personally, in his own interest and behalf, and on the part of the nominal plaintiff, Samuel W. Latz, the action in question.

We concur: BEATTY, C. J.; TEMPLE, J.; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.

(111 Cal. 78)

PEOPLE v. HAWLEY. (Cr. 20.)[1]

(Supreme Court of California. Jan. 21, 1896.)

BURGLARY—TRIAL—SEPARATION OF JURY—VERDICT—EVIDENCE—REVERSAL—VIEW—PRELIMINARY EXAMINATION—DEPOSITION—ADMISSIBLE ON TRIAL.

1. On a trial for burglary, the jury, after several hours' deliberation, were brought in, towards night, and announced that an agreement could not be had without a view of the premises. The court, after consulting with counsel apart from the jury, over the objection of the prosecution, decided to allow the view, on defendant's request, and, with his consent, to dismiss the jury for the night, as no view could be had till morning. The next morning defendant's counsel privately told the court that he would move to dismiss because of the separation of the jury, at which the court became greatly indignant, and, when the counsel moved for the dismissal, denied the motion, and, in an indignant tone, told the jury that they had been dismissed the night before on the motion and with the consent of defendant and his counsel, but "defendant now prefers to move that all proceedings in this case be dismissed." The jury then retired, and, without a view, in five minutes, returned a verdict of guilty. *Held*, that the verdict must be set aside.

2. A motion to discharge defendant in a criminal case for separation of the jury, had on his motion and with his consent, is properly denied.

3. It is within the discretion of the court, on a trial for burglary, when informed by the jury that they cannot agree on a verdict without a view of the premises, to allow such view, with consent of defendant.

4. Pen. Code, § 1128, requires the jury, after retiring to deliberate, to be kept together. *Held*, that the requirement is mandatory, and a separation, though by order of court, with consent of the defendant, is a violation of the requirement, and vitiates a conviction.

5. In a criminal trial a deposition of the defendant, taken on his preliminary examination, is admissible to impeach his testimony as to the same facts, his attention having been first called to it, notwithstanding Pen. Code, § 686, provides that depositions or preliminary examinations can only be read on the trial where the witness is dead, or insane, or absent from the state.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

E. G. Hawley was convicted of burglary, and from the judgment and an order denying a new trial he appeals. Reversed.

H. A. Massey and August Tilden, for appellant. Atty. Gen. Fitzgerald, for the People.

HAYNES, C. Upon the trial of this case the defendant was found guilty of burglary in the second degree, and was sentenced to imprisonment in the state prison at Folsom for the term of three years; and from that judgment, and an order denying his motion for a new trial, he appeals.

Before the evidence was concluded, the defendant moved the court for an order permitting the jury to view the premises alleged to have been entered. This motion was denied, after an expression from the jury as to their wishes; nine of the jury responding that they did not wish to view the premises, two expressing a desire to view them, and the twelfth juror remaining silent. Afterwards, the evidence having been concluded, the jury were instructed by the court, and retired, in charge of an officer, to consider their verdict. After several hours' deliberation, at the request of a juror, the court directed that the jury be brought in; and, having reported that they had not agreed upon a verdict, the following proceedings were had: "The Court: Gentlemen, I received a message from one of the jury with regard to viewing the premises. Do I understand that any of your number desires to view the premises before rendering a verdict. A Juror: Yes, sir. The Court: The message that reached me was that an agreement could not be arrived at without viewing the premises. A Juror: That is it. That is the way it stands now. The Court: I sent down to the premises, and was informed that the lady in possession had gone to Sausalito, and will not be back until to-morrow morning, and the premises are locked up. A Juror: It would be impossible to agree, without seeing the premises, the way it stands now." At this point a consultation was had between Mr. Massey, one of the attorneys for the defendant, and Messrs Hosmer & Dunn, for the prosecution, and the court, not in the hearing of the jury, which is essential to a clear understanding of the subsequent proceedings. The following condensed statement of said consultation will be sufficient for that purpose: The court expressed a desire to grant a view of the premises, and Mr. Massey asked the court to do so. Mr. Hosmer protested that to do so, or to allow new evidence or a separation of the jury, would be equivalent to an acquittal, whatever the verdict might be. The court suggested that if the defendant's attorney, and the defendant personally, would consent, a view might be had. It was then late in the evening, and the question arose whether the jury should be locked up all night, as a view could not be had until morning. The court was reluctant to lock them up, under the circumstances, and Mr. Massey stated that he would consent to the separation, and that the defendant would also. The court said that, with that understanding, he would allow the jury to go home for the night and reassemble for a view next morning; and it was arranged that Mr. Massey should make a motion to that effect, the court being of the opinion that defendant's consent would cure the irregularity. The conference being ended, Mr. Massey moved that the jury be allowed to separate, and meet again in the morning, and then visit the premises. Mr. Hosmer objected that it would operate as a dismissal of the charge, as it involved a constitutional right of the defendant. The defendant, being asked, personally joined in the request made by his attorney; and the court granted the motion, and gave the jury the usual admonition, and dismissed them until the next morning.

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[1] Rehearing denied.

No objection or exception was then taken by the defendant. When court opened next morning the jury appeared, and answered to their names. Mr. Massey then stated to the court, privately, that he disliked to do so, but his duty to his client compelled him to ask for a dismissal because of the separation of the jury. At this point Mr. Tilden, also counsel for defendant, entered the court room, and, being asked privately by the court, said he had advised the course stated by Mr. Massey. Thereupon the court grew indignant, and suggested that counsel were precluded from so contending; that the course proposed was self-stultifying and contemptuous; and, after a reply thereto by Mr. Tilden, the court turned angrily and abruptly from counsel, who thereupon took their seats. The next proceeding took place within the hearing of the jury, as follows: "Mr. Massey: If the court please, in this case I understand there was a virtual dismissal of it yesterday, and I ask that the defendant be discharged. The Court: Motion denied. Mr. Massey: Exception. The defendant objects to all further proceedings. The Court: Gentlemen of the jury: In your presence, last evening, the defendant and his counsel moved the court that you be sent to view the premises where the alleged burglary took place, and with that understanding, on his motion, you were excused until this morning. The defendant now prefers to move that all proceedings in this case be dismissed. The motion has been denied by the court, and you will now retire, in charge of the bailiff, to deliberate upon your verdict. (The above was said in a tone of great indignation.) Mr. Massey: I would like to say the defendant is perfectly willing they should go to view the premises. The Court: I cannot listen to you any further, unless you have motions to make." Further colloquies occurred between the court and counsel while the jury were leaving the court room, and after they had retired. After five minutes' absence the jury returned, with a verdict of guilty, and were then discharged. Thereupon counsel for defendant moved that all the proceedings be set aside, as irregular, and the defendant be discharged. This motion was denied, and defendant excepted.

It is clear that the judgment in this case must be reversed. The fact that, after several hours' deliberation, the jury were unable to agree without having a view of the premises, and that, without such view, they returned a verdict the next morning after a deliberation of only five minutes, justifies the conclusion that they were affected by something aside from the evidence, all of which had been heard before their retirement the day before. Not only may they have been influenced by the manner of the court, but the statement that the defendant, the evening before, moved the court that they be sent to view the premises, but that "now he prefers to move for a dismissal of the case," together with the fact that they were not sent to view the premises, may be reasonably supposed to have led to the almost instantaneous agreement that the defendant was in fact guilty. They had not heard the colloquy between the court and counsel, and doubtless inferred from the language of the court that the defendant had not at any time really desired to have them view the premises, and that such view would have added to the evidence of his guilt.

The defendant's motion for a discharge, based upon the proceedings had after the jury had retired to consider of their verdict, resulting in their separation for the night, was properly denied.

No question is made by appellant based upon that part of the order of the court permitting a view of the premises after the case was submitted to the jury. Though such proceeding is an irregularity, I think it was within the discretion of the court to grant it, upon the request of the defendant. He had asked for such order at the proper time, before the close of the evidence, and it was then denied, and was afterwards asked for because of a statement by a juror that they were unable to agree without it. It was therefore presumably for the benefit of the defendant, and would have been nothing more than the exhibition of that which would elucidate the testimony of the witnesses already heard, and which the court in the exercise of its discretion, had excluded. It was within the spirit of section 1138, Pen. Code, which permits the jury, after they have retired for deliberation, if there be any disagreement between them as to the testimony, to be brought into court; and in such cases the practice is to have the reporter read such parts of the testimony as are involved in the disagreement. It was little, if anything, more than would have been the exhibition of a map which had been referred to in the evidence, but which had not been exhibited to the jury. The separation of the jury, however, was unnecessary. Section 1136, Pen. Code, provides, "While the jury are kept together, either during the progress of the trial or after retirement for deliberation, they must be provided by the sheriff at the expense of the county with suitable and sufficient food and lodgings." The separation of the jury after they are sworn, even during the trial, was never permitted, at common law, in cases of felony, and in many states is not now permitted in capital cases. Our statute permits such separation in all cases before the submission of the case, in the discretion of the court, but expressly provides that, after retiring to deliberate upon their verdict, they must be kept together. Pen. Code, § 1128. The court, therefore, had no authority, either under the statute or at common law, to permit the separation; nor could the consent of the defendant or his counsel operate to empower or excuse the violation of an express provision of the statute. In the state of Ohio the statute provided that "in the trial of felonies the jury shall not be permitted to separate after being sworn, until discharged by the court." In Cantwell v. State, 18 Ohio St. 477, 481, after the jury were sworn, they were permitted to separate from Saturday until Monday, with the defendant's consent, and it was contended that he could not complain of the action of the court. The supreme court said: "It is to be observed that the language of the statute is imperative, and that no provision is made for exceptional cases, nor for any discretionary action in the matter by the court, either with or without the consent of the parties. The statutory prohibition was not left to be so easily annulled. It may be considered an established principle in this state that the defendant cannot be prejudiced by his waiver of any statutory requisition in the prosecution of criminal offenses." Without entering upon or deciding any question other than the one before us, we may briefly say that we approve what was said by that court, above quoted, when applied to the facts of this case.

The motion made by counsel for defendant for his discharge, based upon the separation of the jury, was, however, properly denied. We are not referred to any case, nor do we find any, where such separation has been held to operate as an acquittal of the defendant, though it is, of itself, and without any showing of improper conduct on the part of the jury, or of any of them, during their separation, a sufficient ground for granting a new trial. The separation by leave of the court was not misconduct on the part of the jury, but a violation of an important and invariable rule existing at common law from the very inception of the jury system, as well as under the statute, and which has ever been regarded as important in securing the due administration of justice, and as a necessary safeguard against improper extraneous influences. In Parker v. State, 18 Ohio St. 88, the jury were permitted by the court, with the consent of defendant's counsel, to separate twice during their deliberations. The court said, "The plaintiff in error should not be prejudiced even by a personal consent given under circumstances when it could not be withheld except at the risk of exciting unkind feelings in the breasts of jurors who held his fate in their hands;" citing Bish. Cr. Proc. § 827. And it was held, on this ground alone, that a new trial should have been granted, and the judgment was reversed and a new trial ordered. In State v. Populus, 12 La. Ann. 710, it was held that in all criminal cases the separation of the jury, though by leave of the court, and with the consent of the accused and his counsel, will vitiate the verdict, if such separation takes place after the evidence has been closed and the charge given. In Woods v. State, 43 Miss. 364, it was held that the separation and dispersion of a jury in a capital case, though by the consent or even at the request of the prisoner on trial, vitiates a conviction; that, where the jury were so exposed to intercourse with others that they "might have been subjected to corrupting or improper influences, that fact alone will nullify their verdict." To the same effect is Wiley v. State, 1 Swan, 256, and Wesley v. State, 11 Humph. 502, in both of which new trials were ordered. In Peiffer v. Com., 15 Pa. St. 468, the jury, after being impaneled and sworn, were permitted to separate, with the consent of the prisoner. Gibson, C. J., said: "Even the forms and usages of the law conduce to justice; but the common law, which forbids the separation of a jury in a capital case before they have been discharged of the prisoner, touches not matter of form, but matter of substance. It is not too much to say that, if it were abolished, few influential culprits would be convicted, and that few friendless ones, pursued by powerful prosecutors, would escape conviction. Jurors are open to persuasion, as other men. and neither convenience nor economy ought to be consulted in order to guard them against it."

The court did not err in receiving in evidence the portion of the deposition of the defendant taken upon his preliminary examination to impeach his testimony given upon the trial relating to the same facts, his attention having been first called to it. The provision of the Penal Code (section 686) permitting such depositions to be read upon the trial only where the witness is dead, or insane, or absent from the state, does not apply to its use to impeach a witness who is present, the deposition being properly certified by the shorthand reporter as required by the Code. No other questions need be noticed. The judgment and order appealed from should be reversed, and a new trial granted.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial granted.

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111 Cal. 118

BARFIELD v. SOUTH SIDE IRRIGATION CO. (Sac. 38.)

(Supreme Court of California. Jan. 23, 1896.)

APPEAL—BILL OF EXCEPTIONS—EQUITY—RESCISSION—EVIDENCE.

1. No errors of law need be specified in the bill of exceptions to enable the appellate court to consider the same.

2. In a suit to cancel a grant of a right of way for an irrigation ditch, on the ground of breach of a representation that the ditch would be so located that the grantor could irrigate his land to the best advantage, evidence, merely, that if the ditch had been placed in one corner of the land it would have been upon higher land, does not entitle plaintiff to a rescission.

3. In a suit to cancel a grant of a right of way for an irrigation ditch, it having been the

grantor's object, in granting the right of way, to secure water for irrigating his land, parol evidence of false representation by the agent of the grantee as to the amount of water the grantee would be able to control is admissible.

Department 1. Appeal from superior court, Kings county; Justin Jacobs, Judge.

Action by Margaret Barfield against the South Side Irrigation Company, a corporation. There was a judgment for defendant, and plaintiff appeals. Reversed.

Rowen Irwin and Frank H. Farrar, for appellant. Lamberson & Middlecoff, for respondent.

GAROUTTE, J. Plaintiff brought an action to cancel a deed given by her to defendant for a right of way for a water ditch, upon the ground of false representations and failure of consideration; and the answer specifically denied all the allegations of the complaint. At the trial it was stipulated, in open court, that the parties intended the deed to transfer a mere right of way for ditch purposes, although the deed, in form, was a grant. At the conclusion of plaintiff's evidence a nonsuit was granted as to the relief asked in setting aside and canceling the deed, and a decree was also entered that the deed be reformed in accordance with the aforesaid stipulation. That portion of the judgment as to the matters covered by the nonsuit is appealed from, upon a bill of exceptions.

It is insisted, upon the part of respondent, that the bill of exceptions cannot be considered, because no specifications of errors of law are embodied therein. Miller v. Wade, 87 Cal. 410, 25 Pac. 487, is relied upon to support this position. But the doctrine there declared failed to receive the sanction of a majority of the court, and therefore is not authority. Upon an examination of the authorities there cited to support the principle announced in that case, it will be found that they fail to meet the test; and Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403, declares, to the contrary, that no errors of law need be specified in the bill of exceptions.

The motion for a nonsuit was made generally, and also specially, upon the ground that defendant made no representations to plaintiff as to the ownership by it of the waters of Lower Kings River Ditch Company sufficient to irrigate about 7,040 acres of land, or that it owned or controlled any amount of water sufficient to irrigate any portion of said land. The motion for a nonsuit was also based upon the further ground "that the plaintiff has not shown that the defendant agreed to construct a ditch, through the land in question, in such a manner, and upon such routes, and in such localities as to enable the plaintiff, in the easiest and most practicable manner, or to the best advantage, to irrigate all of said sections of land from the waters flowing in and through said ditch." Among other things, the complaint alleged that defendant represented itself to be the owner of certain waters of Lower Kings River Ditch Company, upon which representations plaintiff relied, and which were false; and the complaint further alleged that defendant represented that, if plaintiff would execute a deed of right of way across her land, for ditch purposes, it (defendant) would locate a water ditch over and upon such right of way, which would enable her to the best advantage to irrigate her land, amounting to 1,240 acres. It is further alleged that defendant represented to plaintiff that it had so located the ditch, and that such representations were false, and that the ditch, as located, would not enable plaintiff to irrigate her said lands. There is no evidence whatever in the record that the ditch, as located, was not so placed but that water could be taken from it to and over any part of plaintiff's land, or that its location was not a good one, and advantageous for the irrigation of all of her said lands. Hence, it would seem unnecessary to enter into a consideration of the question as to whether or not the agreement in this respect was as alleged by the complaint. Conceding such to be the fact, still, if there was no evidence introduced at the trial of its violation, plaintiff failed to make out a cause of action in this regard. There was evidence to the effect that at a certain corner of her land the ditch could have been placed upon higher ground, but this evidence, of itself, only tended to establish the fact inferentially, and, we think, was too weak, remote, and unsatisfactory upon which to declare a noncompliance with the agreement. This evidence may all have been true, and still substantially the entire tract have been susceptible of irrigation from the ditch as located. Plaintiff should have made a stronger case upon this issue.

We think there can be no question but that there was a substantial showing that defendant represented itself to be the owner of the waters of the Lower Kings River Ditch Company. The preliminary written agreement, entered into by these parties some days prior to the execution of the deed, fairly indicates that fact. That agreement recites that it (defendant) was organized "for the purpose of constructing a ditch and irrigating a tract of land containing about 7,040 acres" (plaintiff's land being part of this tract); that it was to secure its water supply from the said Lower Kings River Ditch Company. It agreed to sell plaintiff water upon certain terms and conditions, and agreed that plaintiff should have her pro rata of all the water "now owned and proposed to be distributed on said 7,040 acres of land." Indeed, by the agreement, it assumes to own certain waters of the Lower Kings River Ditch Company, and contracts to dispose of them to plaintiff in certain amounts and under certain conditions, in consideration of her giving this deed of right of way. In addition to the recitals in the agreement, parol evidence was offered, showing that one Heinlein, who was the agent of defendant, and engaged in securing this deed from plaintiff, represented to her agent that defendant was the owner of sufficient water to irrigate the entire tract of 7,040 acres. We think this parol evidence clearly admissible, and, taking all the evidence together upon this point, we are satisfied the court was not justified in holding that these representations as to the ownership of this water were not made to plaintiff, if the court so held. There is also evidence in the record to the effect that, at the time these representations were made, and at the time the deed was executed, defendant was not the owner of any of these waters, and that thereafter, and up to the date of the trial of this cause, never did own but six shares of the stock of the Lower Kings River Ditch Company, which interest was wholly insufficient to give plaintiff the proportion of the water to which she was entitled under the agreement. That the deed to defendant was given by reason of the representations made to plaintiff by it as to the ownership of water that could be used for the irrigation of her tract of land is plain. Indeed, her object in giving the deed was to secure from defendant water for the purpose of irrigating her land. Without pursuing the subject further, it is sufficient to say we think plaintiff, by her evidence, made a prima facie cause of action upon this branch of the case.

There is nothing in the point that the action was not begun in time. We think the judgment appealed from should be reversed, and the cause remanded. It is so ordered.

We concur: HARRISON, J.; VAN FLEET, J.

111 Cal. 73

ZILLMER v. GERICHTEN et al. (No. 15,920.)

(Supreme Court of California. Jan. 21, 1896.)

PROBATE COURT—JURISDICTION—ADMINISTRATOR'S DEED—COLLATERAL ATTACK—NONSUIT —EVIDENCE.

1. An order of sale in administration proceedings, reciting the due publication of an order to show cause why the sale should not be made, is sufficient proof of such publication to admit the administrator's deed as evidence of plaintiff's title, in ejectment, nothing appearing in the transcript to show that said order was not published.

2. Where it appears that a probate court, in ordering the sale of decedent's land, acquired jurisdiction of the subject-matter and all interested persons, the administrator's deed cannot be collaterally impeached for want of regularity in the subsequent proceedings.

3. Evidence of plaintiff's actual possession prior to that of defendants, who were in possession at the time of the commencement of the action, is sufficient proof of title as against a motion for nonsuit in an action of ejectment.

Commissioners' decision. Department 2. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by John G. Zillmer against Louis Gerichten and another to recover a tract of land. A motion for a nonsuit was sustained, and plaintiff appeals. Reversed.

Wm. T. Jeter and Chas. B. Younger, for appellant. W. D. Storey, for respondents.

VANCLIEF, C. Action to recover from the defendants the possession of a small piece of land, containing 2½ acres, to which the plaintiff claims ownership and the right of possession. The defendants deny the alleged ownership and right of possession, and allege that they own the demanded premises, and are rightfully in possession thereof. At the close of the evidence on the part of plaintiff, the defendants moved for judgment of nonsuit, and their motion was granted. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial, and contends that the court erred in granting the nonsuit, and also in rejecting evidence offered by the plaintiff. No brief has been filed in this court on behalf of respondents, and although I have endeavored to supply that deficiency, so far, at least, as the labor of counsel may be properly imposed upon the court, the result is, possibly, not so favorable to respondents as it might have been if such labor had been performed by their counsel.

Plaintiff put in evidence a United States patent, dated May 20, 1872, granting to F. E. Bailey lots Nos. 1, 2, and 3, section 31, township 10 S., range 1 W., M. D. M., and parol testimony tending to prove that the demanded premises were wholly within said lot No. 3; then introduced, without objection, a deed, dated December 8, 1882, from Henry C. Wheeler granting to plaintiff said lot No. 3. Plaintiff next offered a deed, dated July 8, 1873, from F. E. Bailey, as administrator of the estate of William Watson, deceased, to Henry C. Wheeler, for said lot No. 3, together with the record of proceedings in the probate court in the matter of the estate of Watson, by which it was claimed said administrator was authorized to sell said lot No. 3. Defendants objected to said administrator's deed to Wheeler on the alleged grounds—First, that it did not appear that the order to show cause why the sale should not be made was published as required by law; second, that the notice of sale was not published for the time required by law and the order of the court; third, that "no notice of hearing the report of said sale was given, and no order of court made fixing the date of said hearing." The court sustained the objection, and excluded the administrator's deed to Wheeler. Plaintiff also introduced evidence tending to prove that Wheeler was in possession of the demanded premises at the time he conveyed the same to plaintiff, and that plaintiff was in actual possession thereof, by having inclosed the same with his adjoining land, during the winter of

1892–93, prior to the commencement of this action; and there was no evidence tending to prove prior possession by the defendants, or that they had any kind of title to the demanded premises. On the evidence as above stated the plaintiff rested, and it does not appear in what respect it was claimed by defendants to be deficient when they moved for the nonsuit.

1. I think the court erred in sustaining defendants' objection to the administrator's deed to Wheeler. The petition of the administrator for the order of sale is in due form, stating all jurisdictional facts, and no objection to it is made. The order of sale, also, complies strictly with the requirements of the statute, and recites, among other things, that upon the filing of the petition on August 17, 1872, "an order was thereupon made directing all persons interested in said estate to appear before this court, at the court room thereof, on Saturday, the 28th day of September, A. D. 1872, at 10 o'clock a. m., to show cause why an order should not be granted to said administrator to sell so much of the real estate of the deceased as should be necessary, and ordering that a copy of said order to show cause be published at least four successive weeks in the Santa Cruz Sentinel, a newspaper printed and published in the city and county of Santa Cruz." Then, after reciting who were heirs of the deceased, that the minor heirs had no general guardian, the appointment of an attorney ad litem for them, and the appearance of said attorney for the minor heirs and the attorney for the administrator on the day appointed for the hearing (September 28, 1872), proceeds to recite that, "upon satisfactory proof by the affidavit of B. P. Kooser, a competent witness, of the publication of a copy of said order to show cause, in said newspaper, at least four successive weeks, and as often during said period of four weeks as said paper was regularly issued, this court proceeded to the hearing of said petition, and heard and examined the allegations and proofs of the petitioner; no person interested in said estate or otherwise appearing to oppose said application." It then recites that the court found all the allegations of the petition to be true, and "that all the proceedings upon this application have been in all respects strictly conducted in accordance with and as provided in the statute regulating the sales of real estate belonging to the estates of deceased persons." It does not appear in what respect the publication of the order to show cause was claimed to be defective, the affidavit of Kooser not appearing in the transcript; but it is not denied that the order was published as above recited, nor is there anything in the transcript indicating that it was not so published. It therefore appears that the probate court acquired jurisdiction of the subject-matter of the petition, and of all persons interested in the estate of Watson; and it is not denied, but impliedly admitted, that the court confirmed the sale. Furthermore, the transcript contains no evidence that the probate court did not fix a time for hearing the report of the sale, and give proper notice thereof, nor that the notice of sale was not published as required by law and the order of the court. Conceding, however, that the proceeding for confirmation of the sale was irregular, as claimed, and that notice of the sale was not published for the time required by the order of court, yet these irregularities or errors in the exercise of unquestionable jurisdiction would not invalidate the sale nor the administrator's deed to the extent of making them vulnerable to the collateral attack, made upon them in the court below. Dennis v. Winter, 63 Cal. 16; Smith v. Biscailuz, 83 Cal. 359, 21 Pac. 15, and 23 Pac. 314; Richardson v. Butler, 82 Cal. 174, 23 Pac. 9; Phelan v. Smith, 100 Cal. 171, 34 Pac. 667. "Jurisdiction existing, any order or judgment is conclusive, in respect to its own validity, in a dispute concerning any right or title derived through it, or anything done by virtue of its authority." Van Fleet, Coll. Attack, p. 29, § 17. The deed was not objected to on the ground of irrelevancy, nor was it irrelevant; for, even if plaintiff had failed to connect it with the patent to Bailey, as he presumably intended, still he was entitled to connect his possession with that of Wheeler.

2. As above stated, the evidence for plaintiff tended to prove prior actual possession of the demanded premises by the plaintiff. As against the defendants, who were alleged to be wrongfully in possession when the action was commenced,—March 1, 1893,—the prior possession of plaintiff was prima facie evidence of his title. Morton v. Folger, 15 Cal. 175; Leonard v. Flynn, 89 Cal. 543, 26 Pac. 1099; McGovern v. Mowry, 91 Cal. 383, 27 Pac. 746. A nonsuit should be denied when there is any evidence tending to sustain plaintiff's case, without passing upon the question as to the sufficiency of such evidence. Felton v. Millard, 81 Cal. 540, 21 Pac. 533, and 22 Pac. 750. And for this reason, also, I think the nonsuit should have been denied. I conclude that the order and judgment should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are reversed, and the cause remanded for a new trial.

111 Cal. 36

MOUNTAIN TUNNEL GRAVEL MIN. CO. v. BRYAN et al. (No. 18,406.)

(Supreme Court of California. Jan. 21, 1896.)

APPEAL — DECISION — REVERSAL — NEW TRIAL—ORDER—FORM.

1. Where, on appeal on the ground that the findings are not supported by the evidence, respondent fails to appear, and point out, by either oral or written arguments, where the evidence in support of the findings may be found, the record being voluminous, a new trial will be ordered.

2. An order granting a new trial does not, until such order is affirmed on appeal, or the time for appeal therefrom has expired, vacate the judgment, so as to prevent an appeal from being taken from the judgment. Pierce v. Birkholm (Cal.) 43 Pac. 205, followed.

3. Where a new trial is granted as to certain issues only, the order should state, in terms, the issues to be retried, instead of referring to such issues as those covered by certain findings of fact.

Department 1. Appeal from superior court, Placer county; W. H. Grant, Judge.

Action by the Mountain Tunnel Gravel Mining Company, a corporation, against Hamblin S. Bryan and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

Andrew Thorne, for appellant. Tuttle & Tuttle, John M. Fulweiler, and Hamilton & Hamilton, for respondents.

GAROUTTE, J. This is an action of ejectment brought against various defendants, each defendant being in possession, and claiming separate portions of the tract of land described in the complaint. Defendants answered separately, denying plaintiff's claims, and, as an affirmative defense and by way of cross complaint, set out equitable titles, and asked for a specific performance. The trial court found against the claims of plaintiff, and decreed specific performance. Plaintiff appealed from the judgment, and also moved for a new trial upon various grounds, which motion was granted by the court in part and denied in part. The court, after declaring that, in its opinion, certain findings of fact, enumerating them seriatim, were not supported by the evidence, made the following order: "It is ordered that a new trial be, and the same is hereby, granted as to the issue of fact involved in the said proceedings, the evidence at said new trial to be directed solely to the issues of fact therein involved;" and thereupon denied the new trial upon all other grounds. This appeal is by plaintiff from the order, upon the ground that a new trial should have been granted as to the entire action.

Appellant insists that findings numbered 33, 35, and 36 are not supported by the evidence. The facts covered by those findings relate solely to the rights and claims of defendant and respondent Bryan; and as he has not deemed the matter of sufficient importance to appear before this court, either by oral or written argument, and point out, in a somewhat voluminous record, where the evidence may be found which supports these findings of fact, we will assume there is no such evidence; and for that reason will order a new trial of the entire case as to respondent Bryan. Kelly v. Bradbury, 104 Cal. 237, 37 Pac. 872, and cases there cited.

It is insisted that the findings do not support the judgment; and respondents Scherer and Clark urge as a bar to the consideration of that question that the judgment cannot now be attacked, for the reason that it was set aside by the order granting the new trial as to certain portions of the case; but this contention cannot be sustained. As to what effect an order granting a new trial by the trial court has upon the judgment, we refer to the very recent case of Pierce v. Birkholm (decided Jan. 10, 1896) 43 Pac. 205, where the question was directly involved, and carefully considered. The court there concluded that an order made by the trial court granting a motion for a new trial, until affirmed by this court, or until the time to appeal therefrom had expired, did not set aside and vacate the judgment; that during this time the judgment had such life that an appeal could be taken from it; and that, in effect, it was not dead but sleeping. Inasmuch as we think the case must be sent back for a new trial as to all the defendants, and in view of the fact that the respondents who have appeared in this court have not argued those matters upon their merits, relying solely upon the position that the order for a new trial set aside the judgment, we will not enter into a consideration of the points made by appellant that the cross complaints do not state causes of action, and that the judgment is not supported by the findings. Before another trial is had, we suggest that respondents look well to the sufficiency of their cross complaints, and amend them, if such course be deemed advisable.

In granting the new trial in this case, the court had in view the practice recognized and approved in Land & Town Co. v. Neale, 78 Cal. 63, 20 Pac. 372, Duff v. Duff, 101 Cal. 1, 35 Pac. 437, and Fallbrook Irr. Dist. v. Abila, 106 Cal. 365, 39 Pac. 793; but, in granting a new trial as to certain particular issues only, the trial court should with great certainty recite the issues in terms upon which the new trial is to be had. This should be done in order that both counsel and the trial court, and this court upon appeal, may know exactly the questions involved within the scope of the order. The order in this case uses the word "proceedings" where probably the word "findings" was intended, and also the word "issue" where "issues" was contemplated. If these are not clerical errors,—and we have no way of determining the fact,—then the order is so indefinite that it should be held to be general in its terms; but, even conceding these things to be purely clerical mistakes, still, as a rule which we think should be invariably followed, an order granting a new trial pro tanto should not, as in this case, grant the order as to the issues covered by certain numbered findings of fact; for such an order leaves the matter open as to what issues are really included within its scope, and often makes it difficult, if not impossible, for the trial court, or for this court, to say what issues the court had in mind when the order was made. As a striking illustration of the soundness of our position, we refer to finding of fact No. 29, found in this record. A new trial was ordered by the trial court as to the issue or issues involved therein; but, upon examination of that finding, we are entirely unable to ascertain the particular tract of land to which reference is there had. In the present case, by our construction of the order, it grants a new trial as to so many important questions raised by the pleadings that we deem it the better course that the whole case shall again be retried. We are especially firm in this conclusion when we take into consideration the defects appearing upon the face of the order, and the doubts which would probably arise in the minds of both court and counsel as to the exact issues which were required to be retried under the directions therein contained.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

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111 Cal. 51

BEER v. CLIFTON et al. (No. 15,958.)

(Supreme Court of California. Jan. 21, 1896.)

ESTOPPEL IN PAIS.

In an action by the payee of a note against the makers, it appeared that plaintiff had indorsed to two of the makers other notes, but was not liable thereon, on account of their failure to make due demand, which, after maturity, were turned over to the other maker to secure him from liability on the note in suit, which, at his dictation, was executed in a nonnegotiable form; he having refused to sign it in its original, negotiable form, under the belief that thereby he would be able to set off the other notes against liability on it. *Held*, that plaintiff was not estopped, as against the latter maker, to deny her liability on the notes indorsed by her and turned over to him, so as to enable him to set them off against her claim.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action by Jennie Beer against E. Clifton and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

J. H. Seawell and J. W. Oates, for appellants. T. L. Carothers and Crittenden Thornton, for respondent.

HAYNES, C. This is an action brought upon a promissory note dated at Covelo, Cal., March 29, 1890, made by the defendants to the plaintiff, for the sum of $3,500, with interest at the rate of 10 per cent. per annum from March 16, 1889. The case was tried before the court without a jury, and findings were filed and judgment entered for the plaintiff for the full amount of said note, with interest and costs,—in all, $5,335.41; and this appeal is from the judgment and an order denying the defendants' motion for a new trial.

Upon a first trial of this case, the plaintiff had judgment for an amount much less than she claimed, and her motion for a new trial was granted, and the defendants appealed from the order granting said motion. The case upon the former appeal is reported in 98 Cal. 323, 33 Pac. 204, where will be found a general statement of the facts in the case. The question involved upon that appeal was as to the liability of the plaintiff upon her indorsement of 11 promissory notes, then overdue, and which were part of the assets sold by her to Clifton and Weill, and which she indorsed in blank. It was there sought to hold her liable upon these notes, upon said indorsement; but this court held that, inasmuch as the defendants had not made due demand on the makers for payment, and notified her of nonpayment, within a reasonable time, she was not liable as an indorser. Upon this trial the defendants sought to fix her liability upon another ground. It was alleged in the answer that these 11 notes were each and all of them indorsed by plaintiff to Clifton and Weill, "with a distinct agreement and understanding that the plaintiff would make them, and each of them, good, and would pay the same, and was and would remain bound to see the same paid and pay the same," and that Clifton and Weill accepted said notes with that understanding. At the time the $3,500 note here in suit was made, said 11 notes were turned over to White by Clifton and Weill as collateral security against his liability upon said note, and, at his dictation, the words "or order," as it was first drawn, were stricken out, so as to make it a nonnegotiable note; and this circumstance, with others, is relied upon to sustain the defense that said 11 notes were taken under an agreement with the plaintiff that she would see the same paid. The court, however, found that said 11 notes were indorsed by the plaintiff for no other purpose than merely to transfer the title to said notes, and that it was not agreed between the plaintiff and the defendants, or either of them, that she was liable thereon for the payment of the same, and that defendant White knew at the time of the transaction the terms of said indorsement, and the reasons and considerations therefor. The principal question on this appeal is based upon appellants' contention that the evidence is insufficient to justify said findings.

So far as the original transaction between the plaintiff and Clifton and Weill is concerned, the evidence fully sustains the finding that the plaintiff did not "agree or undertake" to become liable upon or for these notes; but it was agreed that as to such part of these notes as Clifton and Weill should fail to collect, after due diligence to collect the same, they be credited upon their seven notes of $500 each, with the amount so uncollected. It was found, however, upon ample testimony, that due diligence had not been used to collect the same, and that the condition of plaintiff's liability was therefore not performed. At the time the note in suit was made and given to the plaintiff in exchange for the seven notes, of $500 each, made by Clifton and Weill, there was no direct personal interview between the plaintiff and the defendants, or either of them. This note was prepared in San Francisco, and sent to Covelo through Wells, Fargo & Co., and was presented to the defendants for execution by Mr. Brown, who was then and there the agent of Wells, Fargo & Co. As above stated, when this note was presented for execution it was negotiable in form, and Mr. White refused to sign it unless the words "or order" were stricken out, for the reason that he held a certain obligation against the plaintiff, and also because said 11 notes were to be delivered to him as collateral security; his purpose being to prevent the plaintiff from transferring said $3,500 note to an innocent holder, thus enabling him, as he supposed, to set off her liability upon the said 11 notes against his liability upon the new note. Mr. Brown communicated with the plaintiff, and obtained her direction to have the note executed with the words "or order" stricken out. It is now claimed that Mr. Brown was the agent of the plaintiff in the transaction, ostensibly at least; that the whole matter was talked over before him by the defendants; and, because the note was accepted in its present form, that the plaintiff is estopped from asserting that she did not thereby agree to become liable for the payment of said 11 notes. Mr. Brown was not examined as a witness, nor is there any evidence tending to show that the reasons given by Mr. White for having the $3,500 note made nonnegotiable were communicated to the plaintiff in any form whatever. The note was sent to Covelo by Wells, Fargo & Co.'s Express, and Mr. Brown, as the agent of the express company, presented the note for execution, but it does not appear that he was in any sense, or for any purpose, other than the presentation of the note for that purpose, the agent of the plaintiff; and being a special agent for a particular and definite purpose, which did not, upon the face of the transaction, imply any authority or discretion in him as agent, the burden was upon defendants to show that he communicated to the plaintiff all the facts stated by Mr. White, and that he was authorized to assent, and did assent, thereto. It cannot be assumed, in the absence of evidence, that the plaintiff was informed of any condition imposed or attempted to be imposed by Mr. White as a condition to his joining in the execution of the note; nor did the plaintiff's consent to the change in the form of the note necessarily imply that the plaintiff had been so informed, or had assented to any of the reasons which led Mr. White to have the change made. Not only so, but the defendants all supposed at the time the $3,500 note was given that the plaintiff was already liable upon said 11 notes, because of her indorsement, and it was because of that supposed liability that Mr. White insisted upon having the new note made nonnegotiable, and all that he said to Mr. Brown was based upon such supposed pre-existing liability; and, no question having been made as to such liability, we fail to see how all that was said by defendant White to Mr. Brown, if it had been communicated to the plaintiff, could in any manner have affected or increased her liability. The effect of her consent to the change in the form of the note was merely saying, "When this note becomes due, and I seek to enforce it, you shall have an opportunity to set off any legal demand you may then have against me." The findings are justified by the evidence, and the judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

5 Cal. Unrep. 237

OSTERMAN v. DISTRICT GRAND LODGE NO. 4, I. O. B. B.

(No. 15,974.)

(Supreme Court of California. Jan. 21, 1896.)

ENDOWMENT BENEFIT — PLEADING — BURDEN OF PROOF—FORFEITURE—PAYMENT—EVIDENCE—PARTIES.

1. A mutual endowment society, by alleging in its answer to an action to recover an endowment that the conditions of the contract, made by its law conditions precedent to recovery, have been fulfilled by the assured, "except as hereinafter set forth," assumes the burden of alleging and proving nonperformance of such conditions by the assured.

2. Where the laws of a mutual endowment association make suspension for nonpayment of dues a forfeiture of membership benefits, and provide a formal method for suspension in such case, nonpayment of dues will not, ipso facto, work a forfeiture, though the assured was secretary of the society, and formal proceedings for suspension have not been had because he failed, as required, to report his own delinquency.

3. In an action by a wife against a grand lodge—whose laws made membership in a subordinate lodge, and an election as member of the endowment fund, conditions precedent to a right to participate therein—to recover an endowment on her husband's membership, it appeared that, on report of the husband's death to the grand by the subordinate lodge, the grand lodge sent the amount due to the subordinate lodge, to be paid, "through the trustees," to plaintiff; that the trustees, prior to its receipt, obtained from her an order to deduct from the amount due sufficient to make good defalcations of her husband, which, as one of them testified they told

her, would amount to at least $1,000. The wife testified that they said it would be about $500. The trustees subsequently obtained her receipt for the whole amount, on representations that it was necessary to procure the money from the defendant. Plaintiff, failing to receive the money, demanded it from defendant, and defendant, then first learning that plaintiff's husband was not in good standing at his death, directed the trustees of the subordinate lodge to return the amount sent to it. There was no evidence what became of this money, except that it was deposited in the bank by the trustees to whom it was delivered. *Held*, that a finding against defendant's plea of payment was warranted.

4. Under the above facts, the grand lodge, and not the subordinate lodge, was the proper party to be sued.

5. In an action for an endowment benefit, where defendant alleges in defense that plaintiff consented that the money due should be applied in paying a sum embezzled by the assured, and that it was so applied, an instruction placing the burden of proving such issue on defendant is proper.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Sarah Osterman against District Grand Lodge No. 4, Independent Order of B'nai B'rith, to recover an endowment benefit. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Marcus Rosenthal, for appellant. Joseph Rothschild, for respondent.

VANCLIEF, C. Action to recover an endowment benefit of $2,000 alleged to be due the plaintiff from the defendant. The cause was tried by a jury, whose verdict was in favor of plaintiff for the sum demanded, and the judgment of the court was in accordance with the verdict. The defendant appealed from the judgment, and from an order denying its motion for a new trial. The pleadings and evidence justified the jury in finding the following facts: The defendant is a fraternal and beneficial society incorporated under the laws of this state, is governed by a written constitution, and, for certain general purposes, has jurisdiction over subordinate lodges within its district. Subject to the constitution of the defendant, each subordinate lodge adopts its own by-laws governing its own finances and local affairs. The defendant corporation maintains a special fund, called the "Widows' and Orphans' Beneficiary Fund," supported by assessments of all members of subordinate lodges who elect to become participants of the benefits of that fund, each of whom is required, by the law relating to that fund, to pay a monthly assessment of $2.50, to be collected by the subordinate lodges, and transmitted to the District Grand Lodge; and, after so transmitted, the subordinate lodge has no power of control over it. Funds for the support and use of the subordinate lodges are supplied by fines and quarter-yearly dues required to be paid by their members, over which funds the Grand Lodge has no control. Only those members of subordinate lodges who elect to become participants in the widows' and orphans' beneficiary fund are assessed for contributions to that fund; and, after so electing, they are called "Members of the Widows' and Orphans' Fund." The laws of the District Grand Lodge governing the disposition of the widows' and orphans' fund, among other things, provide (section 15): "The sum of two thousand dollars shall be paid on the death of a member in good standing in the widow and orphan beneficiary fund of this district, to his widow; if there be no widow, then to his children; and, if there be no widow or children, then to any person, persons, or institutions which the deceased member may designate in the manner prescribed in the following sections." No endowment policy or certificate is issued to a member during his life. The benefit is to be paid upon due notice to the District Grand Lodge of the death of a member of the widows' and orphans' beneficiary fund. Upon such notice the Grand Lodge, by its secretary, ordinarily transmits the money, or a check for it, to the trustees of the subordinate lodge of which the deceased was a member, directing them to pay it to the beneficiary. Ophir Lodge, No. 21, is, and has been since 1880, a subordinate lodge of defendant Grand Lodge. In October, 1881, Monroe Osterman, the husband of the plaintiff, became a member of Ophir Lodge, and of the widows' and orphans' fund, and continue to be such until his death, on the 29th day of May, 1891, and, during the last three years of his life, was the secretary of said Ophir Lodge, As a member of said Ophir Lodge and of the widows' and orphans' branch of said District Grand Lodge, he was in good standing up to the time of his death, unless, for alleged reasons, to be hereinafter considered, he had lost his good standing, and had not been reinstated at the time of his death. Immediately after the death of Monroe Osterman, Ophir Lodge duly notified the Grand Lodge of the fact. Thereafter, on June 30, 1891, the treasurer of the Grand Lodge drew a check on the Bank of California for $2,000, payable to the order of the trustees of Ophir Lodge, which was sent to them by the grand secretary, inclosed in the following letter, dated July 1, 1891: "To the Secretary of Ophir Lodge, No. 21, I. O. B. B.: Worthy Sirs and Brothers: We herewith transmit check for the sum $2,000 in payment of the amount due the late brother, Monroe Osterman. This amount is to be paid to the widow, through the trustees. This is accompanied by an original and duplicate receipt. Fraternally, yours, Louis Blank, Grand Secretary." The trustees received the check, and on July 8, 1891, deposited it with the California Safe-Deposit & Trust Company. On August 12, 1891, the plaintiff, claiming that her benefit had not been paid, made a written demand of the

Grand Lodge for payment thereof, to which demand that lodge answered, in substance, that she was not entitled to any benefit, for the reason that her husband was not at the time of his death a member in good standing of either the Ophir Lodge or of the widows' and orphans' fund, because of his failure to pay certain dues to the Ophir Lodge, and certain assessments for the widows' and orphans' fund, and thereafter, on September 4, 1891, directed the Ophir Lodge, by the following letter, to return the money: "September 4, 1891. Ophir Lodge, No. 21: Brothers: Information has reached the general committee of the Grand Lodge No. 4 that Brother Monroe Osterman, of Ophir Lodge, died May 27, 1891; was in arrears to the widows' fund at the time of his death, and therefore not entitled to the benefits of the widows' fund. As the Grand Lodge transmitted to you a check for the sum of $2,000, to be paid to the widow of said Brother Osterman, and as, under our laws, the said widow would not be entitled to the benefits of the widows' fund, and said money was transmitted to your lodge while we were ignorant of the fact of his delinquency, and therefore the money was improperly paid, we now herewith direct your lodge to at once return to the grand secretary, Louis Blank, $2,000. Yours, fraternally, Louis Blank, Grand Secretary." Such additional facts as may be considered pertinent will be stated in considering the points to which they relate. The defendant lodge pleaded two distinct defenses—First, that by reason of nonpayment of dues to the Ophir Lodge, and assessments for the widows' and orphans' fund, Monroe Osterman was not in good standing, as a member of the Ophir Lodge, at the time he died; and, second, that the defendant, nevertheless, paid the full amount of her benefit to the plaintiff.

1. It was admitted by defendant, at the trial, that Monroe Osterman was ostensibly in good standing, as a member and the secretary of the Ophir Lodge, up to the time of his death, and that there was not even a suspicion that he was delinquent in payment of his dues or assessments until after the Grand Lodge had transmitted to Ophir Lodge $2,000 to pay his widow's benefit, and also that he was never expelled nor suspended from membership in Ophir Lodge or the widows' and orphans' beneficiary fund by any action of the Ophir or Grand Lodge. But counsel for appellant contends that his delinquencies, ipso facto, deprived him of his good standing as a member of the widows' and orphans' fund, without any formal act of suspension or expulsion by either lodge, and consequently deprived the plaintiff of the right to any benefit from that fund. As above remarked, there was no certificate or policy issued to Monroe Osterman, or to his wife, evidencing her right to benefits from the widows' and orphans' fund. The conditions upon which the right to benefits from that fund depend are fully expressed in the constitution or laws of the District Grand Lodge; and, whenever such right accrues, it is the direct effect of self-executing provisions of such constitution or laws. Of course, the first condition is that, being a member of a subordinate lodge, he must have elected to become a member of the widows' and orphans' beneficial fund; and it is alleged in the complaint, and not denied, that Monroe Osterman became a member of Ophir Lodge, and a participant in the widows' and orphans' beneficiary fund, on October 19, 1881, and the answer of defendant affirmatively alleges "that, at the time said Osterman became a member of said Ophir Lodge, he also became a beneficiary or participating member of said widows' and orphans' beneficiary fund, and remained such member, except as hereinafter set forth, down to the time of his death." The only other condition is that expressed in section 15, above set out, namely, that he must have been at the time of his death "in good standing in the widow and orphan beneficiary fund." Therefore, if Monroe Osterman was a member in good standing of Ophir Lodge and of the widows' and orphans' fund at the time of his death, the plaintiff was entitled to the benefit of $2,000. The express admission in defendant's answer that Osterman "remained such member down to the time of his death, except as hereinafter set forth," is sufficient prima facie evidence that he remained in good standing down to the time of his death, and cast upon the defendant the burden of pleading and proving that Osterman was not in good standing at the time of his death. Siebert v. Chosen Friends, 23 Mo. App. 268; Stewart v. Supreme Council, 36 Mo. App. 319; Supreme Lodge v. Johnson, 78 Ind. 110; Mills v. Rebstock, 29 Minn. 380, 13 N. W. 162; Elmer v. Association (Sup.) 19 N. Y. Supp. 289; Black, Ben. & Ins. Soc. § 454. This burden the defendant properly assumed, both in pleading and proof, and the only question for consideration is whether the evidence was sufficient to justify the jury in finding that Monroe Osterman was in good standing at the time of his death. The evidence introduced by defendant on this issue tended to prove only that Osterman was delinquent in payment of dues to Ophir Lodge amounting to $11.50, and in payment of assessments for the endowment fund amounting to $12.50, which were not even suspected until long after his death, and long after Ophir Lodge had certified to the Grand Lodge that he died in good standing, and nearly a month after the Grand Lodge had remitted to the trustees of Ophir Lodge the $2,000, with direction to pay it to plaintiff. It appeared that Osterman's salary as secretary of Ophir Lodge was $200 a year, and that a portion of it more than equal to the delinquent dues and assessments was unpaid at the time of his death; but it is claimed by appellant that the unpaid salary should have been

applied to certain defalcations of the secretary, which were not discovered until after his death, and after Ophir Lodge had certified to his good standing at the time of his death, and which will be considered in connection with the plea of payment.

That the failure of a member of the widows' and orphans' beneficiary fund to pay an assessment within the time required by the laws of the society does not, ipso facto, operate to suspend him, or to affect his good standing, is apparent from the following extracts from those laws: Article 9 of the bylaws of Ophir Lodge provides: "Whenever an assessment is levied by District Grand Lodge No. 4, to pay an endowment, such assessment shall be paid by the members as provided by the general laws of this district." Section 25 of the general laws of the district provides: "A beneficiary member who fails to pay his assessments to the lodge within thirty days after the same has been levied by the secretary shall be suspended, without notice, from the benefits of the widow and orphan beneficiary fund, of which suspension the grand secretary must at once be notified. After the member becomes delinquent in two consecutive assessments, the amounts accruing therefrom, and from every subsequent assessment, shall be charged to his account as lodge dues." This implies that a member may be suspended from the widows' and orphans' fund, and still remain a member of the subordinate lodge. A by-law of Ophir Lodge requires each member thereof to pay, as dues to that lodge, quarter-yearly, $3.50; and section 1, art. 8, of the general laws of the district, applicable to subordinate lodges, provides: "It shall be the duty of the secretary to report to the lodge at the first meeting of each month the names of all those brothers who owe for dues, fines, and assessment an amount equal to the amount of dues for one year. After the secretary has reported delinquents, he shall give legal notice to those in arrears to appear, at the latest, in the second regular meeting thereafter, and show cause why they should not be suspended. If they fail to do so, the president shall put the question: 'Does any brother know a reason why Bro. —— shall not be suspended?' If no satisfactory reason be presented to the lodge, then the president shall declare the brother suspended." This covers the whole subject of suspensions for nonpayments of assessments for the endowment fund and dues to the subordinate lodges, and shows that suspension for these delinquencies requires action by the lodge, and prescribes the mode of such action. The statement on motion for new trial contains the following admission by defendant's attorney: "Mr. Rosenthal: We admit that there never was a formal suspension of Monroe Osterman, either from membership, or from the benefits of the widows' and orphans' fund; that he never was formally suspended. No record of Ophir Lodge shows the suspension of said Osterman for nonpayment of dues or assessments, and no notice was ever issued by or from Ophir Lodge to the defendant showing nonpayment of his dues or of his suspension." It is well-settled law that, in cases of the character of this, the only competent evidence of suspension or expulsion of a member, or that a member lacked good standing in the lodge, is some authorized resolution or act of the lodge, by which such member was expelled, suspended, or degraded. Order of Foresters v. Zak (Ill. Sup.) 26 N. E. 593; Surgical Soc. v. Weatherly, 75 Ala. 248; Hawkshaw v. Supreme Lodge, 29 Fed. 773.

The learned counsel for appellant concedes that "ordinarily, under such laws as those of the defendant, which do not make the nonpayment of assessments or dues, ipso facto, operate as a suspension from benefits or membership, there must be a formal suspension before the right to benefits is forfeited." But he contends that this case is extraordinary, in that it was the duty of Osterman, as secretary of Ophir Lodge, to report all members who were delinquent in payment of dues or assessments, and that he failed to report to the lodge his own delinquency, for which he might have been suspended. In answer to this, it is enough to say that plaintiff's right to recover is not conditioned upon the performance by her husband of his duties as an officer of the lodge, nor upon his payment of dues or assessments within the periods of time limited by the laws of the lodge, for the nonpayment of which he might have been, but was not, suspended, or otherwise deprived of his good standing. In this respect this case is materially different from that of Hogins v. Supreme Council, 76 Cal. 109, 18 Pac. 125, cited by appellant. In that case the defendant was a fraternity organized to promote temperance, and issued policies or certificates of insurance on the lives of its members, according to the mutual benefit system, upon their applications therefor. The rules of the order required total abstinence of its members from the use of intoxicating liquors as a beverage. In his application for insurance, Hogins agreed "that a compliance with all the laws, regulations, and requirements * * * enacted by our said order is the express condition upon which I am to be entitled to participate in the mutual benefit life system." The certificate issued to him on such application declared, "This certificate is issued upon the express condition that said Daniel Hogins shall, in every particular, while a member of our said order, comply with all the laws, rules, and requirements thereof." The court found that Hogins had violated the agreement expressed in his application, and the laws of the order, by drinking whisky, brandy, and other alcoholic stimulants, as a beverage, and that his death was hastened thereby, but had never been suspended from the order, as he might have been, and gave judgment in favor of defendant. This court affirmed the judgment on the ground that the abstention of the insured from the use of intoxicating liquor as a beverage was made by the contract a condition precedent to defendant's liability to pay. But in the case at bar I think the contract will not bear the construction that payment of dues or assessments by Monroe Osterman, as required by the laws of the Grand Lodge or of Ophir Lodge, was a condition precedent to the liability of the Grand Lodge to pay plaintiff the benefit of $2,000. Such a construction of numerous similar contracts has been refused, as in cases above cited, and has been given in no case more nearly similar to this than that of Hogins v. Supreme Council, supra. It is claimed that to permit plaintiff to recover in this action would violate the maxim that "no one can take advantage of his own wrong." But it is not perceived that plaintiff is seeking any advantage from her own wrong. If this maxim is applicable to her case, why would it not be equally so, even if Monroe Osterman had not been secretary of Ophir Lodge, and had merely refused to pay his dues and assessments? The subtraction of his official delinquency would only reduce the degree of the wrong. Yet this maxim has never been applied to this class of cases. Besides, it cannot be assumed that Osterman would have been suspended, or otherwise degraded from his good standing, even if he had promptly reported to the lodge his alleged delinquencies; and whether he ought to have been suspended depended upon the determination of the lodge, based upon a state of facts which may have been materially different from that proved on the trial of this case. The most that should be assumed is that he might have been suspended. No effective retroactive sentence of suspension or expulsion could have been pronounced against the deceased, Osterman, in this action. Nor does the maxim that "equity regards as done that which ought to be done" apply to this case, as counsel contends. Surely, counsel would not be understood to mean that the dues and assessments of Osterman should be regarded as paid when they ought to have been paid, but only that Osterman should be regarded as having been suspended before he died, thus assuming that he ought to have been suspended; yet, as above shown, it can be assumed only that he might have been suspended in case he had not successfully defended or excused himself, and the lodge had so determined; and such a case is not within the maxim. Pom. Eq. Jur. § 365, and notes. Besides, this maxim does not authorize a court to assume, without evidence, that a penalty for any kind of delinquency or wrong has been inflicted by any tribunal.

2. The contention that defendant paid the benefit of $2,000 to plaintiff is founded on the following facts and evidence: Twenty days after the death of Osterman, viz. on June 18, 1891, two members of Ophir Lodge—Messrs. Saalburg and D'Ancona (Mr. Saalburg then being a trustee of Ophir Lodge)—called on the plaintiff, at her home, and informed her that, since the death of her husband, they had discovered that, as secretary of the lodge, he had in his hands at the time of his death a considerable sum of money, which he had received from members for dues, etc., the exact amount of which they did not then know. Mr. D'Ancona testified that he told her that the amount was $1,000, at least. Plaintiff testified that she understood them to say it would amount to only about $500. Omitting the further conflicting evidence as to the representations they made to her on that occasion, it appears that Mr. D'Ancona then drew, and plaintiff signed, the following instrument in writing:

"Mr. William Saalburg, Trustee Ophir Lodge, No. 21: You are hereby authorized to pay to Ophir Lodge, No. 21, all moneys in the hands of my late husband, Monroe Osterman, belonging to said lodge, and to deduct the same from the endowment of $2,000 which you hold for me under the laws of District Grand Lodge No. 4. Mrs Monroe Osterman, 1527 Geary street. Witness: A. D'Ancona."

At the time this instrument was executed, there was no money in the hands of Mr. Saalburg, nor in the hands of the trustees of Ophir Lodge, applicable to payment of plaintiff's endowment, though application for it had been made before that time; and about three weeks thereafter it was remitted by the Grand Lodge to the trustees of Ophir Lodge, as above stated. Without regard to the conflicting evidence as to whether the facts were truly represented to plaintiff before she signed the order, and whether she understood its purport, it is sufficient to say that it is properly admitted that the order was revocable at any time before the money was paid by Saalburg to the Ophir Lodge; plaintiff being under no obligation to make good her husband's defalcations, and there being therefore no consideration for the order to pay them. Yet the evidence was sufficient to justify the jury in finding that she did not understand the contents or purport of the order when she signed it. A few days after the receipt of the check of defendant, and the deposit thereof in bank, by Mr. Saalburg, as hereinbefore stated, to wit, July 13, 1891, Mr. Saalburg, with Mr. Marcus Levy, then secretary of Ophir Lodge, again called upon plaintiff, at San Rafael, where she then resided, and procured from her the following receipt:

"San Francisco, July 13, 1891. Received from District Grand Lodge No. 4, Independent Order of B'nai B'rith, and of Ophir Lodge, No. 21, Independent Order of B'nai B'rith, the sum of two thousand dollars ($2,000), in United States gold coin, in full payment of my claim against said District Grand Lodge No. 4, and said Lodge, No. 21, as the widow of the late Monroe Osterman, a member of said Ophir Lodge, No. 21, of the Independent Order of B'nai B'rith.

“——— Sarah Osterman,
“——— Trustees. Beneficiary.
“——— Wm. Saalburg,
“Attest: Chas. Grosslicht,
“Marcus Levy, L. Levy.
“[Seal] Secretary.”

As to the means used to procure this receipt, and plaintiff's understanding of the transaction, the evidence is conflicting, yet sufficient to justify the jury in finding: That Messrs. Saalburg and Levy did not inform plaintiff that the Grand Lodge had transmitted the money to the trustees of Ophir Lodge, with which to pay her benefit, but represented to her that, in order to procure that money from the Grand Lodge, it was necessary that she should sign that receipt; that, to save her trouble, they would attend to the matter for her,—and that she thereupon signed the receipt without reading it, believing that they would get the money and deliver it to her. That, receiving no further communication from them, and failing to receive the money, she demanded it of the Grand Lodge. That after this demand the Grand Lodge, for the first time, professed to have discovered that Monroe Osterman was not in good standing, as a member of the widows' and orphans' department, at the time of his death, and for that reason refused payment, and ordered the trustees of Ophir Lodge to return the money which it had transmitted to them as above stated. There is no evidence that Mr. Saalburg or the trustees of Ophir Lodge ever paid any part of the money to Ophir Lodge. On the contrary, Mr. Saalburg testified that, on the expiration of his term of office as trustee, the money was still in bank, where he first deposited it; that he delivered the evidence of the deposit to his successor in office, and, for aught he knew, the deposit had not been withdrawn or changed at the time of the trial. Nor is there any evidence as to whether Ophir Lodge returned the money to the Grand Lodge in obedience to the order of the latter lodge, nor any evidence that Ophir Lodge ever claimed the money, or denied the right of defendant to demand a return thereof. If the money has not been returned, it is in the hands of defendant's agents, and therefore legally in its possession. The check for the money was sent to the secretary of Ophir Lodge, with instruction that it be paid to plaintiff “through the trustees” of that lodge. Surely this constituted those trustees agents of defendant for that special service. It follows that the jury was fully justified in finding for the plaintiff, against the plea of payment, notwithstanding her receipt.

3. It is contended for appellant that “the court erred in charging the jury that the burden of proving the charge that the plaintiff consented that the money due upon the endowment should be applied toward the payment of the sum embezzled by Osterman was upon the defendant.” This charge that plaintiff consented, etc., is a material part of affirmative new matter pleaded by defendant as a defense. The other part of the plea is that, pursuant to such consent, the money was actually applied to the payment of the sum embezzled. Of the issues thus tendered, the defendant undoubtedly held the affirmative, and, as to them, would have been defeated if no evidence had been given on either side. Therefore, as to each of those issues, the burden of proof was on the defendant (Code Civ. Proc. § 1981), and the court did not err in so instructing the jury.

4. The court charged the jury, in substance, that, unless they found that Osterman had been suspended by some act of the lodge, his indebtedness to the lodge for dues, assessments, or money received by him, and not accounted for, constitutes no defense to the action. That this instruction was not erroneous is apparent from the foregoing considerations and authorities cited.

5. There is nothing worthy of serious additional consideration in the point that “the action has not been brought against the proper party,” but that it should have been brought against Saalburg, or Ophir Lodge, if at all. To answer this point requires only a repetition of foregoing discussion as to the liability of the defendant, it being there shown that there is no evidence that Ophir Lodge ever received, or even claimed, the money; but it is proved that the trustees of Ophir Lodge received the money as mere agents of defendant, with direction to pay it to plaintiff, and that defendant afterwards ordered them to return to it, etc. It is stated and reiterated by counsel for appellant that the District Grand Lodge alone is responsible for the payment of endowments, and that subordinate lodges have no control over the endowment department of the Grand Lodge. The action of Saalburg in his endeavor to divert the money from the plaintiff to Ophir Lodge was wholly unauthorized by either the Grand Lodge or Ophir Lodge; and it effected nothing which could make him responsible to plaintiff for the payment of the money. I think the judgment and order should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(111 Cal. 57)

McGOWAN v. McDONALD et al. (No. 16,034.)

(Supreme Court of California. Jan. 21, 1896.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS—CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACTS—LEGISLATIVE POWERS—WITNESS—COMPETENT EVIDENCE—INTEREST—PLEADING—ADMISSIONS.

1. Laws 1862, § 27, providing that corporations organized thereunder, and their members, shall not be subject to the conditions and liabilities contained in, and shall be exempt from, the corporation act, Laws 1850, p. 347, is unconstitutional so far as it was intended to declare that the stockholders of a corporation formed under its provisions should not be individually and personally liable for any portion of its debts, within Const. 1849, art. 4, § 36, which was given practical effect by Laws 1850, § 32, and Laws 1853, § 16, each providing substantially that each stockholder of a corporation shall be individually liable for its indebtedness in an amount proportioned to his shares of stock.

2. Laws 1862, § 27, is an independent provision, which did not enter into the general object and purpose of the act; and therefore, while in itself unconstitutional, it did not vitiate the other provisions of the act, nor affect the validity of corporations formed under them.

3. Civ. Code, § 288, provided that no corporation formed or existing before the Code took effect should be affected by its provisions unless such corporation should elect to continue its existence thereunder. *Held*, that the provisions which did not affect such corporation without its election were such only as related to the formation and existence of corporations.

4. Const. 1849, art. 4, § 31, provided that "corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed." *Held*, that thereunder liability of stockholders may be so changed as to impose obligations for which they were not liable when they became stockholders.

5. The constitutions of 1849 and 1879, making stockholders individually liable for corporate debts, applied to all corporations; and the legislature has no power to exempt savings banks from their provisions.

6. Code Civ. Proc. § 2047, providing that a witness "may refresh his memory of a fact by anything written by himself or under his direction at the time when the fact occurred," authorizes the use of a bank book in which entries of deposit were made in witness' presence.

7. The liability of a stockholder for corporate debts is primary, and evidence competent and sufficient to show the liability of the corporation is competent against the stockholder.

8. When a pass book is balanced, and the bank then suspends business, and refuses to pay its depositors, it detains moneys received to their use, within Civ. Code, § 1917, providing that interest is payable on moneys received to the use of another and detained from him.

9. Where an allegation that defendant is the owner of certain shares of stock of a corporation is undenied by him, it is admitted that he is a stockholder.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Matthew McGowan against R. H. McDonald and others, as stockholders of the Pacific Bank, to recover from them their respective proportions of certain debts and liabilities of said bank. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Sawyer & Burnett, Rosenbaum & Sheeline, and Dunn & McPike, for appellants. Roger Johnson, for respondent.

BELCHER, C. This action was brought to recover from the defendants, as stockholders of the Pacific Bank, their respective proportions of certain debts and liabilities of the bank, alleged to have been due and owing to depositors therein, and to have been assigned to the plaintiff. The court below gave judgment for the plaintiff as prayed for, from which, and from an order denying a new trial, the defendants appeal.

It appears from the record that the Pacific Bank was incorporated in February, 1863, by the name of the "Pacific Accumulation Loan Company," and with a capital stock of $5,000,000, divided into 50,000 shares, of the par value of $100 each, under the provision of an act of the legislature of this state entitled "An act to provide for the formation of corporations for the accumulation and investment of funds and savings," passed April 11, 1862 (St. 1862, p. 199). By this act, corporations organized under it were authorized "to loan and invest the funds of the corporation, to receive deposits of money, and to loan and invest the same." In March, 1866, an act was passed by the legislature entitled "An act to authorize the Pacific Accumulation Loan Company to change its name" (St. 1865-66, p. 620); and thereafter, in April of that year, and in accordance with the provisions of the said act, the corporation changed its name to that of Pacific Bank. In February, 1872, an act was passed by the legislature amending the act of April 11, 1862 (St. 1871-72, p. 132); and, under and in pursuance of its provisions, such proceedings were taken by the stockholders of the said corporation that the capital stock thereof was reduced to the sum of $1,000,000, and its shares to the number of 10,000, which said capital stock had theretofore been subscribed and paid up, and thereafter remained as the capital stock of the said corporation. The Pacific Bank never elected to continue its existence under the provisions of the Civil Code, which took effect January 1, 1873, but continued to do business as a bank under the act of April 11, 1862, and subsequent acts amendatory thereof and supplementary thereto, until June 23, 1893, when, being insolvent, it closed its doors, and suspended all business.

1. At common law no individual liability was imposed upon the members of a corporation, but article 4 of the constitution of 1849 contained the following provisions:

"Sec. 32. Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law."

"Sec. 36. Each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities."

On the 22d of April, 1850, "An act concerning corporations" was passed by the legislature, which provided, in section 32: "Each stockholder of any corporation shall be individually and personally liable for a portion of all its debts and liabilities, proportioned to the amount of stock owned by him." St. 1850, p. 347. In 1853 an act "to provide for the formation of corporations for certain purposes" was passed, which provided, in section 16: "Each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company contracted or incurred during the time that he was a stockholder, for the recovery of which joint or several actions may be instituted and prosecuted." In French v. Teschemacher, 24 Cal. 518, it was held that section 36 of the constitution, above quoted, was not self-executing, and that legislation was necessary to give it effect. It was also held that neither of the statutory provisions above quoted was sufficient of itself to impose a liability; "yet, although neither by itself affords a perfect rule, the two combined contain what is omitted in the thirty-sixth section of the constitution, and is needed to give it a practical operation." Section 322 of the Civil Code contains very full and complete provisions as to the liability of the stockholders of all corporations formed or doing business in this state for debts incurred while they were such stockholders, and as to the method of enforcing such liability. And section 3 of article 12 of the constitution of 1879 provides: "Each stockholder of a corporation, or joint stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association."

Appellants contend that they are not liable to the plaintiff in this case for any portion of the debts of the corporation, for the reason (1) that, by terms of the statute under which the Pacific Accumulation Loan Company was organized, the stockholders of the corporation were expressly exempted from such liability; and (2) that, as the Pacific Bank never elected to continue its existence under the provisions of the Civil Code, the corporation was not affected by the provisions of the Code in regard to corporations, and hence no liability was thereby imposed upon appellants.

The provision of the act of April 11, 1862, relied upon in support of the first point, is as follows: "Sec. 27. Corporations formed under this act, and the members and stockholders thereof, shall not be subject to the conditions and liabilities contained in, and shall be exempt from, the operation of an act concerning corporations, passed April twenty-second, A. D. eighteen hundred and fifty." But if, by this section, it was intended to declare that the stockholders of a corporation formed under the provisions of the act should not be individually and personally liable for any portion of its debts and liabilities, then the section was in plain conflict with section 36 of article 4 of the Constitution of 1849, and must be held to have had no validity or effect; for, as said in French v. Teschemacher, supra: "The individual liability of the stockholder is a constituent element in the artificial life of a corporation, made so by the author of its creation, and that life can no more exist under the constitution without the element than a natural person can exist when deprived of an element made indispensable to his existence by the laws of nature. Hence an act of the legislature authorizing the formation of corporations without attaching to the corporators an individual liability would be as obnoxious to the constitution as would be the creation of a corporation by special act."

If, however, this be so, it is claimed that the whole act was rendered unconstitutional, and hence that the bank never had any corporate existence. But this does not follow. In People v. Hill, 7 Cal. 103, it was said that, "if some of the provisions of the bill are unconstitutional, this will not vitiate the whole act, unless they enter so entirely into the scope and design of the law that it would be impossible to maintain it without such obnoxious provisions." And in Robinson v. Bidwell, 22 Cal. 379, it was held that, where a provision of a statute is of such a nature and has such a connection with the other parts as to be essential to the law, its unconstitutionality vitiates the whole enactment. But if an independent provision, not in its nature and connections essential to the law, be unconstitutional, it may be treated as a nullity, leaving the rest of the enactment to stand as valid. See, also, French v. Teschemacher, supra, and Ex parte Frazer, 54 Cal. 94, where the same doctrine is announced. It is quite evident that the section of the act in question was an independent provision, which did not enter into the general object and purpose of the act, and which might be stricken out without prejudice to the other portion thereof. It therefore did not vitiate the other portions of the act or affect the validity of corporations formed under its provisions.

The provision of the Civil Code relied upon in support of the second point is as follows: "Sec. 288. No corporation formed or existing before twelve o'clock noon of the day upon which this Code takes effect is affected by the provisions of part iv. of division first of this Code, unless, such corporation elects to continue its existence under it as provided in section 287; but the laws under which such corporations were formed and exist are applicable to all such corporations, and are repealed subject to the provisions of this section." By the constitution of 1849 each stockholder of a corporation was made personally liable for his proportion of all its debts and liabilities, but, to enforce such liability, legislation was necessary. It was not, however, necessary that every act providing for the formation of corporations should also provide for the liability of their stockholders. A general law making such provisions would have subserved all the purposes required. And while the liability of the stockholder was a constituent element in the life of the corporation, and necessary to its existence, it was still only a burden imposed on the stockholder, and had otherwise nothing to do with the formation or existence of the corporation. In Railway Co. v. Hellman (Cal.) 42 Pac. 225, it was held that the provisions of the Civil Code relating to corporations which did not affect and were not applicable to such corporations as were formed before the Code took effect, and had not elected to continue their existence under it, were such only as related to the formation and existence of the corporations. Under this rule, we think it must be held that section 322 of that Code applies to the stockholders of corporations formed or doing business in this state before or after the adoption of the Codes. Besides, our present constitution imposes the same liability; for, as said in Bidwell v. Babcock, 87 Cal. 32, 25 Pac. 752, section 322 of the Civil Code and section 3 of article 12 of the constitution have "substantially the same meaning and effect."

It is objected, however, that, if the provisions of the Code and constitution are applicable, they impose obligations upon appellants for which they were not liable when they became stockholders, and are in conflict with that provision of the constitution of the United States which inhibits the states from passing laws impairing the obligation of contracts, and are therefore as to them unconstitutional and of no effect. The answer to this objection is that the constitution of 1849 provided: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed." Article 4, § 31. Under the authority thus conferred, both the legislature and the people had power to change the law in regard to the liability of stockholders, without violating any provision of the constitution of the United States. In Re Empire City Bank, 18 N. Y. 199, a similar question arose. That was a proceeding to enforce a personal liability of stockholders for the debts of the bank under an act passed after the bank was incorporated. The court, by Denio, J., said: "The statute under which the proceedings were had was challenged as being a violation of the constitution of the United States and of this state. By the federal constitution, no state can rightfully enact a law impairing the obligation of contracts. It is argued that, by the general banking law, the associations which it authorizes are alone responsible for its contracts, the shareholders being wholly exempt from liability; and it is insisted that this is in the nature of a contract between the state and the shareholders, and that the constitutional guaranty of the integrity of contracts, in the national constitution, would be illusory if a state could, by changing its constitution, subvert all existing engagements, and hence that the guaranty applies as well to state constitutions as to other state laws. Without denying or affirming the soundness of these positions, it is enough to say that the general banking law expressly reserves to the legislature the power to alter or repeal it, so that any changes which it or the people think proper to make are fully authorized by the provisions of the supposed contract itself." See, also, the following cases, which are to the same effect: In re Oliver Lee & Co.'s Bank, 21 N. Y. 9; In re Reciprocity Bank, 22 N. Y. 9; Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335; Tomlinson v. Jessup, 15 Wall. 454; Dam Co. v. Gray, 30 Me. 551.

It is also objected that the Pacific Bank was originally organized for the purpose of doing business as a savings bank, and that the stockholders of such a bank cannot be held liable for its debts. But the provisions of the constitution of 1849 applied to the stockholders of all corporations, without regard to the character of the business to be transacted; and the same is true of the constitution of 1879. It is not therefore within the power of the legislature or the courts to declare any such exemption as that here claimed. And see Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110, and Kennedy v. Bank, 101 Cal. 495, 35 Pac. 1039, where liability for deposits in savings banks was enforced. If, however, the law were as it is interpreted by appellants, the objection could not be sustained, for the reason that it is alleged in the complaint, and not denied by the answer, that, at all the times mentioned therein (within two years prior to the commencement of the action), "said bank was receiving deposits and doing a general banking business." And it was proved that since 1886 the bank had been advertising itself as a commercial bank by a printed statement, on the front page of its by-laws, that it is "the oldest chartered commercial bank in California."

2. Appellants contend that the court committed several errors of law in its rulings upon the admission of evidence offered to establish the indebtedness of the Pacific Bank to the assignors of the plaintiff. There were three such assignors, and each had a bank book. The left-hand page of these books showed the date and amount of each deposit, and the right-hand page showed the amount of each check paid by the bank, the number of checks returned, and the balance remaining due and unpaid to the depositor on each occasion when the balances were struck. The last balances were entered on the 22d day of June, 1893, and the amounts shown thereby to be then due to the depositors were the same as those alleged in the complaint.

It was proved that all the entries on the left-hand page were made by the teller of the bank when the moneys were deposited, and in the presence of the depositor, and were correct, and that all the entries on the right-hand page were made by a clerk of the bank when the books were handed in by the depositors from time to time to be balanced. It was also proved by each of the three depositors that, when he received back his book, he verified the entries made by comparing them with his own accounts, and in every instance found them correct; and each one therefore testified that he knew of his own knowledge that the balance shown by the book was the correct amount due him. Neither of the witnesses could, however, state the amounts of his deposits or of his drafts, or the balance due, without refreshing his memory by looking at his bank book; and this, against the objection of defendants, he was permitted to do. The books were also offered, and, against the objection of defendants, admitted in evidence to prove the same facts. Section 2047 of the Code of Civil Procedure provides: "A witness is allowed to refresh his memory respecting a fact by anything written by himself or under his direction at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing." It is claimed that this section did not authorize the witnesses to refresh their memories by looking at the books, but we think it did. The entries of his deposits were admittedly made in the presence of the witness, and under his direction, and he knew at the time that they were correct. There can be no question, therefore, that as to them he could refresh his memory from the book. And the entries of the amounts drawn out were clearly made under the direction of the witness, for he handed in his book to have such entries made and the balance struck; and, when the book was returned to him, he checked it up from his own books, and knew that the balance stated was correct. This was at a time when the matter was fresh in his memory, and when he knew that the same was correctly stated. In our opinion, therefore, the case comes fairly within the rule declared by the Code, and there was no error in the ruling complained of.

It is also claimed that the pass books were not admissible in evidence against the defendants, and, in support of this position, Neilson v. Crawford, 52 Cal. 248, is cited. It is well settled by numerous decisions of this court that, by the constitution and statutes of this state, the stockholders of a corporation organized therein are made personally liable for their respective proportions of all its debts and liabilities contracted while they are such stockholders. Such liability arises when the debt is incurred, and is primary, and not secondary. In a suit against a stockholder to enforce his liability, the first fact to be established is the indebtedness of the corporation; and, when that is established, the liability of the stockholder results as a necessary sequence. It would seem, therefore, that any evidence which is competent and sufficient to show the liability of the corporation must be competent and sufficient to show the liability of the stockholder. In Borland v. Haven, 37 Fed. 394, a case decided by the United States circuit court for California (Sawyer, J.), the question arose as to the admissibility and effect of evidence in a case like this, and on page 414 it was said "that any evidence that is competent to establish the liability, as against the corporation, must be competent to establish the liability of the stockholders; for, the liability of the corporation being established, the liability of the stockholder for his share follows as an inevitable legal consequence, by the express terms of the constitution and statute." The case of Neilson v. Crawford, supra, relied on by appellants, was an action to enforce the liability of the defendants for their portion of the indebtedness of a corporation of which they were stockholders. At the trial, to prove such indebtedness, the plaintiff offered in evidence the books of the corporation,—its ledger, journal, book of resolutions and transfers. It was held on appeal that while in an action against the corporation for the recovery of a debt its books of account, showing the existence of the indebtedness alleged, would be admissible, because they are the admissions of the corporation entered by its servants, still they were inadmissible in an action against the stockholders. And the court said: "If an admission of indebtedness, made by a corporation, be evidence of indebtedness in an action against a stockholder, it is not perceived why a similar admission made by a stockholder should not be evidence in an action brought against the corporation, nor why an estoppel against the corporation—for instance, a judgment rendered—should not equally estop a stockholder to deny the fact of indebtedness in an action brought against him to enforce his proportionate liability." That case is not in point here, for the reason that in this case the books of the bank were not offered, and the objection urged is only to the admissibility of the pass books of depositors. But the pass books were the books of the depositors, and not of the bank. They showed the indebtedness of the bank as certificates of deposit would have shown it. Now, suppose the assignors of plaintiff had held certificates of deposit, instead of pass books; can there be any doubt that they would have been admissible? We think not. Besides, in Kennedy v. Bank, 97 Cal. 93, 31 Pac. 846, it was held that the legal effect of the condition prescribed by section 3 of article 12 of the constitution of this state, regulating the individual liability of stockholders for debts contracted and liabilities incurred by the corporation, is that a corporation, when created, becomes the agent of its stockholders to make such contracts and incur such liabilities as are authorized by law and its articles of incorporation, and the contracts which it thus makes bind the stockholders to the extent named. If this be so, then the rule that the admissions of an agent which are made while in the performance of his duty, and are a part of the res gestæ, may be proved against the principal, must be applicable here. And see Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110, where it was held that there was no error in admitting in evidence a judgment against the corporation for the purpose of establishing its indebtedness and the liability therefor of its stockholders. We conclude, therefore, that the court below did not err in admitting the pass books in evidence.

3. Some of the appellants object to the allowance of interest against them from the time of the suspension of the bank. But, as before stated, the pass books were balanced and the accounts stated on the day before the suspension. Section 1917 of the Civil Code provides that interest is payable on all moneys "due on any settlement of accounts, from the day on which the balance is ascertained, and on moneys received to the use of another and detained from him." Ordinarily, of course, interest is not payable on the amount found due when a pass book is balanced; but when a bank suspends business, and refuses to pay its depositors, it thereafter clearly detains moneys which it received to their use, and, under the provisions of the Code, must be held liable for interest thereon.

4. The point is made that the evidence does not show that appellant Wood was a stockholder when the deposits were made. But the complaint alleges that Wood was the owner of 212 shares of stock of the bank at all the times mentioned therein, and this allegation is not denied in his answer. His ownership of the stock was therefore admitted, and no evidence as to it was required.

The other points discussed by counsel do not require special notice. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

111 Cal. 96

DENMAN v. BRODERICK, Auditor. (S. F. 237.)

(Supreme Court of California. Jan. 22, 1896.)

CONSTITUTIONAL LAW—SPECIAL LEGISLATION.

After the legislature, in pursuance of Const. art. 11, § 6, providing that it shall classify municipal corporations in proportion to population, had made a classification, the first class of which comprised those containing 100,000 inhabitants or over, Act March 28, 1895, providing for the appointment of a board of election commissioners in municipalities having a population of over 150,000 inhabitants, was passed. *Held*, that the act was unconstitutional, as special legislation.

In bank.

Petition by James Denman against William Broderick, auditor of the city and county of San Francisco, for writ of mandamus. Denied.

Delmas & Shortridge, Philip G. Galpin, Frank J. Sullivan, and David I. Mahoney, for petitioner. Garret W. McEnerney, for respondent.

McFARLAND, J. The petitioner claims to be a member of the board of election commissioners of the city and county of San Francisco, under a certain act of the legislature approved March 28, 1895. St. 1895, p. 341. He presented his demand for a month's salary as such commissioner to the respondent, auditor of said city and county, and requested him to draw his warrant for the amount of such salary upon the treasurer of said city and county. The respondent refused to draw such warrant, on the ground that said act is unconstitutional, whereupon the petitioner presented his petition to this court for a writ of mandamus to compel said respondent to draw such warrant.

The act in question is entitled "An act to add a new article, to be designated as article 4, to chapter 1 of title 2 of part 3 of the Political Code, and also to add six new sections, relative to county, city, and city and county boards of election commissioners." The part of the act necessary to be considered is a new section designated as section 1075, and is as follows: "Sec. 1075. The board of supervisors of each county is ex officio the board of election commissioners in and for the county, and the common council, or other governing body of a city, is ex officio the board of election commissioners in and for such city: provided, that in cities and cities and counties of this state having one hundred and fifty thousand or more inhabitants the board of election commissioners shall consist of four persons, citizens and electors of such city, or city and county, each of whom must be a freeholder, and have been an actual resident of said city and county at least five years preceding his appointment, who shall be appointed by the mayor: provided, that the respective executive committees of the state committees of either of the political parties who may be entitled under the provisions of this act to have members of their party appointed as members of said board of election commissioners shall have the right, within ten days after such appointment, to file with the mayor a written protest against the appointment of a member of said board of election commissioners, as having been appointed as one of affiliation with said party, on the grounds that said appointee is not a person of well-known affiliation and standing with said party from which he has been appointed; and the mayor thereupon shall make another appointment in the place of the party against whom the protest has been filed. The members of said commission shall be ineligible to any other office of public employment, elective or appointive, during the term for which they have been appointed and for one year thereafter. Two of the persons so appointed shall be selected from the body of citizens and electors of such city, or city and county, of known affiliation with and belonging to the political party or organization which at the last presidential election held in such city, or city and county, polled within said city, or city and county, the highest number of votes cast for the candidates of the political party for presidential electors at such election; and the two remaining members of said board shall be selected from the body of electors of such city, or city and county, of known affiliation with and belonging to the political party which, at the last presidential election held at such city, or city and county, polled within such city, or city and county, the next highest number of votes cast for the candidates for presidential electors of a political party. The members of said commission shall, every two years, choose one of their number as chairman; in the event of their failure to select a chairman in five ballots, the oldest of said members in point of years shall be chairman. The persons first appointed as such board of election commissioners shall be appointed on the first Monday of July, eighteen hundred and ninety-five, and shall each hold their office for the term of four years from and after the date of their appointment, except that, of those first appointed, two (one belonging to each political party or organization, as aforesaid), to be designated by the mayor, shall retire at the end of two years, when their successors shall be appointed by the mayor. Whenever any vacancy shall occur in the said board, such vacancy shall be filled by appointment as herein prescribed, and the person so appointed to fill such vacancy shall be selected in the same manner and from the same political party or organization with which his predecessor in office affiliated and belonged at the time of his appointment thereto, and shall hold office for the balance of the unexpired term for which he was appointed. The salary of each member of the board of election commissioners in and for said city, or city and county, having one hundred thousand or more inhabitants, shall be seven hundred and fifty dollars per annum, payable in equal monthly installments out of the treasury of such city, or city and county, in the same manner as the salaries of other officers of such city, or city and county, are paid."

The constitutionality of this section is attacked upon several grounds, and it is apparent that at many points it at least closely approaches the line which limits legislative power. Under our views of the case, however, there are many standpoints from which respondent assails the law which it is not necessary for us to explore. While it may be true, as counsel for petitioner says, that the law was intended for an excellent and worthy purpose, it was evidently drafted in ignorance of the constitution of the state, or with reckless disregard of its provisions. It is matter of history that when the present constitution was adopted there was a great appreciation of the supposed evils which had arisen out of special and local legislation, and there was a strong purpose to prevent such evils in the future. Perhaps some other inconveniences and evils which arise from too great limitation of the legislative power in this respect were not fully anticipated or considered. At all events, the constitution is exceedingly prohibitory of the power to pass local and special laws; and this feature of the constitution should be kept in view by legislators, for a law passed in plain contravention of it—whether good or bad—cannot be upheld by the judiciary. Section 25 of article 4 of the constitution expressly provides that "the legislature shall not pass local or special laws in any of the following enumerated cases, that is to say"; and then follow 32 enumerated cases, which include nearly all subjects of legislation that can be suggested. In addition, there is a thirty-third clause, which reads: "In all other cases where a general law can be made applicable." Among these enumerated cases are the following: "Ninth. Regulating county and township business, or the election of county and township officers. * * * Eleventh. Providing for conducting elections, or designating the places of voting, except on the organization of new counties. * * * Twenty-eighth. Creating offices, or prescribing the powers and duties of officers in counties, cities and counties, townships, election or school districts." As the statute here under review deals with subjects enumerated in said section 25, it follows that it is unconstitutional if it be local or special. But, as it relates only to a part of the territory and people of the state, it is clearly local and special (Earle v. Board, 55 Cal. 489), unless there are some other provisions of the constitution and some principle of law applicable thereto which take it out of that category.

There are two provisions of the constitution which somewhat relieve the pressure against local and special legislation. One is section 5, art. 11, not particularly applicable here, which provides that the legislature, for the purpose of regulating the compensation of county officers, may "classify the counties by population"; and section 6 of the same article, which provides that "corporations for municipal purposes shall not be created by special laws, but the legislature, by general laws, shall provide for the incorporation, and classification, in proportion to population, of cities and towns, which laws may be altered, amended or repealed." Now, this court has held that, when there has been a classification, authorized by the constitution, of counties or municipal corporations, a law which applies to all of any one class is not invalid upon the ground that it is local or special. The construction of the constitution on this subject has been quite liberal; it being held that, if the classification be in other respects such as the constitution warrants, the fact that only one or two counties or municipalities are put in a class will not invalidate it. Cody v. Murphey, 89 Cal. 522, 26 Pac. 1081. But there must be a classification, it must be by a general law (which, of course, may be amended), and the classification must include all the counties or municipalities. Before 1883 the legislature neglected the duty imposed on it by the constitution to make such classification; and its attempts before that time to legislate specially for certain municipalities were held invalid. Desmond v. Dunn, 55 Cal. 242; Earle v. Board, Id. 489. In Desmond v. Dunn the court held that "sections 6 and 7 of article 11 of the constitution evidently contemplated the enactment of general laws providing for all corporations for municipal purposes, and not for some only; and such laws must be as general as the subject to which they relate." In 1883 the legislature made a classification of municipal corporations as follows: "All municipal corporations within the state are hereby classified as follows: those having a population of more than one hundred thousand shall constitute the first class; those having a population of more than thirty thousand, and not exceeding one hundred thousand, shall constitute the second class,"—and so on to the sixth class; and this classification has never been repealed or amended. St. 1883, p. 24. Since then this court, by Temple, C., said: "On the 3d day of March, 1883, the legislature did, by a general law, as the constitution requires, classify all the cities of the state. The class mentioned by the law in question is not one of those classes. It is a class created by the act itself. I am of the opinion that this cannot be done. Section 5 of article 11 was evidently intended to limit, and not to enlarge, the power of the legislature; and I think that it was intended that the classification there authorized was to be by a general law, in the same sense and in the same way in which it was necessary to provide for the incorporation and organization of cities and towns. Legislation in regard to such corporations would thereafter be made by reference to the classes thus made. * * * I think a law in conformity with this special permission in the constitution must be a law classifying all cities in the state, or a law amendatory of such a law. It must leave all the municipal corporations classified." Darcy v. City of San Jose, 104 Cal. 642, 38 Pac. 500. We see no distinction in principle between that case and the case at bar. In that case, for the purpose, no doubt, of affecting the city of San Jose alone, an act was passed by which a certain provision was made applicable only to "all cities containing a population of not less than ten thousand nor more than twenty-five thousand"; but there was no such classification under the general law. San Jose was in the third class, which is constituted of cities with a population of more than 15,000 and not exceeding 30,000; and therefore the act in question in that case did not affect all the cities of the third class, and was invalid. With respect to the case at bar, there is no classification of cities, or cities and counties, "having one hundred and fifty thousand or more inhabitants." Cities, or cities and counties, having that number of inhabitants are in the first class, which includes "all municipal corporations * * * having a population of more than one hundred thousand" (St. 1883, p. 24); and the act here in question, therefore, does not affect all the corporations of the first class. Moreover, there is an attempt by the act itself to create a class for a special purpose, without reference to the existing classification by general law, which was held to be unauthorized in Darcy v. City of San Jose. It is, therefore, local and special, and for that reason unconstitutional and void.

We see no force in the point that the respondent has no interest in the question here involved. The act under which petitioner claims being unconstitutional and void, there is no law authorizing respondent to draw the warrant; and to do the act demanded of him would be to violate his official duty and oath, and subject himself to liabilities and penalties. Neither is there any room here for the play of the principle that separable parts of a statute may be valid while other parts may be unconstitutional. All of the parts of said section 1075, under which alone petitioner claims his salary, are alike involved in the vice of unconstitutionality. Neither is there any distinction, with respect to the point here involved, between cities and consolidated cities and counties. They are both "municipal corporations," and with respect to the constitutional provisions herein discussed they are in the same category. Desmond v. Dunn, supra. The views above expressed relieve us from the necessity of determining the many other important and serious objections made by respondent to the validity of the statute here in question. We hold that it is unconstitutional and void for the reasons heretofore given. The prayer of the petition is denied, and the proceeding dismissed.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.; VAN FLEET, J.; HENSHAW, J.; TEMPLE, J.

(110 Cal. 471)

MAHONEY et al. v. SAN FRANCISCO & S. M. RY. CO. (No. 15,944.)

(Supreme Court of California. Jan. 16, 1896.)

Action by Mary Mahoney and others against the San Francisco & San Mateo Railway Company to recover for the death of the husband and father of plaintiffs. From a decision of department 2 (42 Pac. 968) reversing a judgment in favor of plaintiffs, plaintiffs apply for a rehearing in bank. Modified, and rehearing refused.

PER CURIAM. A hearing in bank is denied, but that portion of the opinion commencing with the sentence. "I think the court also erred in discharging the juror Cooper from the panel," down to and including the phrase, "if a new panel had been taken they could still insist upon their exception," is eliminated therefrom.

GAROUTTE, J. (dissenting). I think a rehearing should be granted, and the judgment affirmed.

(5 Cal. Unrep. 251)

RUNK v. SAN DIEGO FLUME CO. et al. (L. A. 4.)

(Supreme Court of California. Jan. 29, 1896.)

MALICIOUS PROSECUTION — COMPLAINT — SUFFICIENCY.

A complaint against a flume company alleging incorporation of defendant; that defendant maliciously had plaintiff arrested and imprisoned, necessitating bail, and tried, on a charge of interfering with its flume meters without authority; that he was tried and duly acquitted; that by these acts he was injured in reputation, and suffered great anxiety, to his damage in a certain sum,—sufficiently states a cause of action for malicious prosecution.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by J. B. Runk against the San Diego Flume Company and others for malicious prosecution. From a judgment for defendants, plaintiff appeals. Reversed.

Aitken & Smith, for appellant. McDonald & McDonald and Works & Works, for respondents.

VAN CLIEF, C. Action to recover damages for an alleged malicious prosecution. A demurrer to the complaint on the grounds that it does not state a cause of action, that in specified particulars it is uncertain, and that two causes of action are improperly joined therein, was sustained by the trial court; and thereupon, plaintiff declining to amend his complaint, judgment passed for defendants. Plaintiff appeals from the judgment, and contends that the court erred in sustaining the demurrer. The following is a copy of the complaint: "(1) That on the 19th day of July, A. D. 1894, the said defendants, contriving and maliciously intending to injure the said plaintiff in his good name and reputation, and to cause him to be imprisoned, falsely and maliciously, and without any reasonable or probable cause therefor, procured and caused plaintiff to be charged before E. J. Ensign, a justice of the peace of San Diego township, county of San Diego, state of California, with the crime of: 'Without authority from the San Diego Flume Company (a corporation), of said county, or any agent thereof, did raise, disturb, and open an appurtenance attached to a flume belonging to said San Diego Flume Company, then and there used for the purpose of holding and conveying water for agricultural and domestic uses, and which said appurtenance was so attached to said flume or conduit for the purpose of measuring and controlling water held and conveyed in and by said flume or conduit, and used for said purposes,'—and thereupon caused said justice to make out a warrant, in due form of law under his hand, for the apprehension of plaintiff, and falsely and maliciously, and without probable cause therefor, caused plaintiff to be arrested on said charge, and to be imprisoned for two hours, and compelled to give bail in the sum of one hundred dollars ($100) for his release. (2) That on the 31st day of July, 1894, at the trial of said cause, the plaintiff was acquitted of said crime, and said prosecution is wholly ended and determined. (3) That by means of which said acts the plaintiff has been greatly injured in his credit and reputation, and brought into public scandal, infamy, and disgrace, and has suffered great anxiety and pain of body and mind, to his damage in the sum of five thousand dollars, and has been forced to lay out and expend the sum of one hundred dollars in procuring his discharge from said imprisonment, and in defending himself. (4) That the defendant San Diego Flume Company is a corporation duly organized under and by virtue of the laws of the state of California, and has its principal place of business at San Diego, California. Wherefore plaintiff demands judgment against said defendants for the sum of five thousand one hundred dollars ($5,100), and all costs of suit." The cause was submitted to this court by written stipulation, "upon the briefs of the respective parties now [then] on file." But there is no brief on file on the part of respondents; and, without aid from counsel for respondents, I have been unable to perceive that the complaint is open to attack upon any ground specified in the demurrer. It seems to state a single cause of action, conformably to the precedents, and with sufficient certainty. 2 Chit. Pl. p. 555; Work, Prac. & Pl. 211, 212; 1 Boone, Code Pl. § 167; 2 Boone, Code Pl. p. 272; Bates, Pl. 550; 2 Greenl. Ev. § 449; Townsh. Sland. & L. § 420 et seq.; Druex v. Domec, 18 Cal. 83; Eastin v. Bank of Stockton, 66 Cal. 123, 4 Pac. 1106; Krause v. Spiegel, 94 Cal. 370, 29 Pac. 707. See, also, Pen. Code, § 624, under which the alleged prosecution of plaintiff in the justice's court was probably intended. I think the judgment should be reversed, and the cause remanded, with direction that the court below overrule the demurrer.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed, and the court below is instructed to overrule the demurrer.

(111 Cal. 154)

BARRETT v. SUPERIOR COURT OF PLACER COUNTY. (S. F. 216.)[1]

(Supreme Court of California. Jan. 29, 1896.)

ADMINISTRATOR — HEARING ON SUFFICIENCY OF BOND—APPEARANCE—SERVICE OF ORDER —WAIVER.

1. An administratrix cited to appear, under the provisions of Code Civ. Proc. §§ 1394, 1395, for a hearing as to the sufficiency of her bond, and who appears in person and by attorney on the first day of such hearing, cannot object to the jurisdiction of the court to enforce an order entered at a date to which the hearing was adjourned, and which order was excepted to by her attorney, on the ground that such order was not served on her; no service being required by the statute, and she being constructively present in court.

2. An administratrix who tenders a new bond required by an order of the court, though not within the time fixed, thereby waives service of the order, if it were necessary.

In bank.

Petition of Maggie G. Barrett against the superior court of Placer county (J. E. Prewett, judge) for a writ of review. Denied.

Geo. B. Merrill, for petitioner. John M. Fulweiler, for respondent.

HARRISON, J. The petitioner was appointed the administratrix of the estate of Joseph Byrne, deceased, January 23, 1895; and having filed an undertaking as such administratrix, in accordance with the order of the court therefor, in the sum of $7,000, with two sureties, who were approved by said court, letters of administration were issued to her. June 15, 1895, the judge of said court, of his own motion, ordered a citation to be issued to the sureties on said undertaking, requiring them to appear before him at the court room in said county on the 24th day of June, to be examined touching their property and its value, and that a citation be issued also to the administratrix, requiring her presence at said hearing. In obedience to said citation said sureties and the administratrix appeared at said time and place, and the sureties were then examined by the

[1] Rehearing denied.

judge, and the further hearing continued for one week. July 1st an order was made and entered by said court to the effect that said sureties were insufficient, and requiring the administratrix to file additional security within five days. This order was not served upon the administratrix, nor was any notice thereof given her, nor was any order made that she be notified thereof. July 9, 1895, an order was made by the court suspending the powers of the administratrix, and also another order appointing a special administrator of said estate. The present application is for a writ of review, and to annul the last-named orders, upon the ground that they were without the jurisdiction of the court. The ground upon which it is claimed by the petitioner that the order was without the jurisdiction of the court is that no notice of the order requiring her to give the additional security was ever served upon her, and that before she could be in default for not complying therewith she was entitled to notice thereof, and that without such service of notice the court had no power to make an order visiting her with any penalty.

The proceedings were taken under the provisions of section 1394, Code Civ. Proc., and the petitioner was present in person and by her attorney at the hearing under the citation. At the close of the examination on that day an order was made by the court, and entered in its minutes, "that the further hearing of the matter be regularly continued and deferred for one week, to wit, July 1, 1895, at 1:30 p. m." July 1st the court made an order finding that the sureties were insufficient, and "that said administratrix, within the five days next ensuing, cause to be executed and presented to this court, or the judge hereof, for approval, additional security, as follows" (specifying the amount); and it was also stated in this order, "that said administratrix is represented in court at the time of the rendition and entry of this order by her attorney, and that she was regularly cited to be present at this hearing." The minutes of this day were subsequently amended by the court to show "that said administratrix was represented in said court at said time by her attorney, W. B. Lardner and that said Lardner then and there, on her behalf excepted to the said order requiring further security, and granting her five days within which to give the same." July 9th an additional bond was presented on behalf of the administratrix, with a request by her counsel that the same be approved by the court. This request was denied, and the court then made an order "that the right of the administratrix to the administration of this estate cease," and on the same day made another order "that her powers as such administratrix be and the same are hereby suspended, and her letters as such revoked, until a further hearing upon the question of her permanent removal, now pending, be heard on September 12, 1895." The administratrix was present in person, and was also represented by her attorney, at the hearing on June 24th; and, if the court, at the close of the hearing on that day, had determined that the sureties were insufficient, and made the order requiring her to give additional security within five days, it would have been a personal direction to her to that effect, and her failure to comply with such order would have caused her right to the administration to cease. Section 1395 does not require any order to be served upon the administratrix, but declares that the mere failure to give the security within the time fixed by the judge's order shall of itself without any further action on the part of the court, cause the right of the administrator to the administration to cease. The continuance of the hearing from June 24th to July 1st had the legal effect to continue until that day the appearance in person and by attorney, which the administratrix made on the 24th of June, and to give to the order that was made on the 1st of July the same effect as if it had been made at the close of the hearing on the 24th of June. Having taken an exception to the order when it was made, it would not be competent for the administratrix afterwards to make the objection that the order had not been served upon her. Her subsequent request to the court to approve "the additional bond heretofore required by the court" must also be regarded as a waiver of the service of the order, even if a service thereof was required.

Upon the failure of the administratrix to file the additional security required by the order of June 24th, and the consequent cessation of her right to the administration of the estate, the court was required by section 1395 to appoint as administrator "the person next entitled to the administration on the estate, who will execute a sufficient bond," and was authorized to make an order suspending the powers of the petitioner until such further appointment could be made, and in the meantime to appoint a special administrator of the estate. Code Civ. Proc. § 1411. The alternative writ heretofore issued is discharged.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

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111 Cal. 144

PEOPLE v. VAN EMAN. (Cr. 69.)

(Supreme Court of California. Jan. 28, 1896.)

EMBEZZLEMENT — INDICTMENT — ALLEGATION OF OWNERSHIP—EVIDENCE—OTHER CRIMES—ADMISSIONS — CROSS-EXAMINATION — REBUTTAL — INSTRUCTIONS AS TO DEFENDANT'S CREDIBILITY.

1. In an indictment for embezzlement of money collected by defendant as an agent from a debtor of his principal, after his discharge, the debtor may properly be alleged as owner.

2. In such a case a demand by the debtor for the return of the money is not necessary.

3. In a prosecution against an agent for em-

bezzlement of money collected by him from a debtor of his principal, after his discharge, the indictment alleging ownership in the debtor, evidence of embezzlement from the principal about the same time is admissible.

4. In embezzlement against an agent, receipts given by him to debtors of his principal over his own name are admissible in evidence against him.

5. That defendant's counsel on cross-examination presented a paper to the witness, and requested him to identify certain entries therein, but did not offer the paper or the items in evidence, does not entitle the prosecution on re-examination to introduce the paper in evidence.

6. In a prosecution for embezzlement, it is error to allow the prosecution to cross-examine defendant as to bets made by him at a race track, defendant not having testified in regard thereto on his examination in chief.

7. It is error to allow witnesses to reiterate their testimony under the guise of rebuttal.

8. Under Const. art. 6, § 19, prohibiting judges from instructing in criminal cases as to the matters of fact, an instruction to the jury on defendant's testimony that in "weighing his testimony you are to consider what he has at stake. You are to consider the temptations brought to bear upon a man in his situation to tell a falsehood for the purpose of inducing you to acquit him or to disagree," is ground for reversal.

Department 2. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

W. W. Van Eman was convicted of embezzlement, and appeals. Reversed.

Bruner & Bruner, for appellant. Atty. Gen. Fitzgerald, for the People.

McFARLAND, J. The defendant was charged with embezzling $100, the property of one J. Poppa, and was convicted. He appeals from the judgment, and from an order denying his motion for a new trial. Although the case must be reversed for reasons hereinafter given, a few of the points made by appellant which are not tenable must be noticed because they may arise upon another trial.

1. It is contended that the money alleged to have been embezzled was not the property of Poppa, but was the property of the Savage Commercial Company. The appellant had for several years been the agent of said company, with authority to sell goods and collect bills. He had sold goods frequently to Poppa, and had collected the amounts due said company for said goods. On December 13, 1893, he collected from Poppa the $100 alleged to have been embezzled. Now, witnesses for the prosecution testified that appellant had been discharged from the employ of said company several days prior to said December 13th. If this is true, then there was no fatal variance between the indictment and the proof; and, in that event, the fact that Poppa was not notified of appellant's discharge, and therefore could compel the company to credit him with the money, makes no difference. If, however, appellant had not been discharged on the 13th, then the money was the property of said company, and appellant could not be convicted under the indictment. We do not think that a demand by Poppa on appellant for the money was, under the circumstances, necessary. We do not think that the court erred in allowing evidence tending to show other embezzlements by appellant of moneys of said company about the time of the alleged embezzlement charged in this indictment. Neither do we think that the court erred in admitting receipts given by appellant over his own signature to certain customers of said company. We do not mean to say that such a receipt would, itself, be sufficient to show an embezzlement; but it would be an act of a defendant admissible as evidence on that issue. The question presented in Ford v. Smith, 5 Cal. 314, was a very different one. There it was attempted to introduce the receipt of a third party to prove that the defendant in that case had paid money.

2. On the cross-examination of the people's witness, Ade, counsel for appellant presented a paper to the witness and asked him to identify two items in it, but did not offer the paper or the items in evidence. On re-examination the prosecution offered the paper in evidence in explanation of the two items, and it was admitted over appellant's objection; but as the appellant had not offered the items in evidence, it was clearly erroneous to allow the introduction of the paper by the prosecution at that time. The court also erred in allowing appellant to be cross-examined about some bets which he made on said December 13th, at the race track. It was not proper cross-examination, for it was not a matter about which he testified in chief, nor was it relevant; and its effect was to prejudice appellant in the minds of the jurors. We think that the court improperly allowed witnesses for the prosecution to reiterate their testimony under the guise of rebuttal. There are also minor points made on alleged errors in rulings on the admissibility of evidence, which are hardly of importance enough to demand special notice.

3. But, whether or not the errors above noticed are sufficiently grave to cause a reversal, the judgment and order appealed from must be reversed on account of the instructions given by the court to the jury on the subject of the credibility of the appellant as a witness. If the question were entirely an open one, we would feel constrained to hold, upon principle, that any instruction at all as to the credibility of any witness, or the weight to be given to his testimony, is violative of section 19 of article 6 of the constitution, which provides that "judges shall not charge jurors with respect to matters of fact," and section 1847 of the Code of Civil Procedure, which, referring to a witness, provides that "the jury are the exclusive judges of his credibility." But in People v. Cronin, 34 Cal. 191, which was decided nearly a generation ago, an instruction was approved which stated in general terms that, when a defendant had appeared him-

self as a witness, the jury should consider the situation under which he gave his testimony, the consequences to him from the result of the trial, and the inducements and temptations "which would ordinarily influence a person in his situation." During succeeding years a similar instruction was several times approved, and as district attorneys and trial courts persisted in asking for and giving it on all occasions, it was evident that the rule could not be changed without causing reversals in nearly every case on its way here by appeal. Moreover, the instruction in the Cronin Case was very general in its language, and could hardly be construed as an intimation from the judge that he doubted the truth of the defendant's testimony in a particular case, and as therefore it could probably do no harm, it was no doubt better to allow the rule to stand than to disturb the course of justice in many cases by overruling it. But trial courts, moved, no doubt, in many instances by prosecuting officers, began to gradually expand the Cronin instruction, and to substitute for it their own language; and the danger of that course has been many times pointed out by this court. It will be profitable, perhaps, to notice here a few of the opinions and decisions upon the subject, with the hope that officers intrusted with the administration of the criminal law who have not read those opinions and decisions may happen to notice the present opinion.

In People v. Murray, 86 Cal. 31, 24 Pac. 802, the court, speaking of the Cronin instruction, said: "That instruction has been affirmed in subsequent cases, and it is now too late to question its correctness; but if courts and prosecuting attorneys think it their duty to have an instruction on that subject in every case, they should be careful to go no further in that direction than courts have already gone. An instruction giving the general rule can do no harm, and is not of much consequence, for every intelligent juror knows, without any instruction on the subject, that a defendant, whether innocent or guilty, is deeply interested in being acquitted. But when such an instruction is reiterated, and put into exceedingly strong language, so as to give it peculiar emphasis, it is too apt to lead the jury to believe that the court thinks the defendant in the particular case on trial to be unworthy of belief. The credibility of the witness in such a case should be left as much as possible to the jury." In People v. Faulke, 96 Cal. 20, 30 Pac. 837, the court, after alluding to the Cronin instruction, and saying "that it is too late now to question its correctness," and that "it is an instruction that can rarely be necessary," and alluding to the danger of changing it, say: "If district attorneys, as well as courts, would be careful while framing instructions not to tread upon that dangerous borderland which lies between matter of fact and matter of law, the result of the trial would rarely be changed, and the occasion for an appeal would be avoided. After a proposition of law involved in an instruction has been often approved upon appeal, the trial court will obviate further appeal thereon if it will limit its instruction upon that proposition to the terms in which it has been approved, rather than attempt a variation upon such terms." In People v. O'Brien, 96 Cal. 182, 31 Pac. 45, the court, speaking of a like instruction, say: "As a slight change in the phraseology of the instruction, however, is liable to be construed as going beyond the limits of what has been approved, it would be a safer course, and one which would work no injustice to the people, if it were entirely omitted from the instructions asked and given on behalf of the prosecution." In People v. Curry, 103 Cal. 549, 37 Pac. 503, the court, speaking of a similar instruction about a defendant's testimony as a witness, say: "We have often suggested that the better practice would be to refrain from instructing jurors to the effect as evidenced by the foregoing instruction, but the suggestion appears to fall upon stony places, and brings forth no results. We shall limit the rule strictly as it has been heretofore declared, and new trials will be the result if those limits are overstepped to any extent." In People v. Lang, 104 Cal. 368, 37 Pac. 1031, the court quoted with approval the language used in the opinion in People v. Murray, supra. In People v. Anderson, 105 Cal. 35, 38 Pac. 513, the court, speaking of a similar instruction, said: "While the instruction is not so wide a departure from instructions which have been allowed to pass by this court as not furnishing sufficient ground for reversal, we deem it proper to again call attention to the criticism of similar instructions in the recent cases of People v. Murray, 86 Cal. 31, 24 Pac. 802, People v. Curry, 103 Cal. 548, 37 Pac. 503, and People v. Lang, 104 Cal. 363, 37 Pac. 1031." In People v. Hertz, 105 Cal. 663, 39 Pac. 32, the trial court had undertaken to carry the doctrine so far as to include the relatives of the defendant; and the court, in its opinion reversing the case, said: "An instruction to the jury bearing upon the credibility of a defendant's testimony is not looked upon with favor by this court. We have repeatedly frowned upon the doctrine, and said that it would be limited within the strictest lines." And in the recent case of People v. Shattuck, 42 Pac. 315, in which the judgment was reversed for an instruction touching the testimony of a relative of the defendant, and in which the case of People v. Hertz, supra, was approved, the court said: "The court has frequently hinted that a similar instruction in regard to the defendant is erroneous, because it violates the constitutional provision that the judges shall not charge juries with respect to matters of fact."

As to the general proposition that a judge is precluded from instructing about the credibility of a witness, or any matter of fact, see People v. McNamara, 94 Cal. 509, 29 Pac. 953; People v. Cesena, 90 Cal. 383, 27 Pac. 300; People v. Travers, 88 Cal. 233, 26 Pac. 88; People v. Fong Ching, 78 Cal. 169, 20 Pac. 396; People v. Dick, 34 Cal. 663; McMinn v. Whelan, 27 Cal. 320; People v. Stanton, 106 Cal. 142, 39 Pac. 525; People v. Choynski, 95 Cal. 643, 30 Pac. 791. Instructions about the credibility of a defendant as a witness are, no doubt, sometimes given through habit, or to round out a charge; but, considering the many expressions of opinion and decisions above referred to, it is difficult to logically attribute the giving of any instruction whatever on the subject to anything else than a purpose to expressly disparage a witness before a jury,—the very thing that a court has no authority to do. However, if the language used be kept well within the general terms of the instruction in the Cronin Case, this court, for the reason that has been so frequently given, will not, on account of such language, reverse the judgment; but when the language used is such as to strongly suggest to the jury that in the case then before them the defendant testified falsely, or to intimate that such is the opinion of the court, then the judgment cannot stand. And in the case at bar we think that the language used, as was said in People v. Murray, supra, tended to "lead the jury to believe that the court thinks the defendant in the particular case on trial to be unworthy of belief." There was considerable said in the charge about the defendant's testimony. The jury was called upon to consider "what he said," and "what he didn't say"; and they were finally told: "In weighing his testimony you are to consider what he has at stake. You are to consider the temptations that may be brought to bear upon a man in his situation to tell a falsehood for the purpose of inducing you to acquit him, or to disagree." This was going far beyond the general platitudes of the instruction in the Cronin Case. It is difficult to see how it was intended for anything else than an argument against the truthfulness of appellant's testimony. Why were the jurors warned against the temptation that appellant was under to cause them, by his false testimony, to disagree? Why was anything said about disagreement before the case had been submitted to the jury? The suggestion at that time of a disagreement was a suggestion that at least some of the jurors would, or ought to, be in favor of a conviction. Indeed, it is almost impossible to conceive how the jury could have failed to understand that the opinion of the court was adverse to the credibility of the appellant. And where the language used by a court in commenting on the testimony of a defendant is materially different from that used in the Cronin Case, and we cannot see that the difference has not been prejudicial, the judgment must be reversed. An instruction on the subject that is kept within proper limits is of no real benefit to the prosecution, and therefore unnecessary; if pushed beyond those limits, it is erroneously prejudicial to the defendant. Justice would therefore be more surely accomplished if no instruction at all were given, and the credibility of the defendant were left entirely to the jury. The correctness and justice of such a course has been frequently pointed out by this court; and if it were followed, there would be no difficulty on the subject.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: TEMPLE, J.; HENSHAW, J.

111 Cal. 139

PURSER v. EAGLE LAKE LAND & IRRIGATION CO. et al. (Sac. 33.)

(Supreme Court of California. Jan. 28, 1896.)

EVIDENCE AS TO ACTION OF DIRECTORS OF CORPORATION—MORTGAGES—WHAT CONSTITUTES.

1. An instrument, in form a certified copy of a resolution by the board of directors of a corporation, duly attested by the signatures of the president and secretary, under the corporate seal, ratifying the execution of a mortgage, and sent to the mortgagee, is presumably the act of the corporation, and admissible in evidence to prove the ratification, without proof of the loss of the corporate record of such resolution.

2. An instrument reciting that defendant, to secure a certain indebtedness to plaintiff, conveys to him certain land, and that the agreement is on the express condition that, if defendant conveys to plaintiff certain other land, the instrument shall be void, and that, when defendant shall have conveyed to plaintiff the land, he shall pay defendant a certain sum, and, after defendant has made certain improvements on the land, plaintiff shall pay him a further sum, is a mortgage, entitling plaintiff to foreclose on default in payment or conveyance of the other land, without demand for such conveyance, or tender of the price to be paid thereon.

Department 1. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by Edward T. Purser against the Eagle Lake Land & Irrigation Company, a corporation, and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Goodwin & Goodwin, J. E. Pardee, and Spencer & Raker, for appellants. Shinn & Shinn and F. A. Kelley, for respondent.

VAN FLEET, J. Action to foreclose a mortgage given by defendant, Eagle Lake Land & Irrigation Company, to secure a promissory note of the corporation. Judgment was for plaintiff, and defendants appeal therefrom, and from an order denying them a new trial.

1. It is claimed that the finding that the corporation executed the mortgage in suit is not sustained by the evidence. This is based upon the contention that no authority was shown in the officers of the corporation to ex-

ecute that instrument, and that there was no sufficient evidence of ratification of their act. The original instrument was shown to have been lost, and a certified copy of the record thereof in the county recorder's office was introduced in evidence. From this copy it appeared that the instrument had been signed and acknowledged in due form by the president and secretary of the corporation, but it did not appear that the seal of the corporation had been affixed thereto. No proof was offered to show that the seal was attached to the original instrument, nor was there evidence tending to show any antecedent authority by the corporation for the execution of the mortgage; but plaintiff produced, and was permitted, against the objection of defendants, to put in evidence an instrument purporting to be a ratification of the execution of the mortgage. This instrument was, in form, a certified copy of a resolution by the board of directors of the corporation, duly attested by the signatures of the president and secretary, under the corporate seal. It recites that the resolution was unanimously adopted, at a special meeting of the board called for the purpose, refers to and identifies the note and mortgage in suit and certain other notes, and resolves that the execution of said instruments was "for the best interests of said corporation, and each, every, and all of said acts are hereby ratified and confirmed, and are hereby declared to be the acts of this corporation, with the full and unqualified approval of the directors of this corporation." The objection was, not that this paper, if established, did not show a ratification, but that its contents could only be competently proven by the production of the record thereof in the books of the corporation, or after a showing that no such record had been kept. We think the resolution was properly admitted. It was shown that it had been furnished to plaintiff by the secretary of the corporation, and it was authenticated by the corporate seal. It was, therefore, presumptively the act of the corporation, and admissible in evidence as such; and, in the absence of any countervailing proof, its recitals were binding upon the corporation. Hawley v. Paving Co., 106 Cal. 337, 39 Pac. 609; Ditch Co. v. Zellerbach, 37 Cal. 597; Underhill v. Improvement Co., 93 Cal. 300, 28 Pac. 1049.

2. It is further contended that, assuming the execution of the mortgage or instrument in suit to have been competently proven, it is not, in fact, a mortgage, but an executory contract for the sale and purchase of land; and that, as such, the plaintiff did not make a case entitling him to recover thereunder, for the reason that he failed to show that he had tendered the balance of the purchase price of the land and made demand for a conveyance, and that the defendant corporation was, consequently, not put in default. The instrument recites that the party of the first part, the corporation, "is justly indebted to the party of the second part in the sum of $6,800, United States gold coin, secured to be paid by a certain promissory note," and then follows a copy of the note; that "for the better securing of the payment of the said sum of money so secured to be paid by the said promissory note, with interest," etc., the corporation grants, bargains, sells, and conveys to the party of the second part (the plaintiff here) certain lands, describing them. It is then provided "that these presents are upon this express condition: that if the said party of the first part shall, on or before March 1, 1893, convey or cause to be conveyed to the said party of the second part, by good and sufficient deed, free from all incumbrances," certain described lands (other than the mortgaged lands), containing 680 acres, together with a deed to sufficient water from the irrigation system of the corporation, at certain stipulated annual rates, to perpetually irrigate said land, "then, in that case, these presents and the estate hereby granted shall determine and be void." It is further provided "that, when said corporation shall have conveyed said 680 acres of land to said party of the second part, as aforesaid," the latter shall pay to the corporation the further sum of one dollar per acre for the 680 acres; that the corporation "shall grub, clear, burn, and remove the brush from said 680 acres of land, and break and plow said land" in a manner to make it suitable for seeding and cultivation; and that, upon the completion of such work, the plaintiff shall pay the corporation the additional sum of four dollars per acre for the 680 acres, on demand, in a manner therein provided. It is then finally provided that, in case the corporation makes default in the conveyance of the land as provided, then plaintiff is empowered to foreclose, and to sell the mortgaged premises, and out of the proceeds pay the principal and interest of said note, with costs, charges, and attorneys' fees, etc.

Regarded in its entirety, we think this paper was clearly a mortgage. It was designed to serve a double purpose, perhaps, but its primary purpose was to secure the indebtedness due the plaintiff. It gave the corporation the option of liquidating that indebtedness by the conveyance of certain lands and water rights, it is true; but it is not clear that it conferred upon plaintiff any corresponding right to enforce such conveyance in the event the corporation failed to exercise its right to make it. Assuming, however, that it did, it clearly gave plaintiff his election between such remedy and that of foreclosure,—upon the default of the corporation to either make such conveyance or pay the indebtedness. Nothing remained for plaintiff to perform to put the corporation in default. It is said he should have tendered the balance of the purchase price, and demanded deeds of the land and water, before suing. But we fail to discover wherein, under the peculiar provisions of the contract, there was any balance of purchase price due. All of plaintiff's money was up which he was required to put up until a conveyance of the land and the water right, when, and when only, he was required to pay an additional dollar per acre, and upon certain other conditions an additional four dollars per acre. These conditions were wholly independent, and plaintiff was not required to pay or tender such further payments until after the making of the conveyances. The giving of the deeds and the payments of the additional acreage were in no sense contemporaneous or dependent covenants. The corporation was in default when it failed to either convey the land and water or pay the indebtedness within the stipulated time, and plaintiff was then entitled to foreclose. The recitals in the instrument of ratification in no way added to or detracted from the terms of the mortgage, or in any way limited the construction to be put upon them. We think the evidence fully supports the findings, and the judgment and order must be affirmed. It is so ordered.

We concur: GAROUTTE, J.; HARRISON, J.

(111 Cal. 133)

CALIFORNIA SAVINGS & LOAN SOC. v. HARRIS. (Sac. No. 65.)[1]

(Supreme Court of California. Jan. 28, 1896.)

CORPORATIONS — REQUIRING FILING OF ARTICLES OF INCORPORATION AND COPIES—RIGHT TO SUE—PLEA IN ABATEMENT.

1. Civ. Code, § 296, requires every corporation to file its articles of incorporation in the county of its principal place of business, and a certified copy in the office of the secretary of state. Section 299 provides that it shall file "a copy of the copy of its articles of incorporation filed in the office of the secretary of state, duly certified by such secretary of state," in the office of the clerk of any county in which it holds any property, and, further, that it shall not maintain or defend any action in relation to such property "until such articles of incorporation, and such certified copy of its articles of incorporation, and such certified copy of the copy of its articles of incorporation, shall be filed at the places directed by the general law and this section." *Held*, that a certified copy of the copy on file with the secretary of state was the only one required by section 299 to be filed in counties because property was there situated.

2. The failure of a corporation to file a copy of its articles of incorporation in a county where it has property, and in which it brings an action, as required by Civ. Code, § 299, does not affect its cause of action, and can only be taken advantage of by plea in abatement.

3. The provision in Civ. Code, § 299, that a corporation "shall not maintain" any action until it complies with the terms of such section, does not prevent it from commencing an action, but suspends its right to maintain it if proper objection is made; and where it complies with the statute after the commencement of an action, but before the filing of a plea in abatement, the latter should be overruled.

Department 1. Appeal from superior court, Madera county; W. M. Conley, Judge.

Action by the California Savings & Loan Society against Harris. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Larew and W. C. Wallace, Jr., for appellant. J. F. Cowdery and Francis A. Fell, for respondent.

HARRISON, J. Plaintiff is a corporation, whose principal place of business is the city and county of San Francisco, and commenced the present action for the foreclosure of a mortgage that had been assigned to it. The mortgage was executed October 18, 1888, upon lands which at its date were situated in that portion of the county of Fresno which was afterwards included in the county of Madera. The complaint was filed in the county of Madera September 6, 1893, and on April 25, 1894, the defendant Harris filed an amended answer, in which he set up as a separate defense "that said plaintiff did not file in the office of the county clerk of the county of Madera its articles of incorporation, a certified copy of its articles of incorporation, and a certified copy of the copy of its articles of incorporation, as required by section 299 of the Civil Code, prior to the 6th day of January, 1894." The cause was tried by the court, and judgment rendered in favor of the plaintiff. Upon the matter set forth in the foregoing defense, the court made findings in the same terms as it was pleaded. The defendant has appealed upon the judgment roll, and urges in support of his appeal that, inasmuch as the plaintiff had not filed a certified copy of its articles of incorporation in the office of the county clerk of Madera county prior to the commencement of the action, it was not entitled to judgment.

Section 299, Civ. Code, requires every corporation to file in the office of the county clerk of any county in the state in which it holds any property, except the county where the original articles of incorporation are filed, "a copy of the copy of its articles of incorporation filed in the office of the secretary of state, duly certified by such secretary of state," and declares, as the penalty for failure to comply with this requirement, that "any corporation failing to comply with the provisions of this section shall not maintain or defend any action or proceeding in relation to such property, its rents, issues or profits, until such articles of incorporation, and such certified copy of its articles of incorporation, and such certified copy of the copy of its articles of incorporation, shall be filed at the places directed by the general law and this section." The last clause of this sentence shows that the previous clause is to be construed distributively, and that the documents therein named are to be filed at the places required therefor, respectively. As section 296, Id., requires the original articles of incorporation to be filed with the county clerk of the county in which the principal business of the company is to be transacted, and a certified copy of these articles with the secretary of state, and, as the principal place of business of the plaintiff herein is in the city and county of San Francisco, it is evident that the only document referred to in this portion of section 299, which is required to be filed with the county clerk of the county of Madera, is the copy of the copy of its articles of incorporation certified by the secretary of state.

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[1] Rehearing denied.

The failure to file this certified copy does not impose upon the corporation a loss or forfeiture of its property, or impair or deprive it of any cause of action or defense it may have in reference to such property. A previous filing of the certified copy is not a fact essential to the cause of action, or an element constituting the plaintiff's right of action; and the omission of such an averment in the complaint is not a ground of demurrer (Mining Co. v. Rosa, 80 Cal. 333, 22 Pac. 222), or for the reversal of a judgment (Labory v. Orphan Asylum, 97 Cal. 270, 32 Pac. 231), and consequently is not a jurisdictional element in the suit. Nor does such failure afford to the other party any defense to the cause of action upon which a suit has been commenced, but is merely a special defense, in the nature of a plea in abatement (Bank v. Tibbits, 80 Cal. 68, 22 Pac. 66), by which the right of the plaintiff to maintain the action is suspended "until" the statute is complied with, and is subject to the same rules of pleading as are other pleas in abatement. Being matter merely in abatement, it is a defense which may be waived by the defendant, and which is waived by him unless it is affirmatively pleaded.

Pleas in abatement, or dilatory pleas, have never been favored, and are to be strictly construed. Tooms v. Randall, 3 Cal. 438; Larco v. Clements, 36 Cal. 132. "The party pleading them relies on technical law to defeat the plaintiff's action, and is held to a technical exactness in his pleading." Thompson v. Lyon, 14 Cal. 39. Matter in abatement of the plaintiff's action must exist at the time of filing the plea. A plea of nonjoinder of a party plaintiff is unavailing, unless at the time it is made such party can be joined as a plaintiff. 1 Saund. 291a. A plea of a pending suit is ineffective unless the former suit is pending at the time the plea is filed. Pew v. Yoare, 12 Mich. 16. In Moore v. Hopkins, 83 Cal. 270, 23 Pac. 318, it was held that the effect of such a plea was obviated by the dismissal of the former suit at any time after the plea had been filed, and before the trial. A statutory defense which does not affect the cause of action, and which is limited by its terms "until" the removal of the grounds upon which it is authorized, is to be construed with the same strictness. The act of April 1, 1876 (St. 1875–76, p. 729), provided that a banking corporation should not maintain or prosecute any action until it had filed and published the statement therein required. In Bank v. Henderson, 101 Cal. 307, 35 Pac. 899, it was held that this provision did not deprive the plaintiff of its right of action, and that, as the defense was available only "until" the statute had been complied with, a repeal of the statute pending the action took away the defense, and that a judgment which had been rendered in disregard of such defense would not be reversed where the statute was repealed pending the appeal from such judgment. The defense which is authorized by section 299 does not confer any right upon the defendant, and is authorized for the purpose of enforcing a compliance by the plaintiff with a statutory requirement. It is limited by its terms "until" such compliance has been had, and, when its object has been effected, its terms prescribing a penalty should be strictly construed, and in favor of the corporation. At the commencement of this action the plaintiff had not filed the certified copy with the county clerk of Madera county, but it did file it with that officer several months before the defendant filed his amended answer, setting up this defense, so that at the time this defense was pleaded by the defendant the plaintiff had complied with the statute. The defense pleaded by the defendant was therefore unavailing to him to prevent the plaintiff from thereafter maintaining the action. Section 299 does not declare that the plaintiff shall not commence an action in any county unless it has filed a certified copy in the office of the county clerk, but merely declares that it shall not maintain an action until it has filed it. To maintain an action is not the same as to commence an action, but implies that the action has already been commenced. "The verb 'maintain,' in pleading, has a distinct, technical signification. It signifies to support what has already been brought into existence." Moon v. Durden, 2 Exch. 30. The expression in the opinion in Byers v. Bourret, 64 Cal. 73, to the effect that the provision of section 2468, Civ. Code, must be complied with before the commencement of the action, was not involved in the case then before the court. That section provides that an action cannot be maintained by the partnership until the publication of the certificate therein referred to has been made for four weeks, and it appeared at the trial of that case that the publication of the certificate had been commenced only one week prior thereto. If the completion of the publication had been essential to the commencement of the action, there would have been no occasion for any discussion respecting its publication subsequent to the commencement. The judgment is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

WHEELER v. DONNELL. (L. A. 91.)

(Supreme Court of California. Feb. 8, 1896.)

On petition for rehearing. Denied.
For prior report, see 43 Pac. 1.

PER CURIAM. The petition for a rehearing is denied. We desire to say, however, that the right of appeal of a defendant charged by accusation under section 772 of the Penal Code is not here involved. Therefore, whether or not the legislature, under the latter clause of section 18, art. 4, of the constitution, may confer the right of appeal upon a defendant in such proceeding, and whether or not it has conferred such right, are to be considered as open questions.

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5 Cal. Unrep. 256

JOHNSON v. THOMAS. (L. A. 63.)

(Supreme Court of California. Jan. 31, 1896.)

NEGLIGENCE—FAST DRIVING—VIOLATION OF CITY ORDINANCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

1. Plaintiff was run over at a street crossing by a wagon driven at great speed by defendant's servant. Plaintiff saw the wagon when it was about a block away, but, thinking that it would not be turned towards the side street where he was standing, because of the high speed, paid no further attention. *Held*, that the question of contributory negligence was properly left to the jury.

2. In an action for injuries due to fast driving, a city ordinance prohibiting fast driving is admissible to show negligence.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Peter Johnson against Albert Thomas for personal injuries due to negligence of defendant's servant. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

H. D. Cassidy, for appellant. Variel & Davis, for respondent.

SEARLS, C. This is an action by Peter Johnson to recover damages for personal injuries received by plaintiff by being knocked down and run over by a horse and wagon driven by a servant of defendant, upon a public street in the city of Los Angeles, California. Plaintiff had a verdict and judgment for $500, from which judgment, and from an order denying his motion for a new trial, defendant appeals. Appellant makes three points for reversal: (1) That the court below erred in denying defendant's motion for a nonsuit. (2) That the court erred in admitting in evidence, on the part of plaintiff, section 4 of Ordinance 202 of the city of Los Angeles. (3) That the verdict of the jury is not sustained by the evidence.

The evidence on the part of the plaintiff, among other things, tends to show that Macy street, in the city of Los Angeles, runs east and west, is, say, 57 feet wide, and is crossed at right angles by Alameda street, which is 96 feet wide, with a sidewalk on the west side thereof 12 feet wide, and two railroad tracks running longitudinally through it, at or near the center thereof. Macy street, going east thereon, has, at the point in question, a down grade of, say, 7¾ feet in a distance of 175 feet. Plaintiff is a cabinet maker and carpenter, and has a shop on the west side of Alameda street 150 feet south of its intersection with Macy street. On the 15th day of January, 1894, plaintiff started to go from Kerchkoff & Cuzner's mill, on Macy street, to his shop, on Alameda street. He had his apron full of blocks, brackets, etc., which he held with his right hand, and in his left hand he carried some larger articles of like character. His course took him west along the south side of Macy street, to and across Alameda street, thence south, on the west side of the latter street, to his shop. When crossing Alameda street, the horse and heavy spring wagon of defendant, driven rapidly by Albert Jennings, the servant of defendant, came east down Macy street, turned south into Alameda street, and struck plaintiff, who was upon the crossing, and within 8 to 10 feet of the sidewalk, on the west side of Alameda street, knocking him down, and two wheels of the wagon passing over him, whereby he was seriously injured, etc. Plaintiff first saw the horse and wagon of defendant a block away (175 feet) coming down Macy street, when he was near the center of Alameda street, and, as he testified, coming down Macy street "at terrific speed," and supposed from the rapidity with which the horse was being driven he would continue on straight down Macy street, and did not further observe the team or look for it until at or about the moment he was struck down. To the question asked plaintiff, on cross-examination, "Well, at the time when you saw him coming rapidly, didn't it excite your fear of danger at all?" He answered, "No, sir; it didn't. I supposed by the way he was coming that he was going on right down Macy street." Again, he said, in answer to what reason he had for thinking he would continue down Macy street, "He was going so fast. It is kind of a sharp turn there for a man down Macy; and, as I said, I paid no attention." There was other testimony tending to show that defendant's horse was driven down the grade at "about a four-minute gait," and that there were no obstructions to a clear view. There was also evidence tending to show that defendant's horse was restive and nervous; had been frightened by a passing freight train, and as a consequence was not fully under control of his driver when he came down Macy street, but that he was stopped within "ten or fifteen feet" after the accident. That the horse came down Macy street at a speed so great as to attract the attention and excite the interest, if not fears, of witnesses, is apparent from the testimony. Allen J. Cobb says: "I saw a wagon coming very rapidly down Macy street. I watched it to see which way it was going, as it was coming so fast I thought I might have to dodge." Plaintiff introduced in evidence section 4 of Ordinance No. 202, of the city of Los Angeles, which is as follows: "It shall be unlawful for any person to immoderately ride or drive any horse upon any public street of the city of Los Angeles, or to permit any horse or horses attached to any vehicle to gallop, run or race upon any public street of said city."

Upon the showing made by plaintiff, the motion for a nonsuit was properly denied. Treated as a question of contributory negligence on the part of plaintiff, which proximately led to the result, the evidence falls short of a case in which the court is authorized, as matter of law, to say the plaintiff was inhibited from a recovery. As a general proposition, cases of negligence (to which those of contributory negligence form no exception) present a mixed question of law and fact, in which it devolves upon the court to say, as matter of law, what is or amounts to negligence, and upon the jury to determine, as matter of fact, whether or not, in the particular case, the facts in proof warrant the imputation of negligence. Where, however, the facts are undisputed, and the inference of negligence is irresistible, and not open to doubt, debate, or rational difference of opinion, the question becomes one of law, to be passed upon by the court. Dufour v. Railroad Co., 67 Cal. 319, 7 Pac. 769; Long v. Railroad Co., 96 Cal. 269, 31 Pac. 170; Jamison v. Railroad Co., 55 Cal. 593; Van Praag v. Gale, 107 Cal. 438, 40 Pac. 555;

Davis v. Button, 78 Cal. 248, 18 Pac. 133, and 20 Pac. 545; Holmes v. Railroad Co., 97 Cal. 161, 31 Pac. 834; Wardlaw v. Railway Co. (Cal.) 42 Pac 1075. As was said in Van Praag v. Gale, 107 Cal. 438, 40 Pac. 555, "it by no means follows that the facts are admitted because there is no conflict in the testimony. * * * What the plaintiff did is established without dispute and beyond cavil; but whether from this conduct the deduction is inevitable that he did not exercise the precautions for his own safety which a reasonable man would have done under precisely the same circumstances is not so clear. That this is the ultimate fact to be determined must be conceded." When plaintiff saw the servant of defendant coming down the street, driving like "Jehu, the son of Nimshi," he reasoned that he would continue down Macy street, and not make the short turn at such a rate of speed onto Alameda street. This conclusion was very likely one warranted by observation in like cases, and the inference of negligence on the part of plaintiff in not further watching the team depended upon whether or not he was justified in this reasoning. It was certainly an inference upon which minds might well differ, and hence proper to be submitted to a jury, under proper instructions. There is nothing in the testimony to show that plaintiff could have reasonably escaped injury by any amount of care, after the horse and wagon turned upon Alameda street, and to hold that a foot passenger in crossing a side street must watch and plan to escape injury from vehicles upon a main street without some indication that the latter are about to leave such main street, and that a failure so to do is conclusive evidence of negligence, is to carry the doctrine of contributory negligence to a romantic and unwarranted length. The evidence of negligence on the part of defendant's servant was ample, and the motion for a nonsuit was properly denied.

2. The section of the city ordinance was properly admitted in evidence. "The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. Thus, the violation of a statute or ordinance regulating the speed of vehicles, horses, or trains * * * is such a breach of duty as may be made the foundation of an action by any person belonging to the class intended to be protected by such a regulation, provided he is specially injured thereby." Shear. & R. Neg. (4th Ed.) § 13, and cases there cited.

3. The evidence was sufficient to uphold the verdict. To discuss it at length can be productive of no good. Many of the incidents testified to by Jennings, the driver of the horse, were sharply contradicted, and in such a case the action of the jury thereon is conclusive. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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111 Cal. 106

SCHWARZ et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 251.)

(Supreme Court of California. Jan. 23, 1896.)

CONTEMPT—VIOLATION OF INJUNCTION—EFFECT OF APPEAL—SUPERSEDEAS—CERTIORARI—EXTENT OF REVIEW.

1. An appeal from an injunction ordering the removal of trade signs, and prohibiting the future use of the trade name thereon, stays proceedings as to the mandatory portion of the injunction, so that a failure to remove such signs could not, pending appeal, be punished as contempt.

2. Plaintiffs were ordered by the court to remove certain trade signs from their premises, and prohibited from using the trade name thereon, and, pending an appeal from the order, made no new use of the name, and removed it from their business stationery, but failed to remove the signs, claiming that they were the property of their lessor. *Held*, that the fact that they continued to do business on the premises was not a violation of prohibitory portion of the injunction, which could be punished as contempt pending the appeal.

3. On certiorari to review proceedings for contempt for violation of an injunction, the court is not limited to the record proper and the order of commitment in determining the power to make such order, but may look to evidence not in the record.

In bank. Certiorari by Gustave Schwarz and another to review an order of the superior court of the city and county of San Francisco adjudging petitioners guilty of contempt. Order annulled.

Morrison, Stratton & Foerster, for petitioners. J. J. Scrivner, for respondent.

VAN FLEET, J. This is a proceeding to review by certiorari an order or judgment of department 7 of said superior court (Hon. A. A. Sanderson, J.) convicting petitioners of contempt for the alleged violation of an injunction. The facts pertinent to the inquiry are briefly these: The petitioners are the defendants in an action pending in said superior court, brought by Rudolf Hagen and Felix Eisele, wherein it is alleged that the latter are conducting a saloon and restaurant business at No. 8 O'Farrell street, in the city of San Francisco, under the name and designation of "Louvre"; that they are the owners of said designation as a trade name by right of purchase from their predecessors in interest, by whom it was appropriated for the purpose; that the defendants (these petitioners) have established a like business at No. 1 O'Farrell street, in said city, and have without right adopted the words "Louvre" and "Old Louvre" as a business designation for their saloon and restaurant, and have had said words placed upon the gaslight lamps in front of the entrance, and upon large glass signs over the entrances to their place of business, and elsewhere about the premises, etc.; and it is prayed that they may be forever enjoined and restrained from using the said words in connection with or in any manner in or about their said restaurant and saloon, and that defendants be required to remove said signs and other objects upon which said name appears, etc. Pending the trial of the action, the superior court, on July 19, 1895, made an order in said action whereby petitioners, the defendants therein, were "enjoined and restrained from using said word 'Louvre,' or the words 'Old Louvre,' upon any sign or signs, lamps, transparencies, either engraved or painted or otherwise arranged thereon, in connection with or in any manner in or about defendants' restaurant and saloon at No. 1 O'Farrell street, in the city and county of San Francisco, state of California, or any other words or devices printed, painted, or stamped or written on such signs or street lamps in such manner as to be a colorable imitation of the trade name of plaintiffs; and that defendants be required to remove their said lamps and transparencies upon which is now in any manner placed or appears the word 'Louvre,' or the words 'Old Louvre,' or any colorable imitation thereof; and that the said defendants, and each of them, be further enjoined and prohibited from using the said words, or either of them, in connection with the said business at No. 1 O'Farrell street, in said city and county of San Francisco." From this order, petitioners, on August 1, 1895, duly perfected an appeal to this court. Thereafter, the petitioners, having been cited to show cause why they should not be punished for contempt in failing to comply with said injunction order, appeared, and objected that said court had no jurisdiction to hear or proceed in the matter, by reason of the appeal from said order, the taking and perfecting of which appeal were duly called to the attention of the court; but, notwithstanding said objection and the said appeal, the superior court proceeded with said hearing. Thereupon petitioners introduced affidavits showing that the premises No. 1 O'Farrell street, where petitioners carry on their business, were at the time, and for several years prior thereto had been, held under a lease from the owner of the building by the Pabst Brewing Company, a corporation, which latter, previous to the occupation by petitioners, had at its own cost fitted up and furnished said premises in a complete manner for the purposes of a restaurant and saloon, and had caused said premises to be designated by the name "Old Louvre," by having said designation placed upon the several signs complained of; that two of said signs, one over each of the two entrances to said premises, are of fancy stained glass of an expensive character and make, and another of said signs is painted upon the wall of the Phelan building, in which said premises are situated; that all of said signs were so placed by said corporation before petitioners occupied said premises, and are the personal property of said corporation; that in March, 1895, petitioners rented said premises, with the furniture and fixtures therein, from said Pabst Brewing Company, as subtenants, for the purpose of conducting a saloon and restaurant business therein, and have since been carrying on such business, and were so engaged when the injunction was served upon them; that, immediately after the service of said injunction, petitioners complied therewith, and have since continued to do so in all respects, excepting only that they have not removed or interfered with the said signs above adverted to, which, as aforesaid, do not belong to them; that upon their wine cards and bills of fare the words "Old Louvre" have been left off, and the word "Louvre" in no manner or connection appears thereon, but instead appears the designation "Schwarz & Beth's Restaurant and Family Resort"; and that neither said name of "Louvre" or that of "Old Louvre" has since existed or been used in connection with their said business upon any signs, street lamps, or transparencies, or otherwise, excepting only upon the said signs, belonging to said brewing company. At the conclusion of said hearing, on August 27, 1895, the court made an order finding that petitioners were continuing to "use the said word 'Louvre' and the said words 'Old Louvre' in connection with their said business," in violation of said injunction, and adjudged them guilty of contempt therefor, and it was ordered and adjudged that they be committed to the county jail "until they, and each of them, shall desist and refrain from carrying on or conducting their said business at said No. 1 O'Farrell street, under the trade name of 'Louvre' or 'Old Louvre,' or from in any manner using said names in connection with their said business, or from carrying on the business of restaurant and saloon at said No. 1 O'Farrell street, under the said name of 'Louvre' or 'Old Louvre,' in said city and county of San Francisco"; and it was adjudged that they be fined in the sum of $150, and that they pay the same with the costs of the proceedings to plaintiffs, and that plaintiffs have execution therefor.

It is conceded that the injunction, in so far as it requires petitioners to remove the signs bearing the name in controversy, is mandatory in character; and it is further conceded that, as to the mandatory features thereof, it is stayed and suspended in its effect by the appeal taken by petitioners from the order granting the same. The appeal, however, has no such effect upon that part of the injunction which is merely prohibitory, but that remains in force and unimpaired, notwithstanding the appeal; and the question therefore arises: What was the particular in which the petitioners failed to conform to the requirements of the injunction, and for which they were found guilty of contempt? Was it in failing to observe the prohibitory features of the writ, or in not doing the affirmative thing required thereby,—that is, the removal of said signs? If the latter, then the court had no power to punish petitioners for their failure, since, that part of the writ being in suspension, the court could not proceed to enforce it pending the appeal. Code Civ. Proc. § 949; Dewey v. Superior Court, 81 Cal. 64, 22 Pac. 333; Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156, 563. While the recitals of the judgment of contempt are general in terms, that the petitioners "have continued to and do now use" the prohibited name "in connection with their said business," it is quite manifest, we think, from the record, that the failure to remove the obnoxious signs was the fact upon which that finding is based, and that it was this fact which in the mind of the court constituted the failure of petitioners to comply with the injunction, and rendered them guilty of contempt. This is very apparent, not alone from the facts above recited, and which were wholly uncontradicted, but also by reference to the charge in the affidavit upon which the contempt proceedings were predicated. In substance, this affidavit is to the effect that, notwithstanding petitioners have been restrained from using the word "Louvre" or the words "Old Louvre" upon their signs, transparencies, etc., and are required to remove the same, they still continue, in violation of the injunction, to employ said designation. It is not charged specifically that the name is so being used in any other manner than upon said signs, and the affidavit can therefore be construed only as a charge that the name is being so used thereon, and not otherwise. The judgment follows the general language of the affidavit in this respect, and should receive no broader construction than the latter will bear. Contempt being a criminal proceeding, and the party being entitled to know with what he is charged, it will not be presumed that he was held guilty of some act not specifically alleged in the affidavit or fairly covered thereby. The offense being criminal in its nature, both the charge and the finding and judgment of the court thereon are to be strictly construed in favor of the accused. Batchelder v. Moore, 42 Cal. 412; Maxwell v. Rives, 11 Nev. 221; Phillips v. Welch, 12 Nev. 158 (Opinion of Beatty, J., 187).

The objection that we are not at liberty to go beyond the recitals or findings in the judgment itself, in reviewing the action of the court below, is no well taken. While the writ of review is not a writ of error, and is not a means by which, as upon appeal, the mere manner of conducting the proceedings, the rulings of the court upon questions of evidence, and other matters within the jurisdiction, involving the merits, however erroneous they may be, can be reviewed, it is, nevertheless, a means by which the power of the court in the premises can be inquired into; and for this purpose the review extends, not only to the whole of the record of the court below, but even to the evidence itself, where necessary to determine the jurisdictional fact. People v. Board of Delegates of San Francisco Fire Department, 14 Cal. 479; Lowe v. Alexander, 15 Cal. 301; Blair v. Hamilton, 32 Cal. 49; Bodine v. Goodwin, 5 N. Y. 568. In Blair v. Hamilton, supra, in reviewing by certiorari the order of the court below, it is said: "In many cases jurisdictional facts may not appear of record, either by failure of the inferior court or officer to follow the requirements of the law and make them of record, or because the law itself does not require it to be done. In such cases this court and all other courts having jurisdiction to review and correct the proceedings of inferior courts would be powerless unless it can compel the inferior tribunal to certify to this court not only what is technically denominated the 'record,' but such facts, or the evidence of them, as may be necessary to determine whatever questions as to the jurisdiction of the inferior tribunal may be involved; and the grossest abuses of power, to the great reproach of the law, might be perpetrated with impunity and without the possibility of a remedy."

But, while it is conceded that the removal of the signs cannot be compelled pending the appeal, it is contended that petitioners, in continuing business with the signs in place, were thereby using the said trade name in connection with their business, in contravention of the prohibitory features of the injunction, and that this constituted a contempt of the order of the court; that such use could have been avoided by either quitting their business or removing it to other premises, and, failing to do this, the petitioners were properly punished. But assuming that this would constitute such use as would, under the facts of this case, render it obnoxious to the injunction in any sense, to hold under such circumstances that petitioners could be punished therefor pending the appeal would simply be enabling that to be accomplished indirectly which could not be done directly, and to deprive petitioners entirely of the benefit of the stay afforded by their appeal. "The stay of proceedings pending an appeal has the legitimate effect of keeping them in the condition in which they were when the stay of proceedings was granted. It operates so as to prevent any future change in the condition of the parties." Mining Co. v. Fremont, 7 Cal. 130. To require petitioners to abandon their business or the premises would be working a very material, if not an irreparable, change in the condition of the parties, notwithstanding the effect of the appeal was to stay all affirmative action in the premises.

It results inevitably from these considerations that the record discloses a case where the court had no power to proceed and punish the petitioners as for a contempt, and its judgment in that respect must be annulled. It is so ordered.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; McFARLAND, J.; HENSHAW, J.; TEMPLE, J.

(111 Cal. 129)

CARLSON v. BURT. (L. A. 20.)[1]

(Supreme Court of California. Jan. 27, 1896.)

ELECTION CONTEST—RETURN DAY.

The "return day," within Code Civ. Proc. § 1115, providing that, when an elector contests the right of a person declared elected, he must within 40 days after the return day of such election file a statement, is not the day on which the result of the election is declared, but the day on which the canvass begins, under Pol. Code, §§ 1278, 1280, 1281, declaring that the board of supervisors shall meet on the first Monday after the election to canvass the returns; that, if they have not all been received, the canvass must be postponed from day to day, till all the returns have been received, or till six postponements have been had; and that the canvass shall be made by opening the returns and estimating the votes.

Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Proceeding by William H. Carlson against John P. Burt. Judgment for defendant. Plaintiff appeals. Affirmed.

William H. Fuller, for appellant. H. S. Utley and Charles Wellborn, for respondent.

TEMPLE, J. This is a contest for the office of assessor of the county of San Diego. The case was decided against the contestant on demurrer to the complaint. The court held that it had no jurisdiction, because the complaint (or "written statement," as it is termed) was not filed with the county clerk within 40 days after the return day of the election, as required by section 1115, Code Civ. Proc. The complaint shows that the election was held on Tuesday, November 6, 1894; "that the respective boards of election of the several precincts of said county, on or before Monday succeeding the said Tuesday, made their returns to the board of supervisors of said county of San Diego, of the votes cast at the said general election; and that upon said Monday said board of supervisors met, and, finding that all of the returns in the several precincts in which said election was held had been duly and properly received, they thereupon proceeded to canvass said returns." It is also averred that on the 19th day of November, 1894, the board caused to be entered in the record of said board a statement which purported to show the various matters required by section 1282 of the Political Code, and that thereupon the board declared John P. Burt elected county assessor of San Diego county. The complaint in this case was filed December 29, 1894. This was the fortieth day after the entry was made in the records of the board declaring Burt elected, and the forty-sixth day after the day on which it is averred that the board proceeded to canvass the votes. If the return day is the day upon which the result of the canvass is declared, then this contest was inaugurated in time. On the other hand, if the return day is the day upon which the returns being all in are produced before the board, which then proceeds to canvass them, the statement was filed too late, and the court properly refused to entertain the case.

Section 1115, Code Civ. Proc., provides that, "When an elector contests the right of any person declared elected to such office, he must, within forty days after the return day of such election, file with the county clerk a written statement," etc. The Codes do not in any other place speak of any return day, but several sections in the Political Code direct the precinct officers to transmit to the county clerk certain matters pertaining to the election. The papers to be transmitted must be in packages, and in section 1278, Pol. Code, are spoken of as returns. The board is directed to meet on the first Monday after the election to canvass the returns. If the returns have not all been received, the canvass must be postponed from day to day until all the returns have been received, or until six postponements have been had. The canvass shall be made by opening the returns and estimating the votes. Pol. Code, §§ 1278, 1280, 1281. The clerk of the board is required as soon as the result is declared to enter on the records a statement similar to that which the complaint shows the board caused to be entered on the 19th. Id. § 1282. In other sections the election returns are mentioned, so that there can be no doubt as to the meaning of the phrase "election returns." But what is the return day of an election? The phrase "return day" has been long a familiar phrase in legal practice. Blackstone says (book 3, p. 277) that they are called "days in banc"; that is, days of appearance in the court of common bench. They were stated days in the term on which writs were returnable. These were original writs by which suits were commenced. If the defendant did not then appear and submit to the jurisdiction, process was issued to compel him to do so. In analogy, the last day on which any process can be returned is called "return day"; or, in case of an order to show cause, the "day of the hearing." The statute fixes no precise day in which election returns must be made. They should be sent to the clerk at once. But it would seem that any return is timely which is received before the board commences the canvass. Naturally, then, the return day would be the first Monday after the election, with authority in the board to adjourn return day six times from day to day, if all returns have not been received.

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[1] Rehearing denied.

Appellant argues that this construction may deprive an elector of the right to contest altogether, as the board may not declare the result until 40 days after the canvass begins. Unquestionably, the argument is entitled to great weight; and, if any reasonable construction can be given to the law which would not result in nullifying the law as applied to a possible case, such construction should be given, rather than a construction which would have that effect. But this right to contest is not given to enable a candidate to vindicate his rights, but to any elector. Public policy requires that it should be inaugurated at once. If commenced within 40 days after the commencement of a canvass, it will be before the commencement of the term of the person declared elected. If delayed much longer, it will be after the commencement of the next term of office. To contest the right to an office in this mode is not a natural right, but one given by statute. The phrase "return day" refers to the election returns, and to some day fixed by reference to something done in regard to the returns. If it had been intended that the time should run from the day on which the person was declared elected, it was easy to say so, and the very language required was in the precise sentence in which the limitation was made. How natural it would have been to say that a contest as to the right of a person "declared elected" shall be commenced within 40 days after he has been so declared elected, instead of changing the expression, making it read "from the return day of the election." There is nothing in the expression used which naturally refers to the day on which the person whose right is contested was declared elected.

To the suggestion that the board may take more than 40 days to canvass the votes, it may be said that it may be possible, but it is quite improbable. If it should take much more than 40 days, the vote would not be canvassed until the term for which officers are to be elected will begin. Such a contingency was not anticipated, and can rarely happen, except through a criminal intent. The presumption is that in fixing the election at a certain period before the commencement of the terms of office, and in limiting the period for the commencement of a contest, the legislature has taken all these things into consideration, and has concluded that the period fixed will always prove sufficient, and I believe that in practice it always has.

It must be held, then, that the return day is the day on which the board actually commences the canvass, or, rather, the day on which, under the law, they ought to do so. It follows that the contest was commenced too late, and the judgment is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

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111 Cal. 189

In re TREADWELL et al. (No. 15,954.)

(Supreme Court of California. Jan. 30, 1896.)

APPEAL—ACQUIESCENCE IN JUDGMENT—DISMISSAL.

Where a guardian, pending an appeal by him from an order revoking his appointment, tenders his resignation, which is accepted, and his account settled, it is an acquiescence in the order appealed from, and the appeal will be, on motion of appellee, dismissed.

In bank. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Appeal in the matter of the estate and guardianship of one Treadwell and others. Heard on motion by appellant to recall remittitur on dismissal of appeal. Denied.

Jackson Hatch, E. M. Rosenthal, W. C. Burnett, and L. C. Burnett, for appellant. Myrick & Deering and C. D. Wright, for respondent.

HARRISON, J. When this cause was called for argument, in its order upon the calendar, August 19, 1895, there was no appearance on behalf of the appellant, and the counsel for the respondent then stated to the court that, since the appeal was taken, the oldest of the minors had attained majority; and he also presented a certified copy of an order settling the account of the appellant as guardian of the estate of said minor and discharging him from his trust, and also a certified copy of another order of said court discharging the appellant as guardian of the other minors, made upon his own application, both of said orders having been made subsequent to the taking of the appeal herein, and submitted the matter to the court for such order as should be proper. Thereupon the court made an order that, as it appeared that all matters involved in the appeal were disposed of, the appeal be dismissed. September 20th the remittitur upon this order was filed in the superior court, and on the 18th of October a notice on behalf of the appellant was given to the attorneys for the respondent of a motion to set aside the order dismissing the appeal, and to recall the remittitur, upon the ground that said order had been improvidently granted upon a false suggestion, and under a mistake as to the facts of the case. At the hearing thereon, the appellant based his motion upon the ground that no notice of a motion to dismiss the appeal had been previously served upon him, but made no showing of any false suggestion to the court or of any mistake as to the facts of the case. In support of the order, the respondent, in addition to the above-certified copies, presented a certified copy of a petition made by the appellant to the superior court subsequent to the taking by him of the appeal herein, in which the appellant stated that on the 13th of August, 1894, he resigned his trust as guardian of the minors, and that his resignation was duly and regularly accepted by the court. The order from which the appeal herein was taken was made July 31, 1894, and was an order revoking and annulling a previous order appointing the appellant guardian of the minors. The resignation by the appellant of his office as such guardian, subsequent to the order revoking his letters, and the acceptance of such resignation by the court, together with the settlement of his account, operated as an acquiescence by him in the previous order of the court annulling his letters, and precluded him from assigning any error in such order, and rendered the order dismissing the appeal proper. The motion is denied.

We concur: McFARLAND, J.; GAROUTTE, J.; VAN FLEET, J.; TEMPLE, J.; HENSHAW, J.

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111 Cal. 114

ROZECRANS MIN. CO. v. MOREY. (Sac. 12.)

(Supreme Court of California. Jan. 23, 1896.)

CORPORATIONS—DIRECTORS—DE JURE AND DE FACTO.

Under Civ. Code, § 305, providing that directors of a corporation must be stockholders, a person owning no stock in the corporation, elected a director without his knowledge, does not become a director, either de jure or de facto, so as to prevent his purchasing corporate property at a judicial sale, though a share of stock was, subsequently to his election, issued and delivered to him, which he retained; he never having acted as a director or been called upon to do so until 10 years after his election, when he repudiated his office.

Department 1. Appeal from superior court, Eldorado county; N. D. Arnot, Judge.

Action by the Rozecrans Mining Company against H. S. Morey. There was a judgment for defendant, and plaintiff appeals. Affirmed.

A. Everett Ball and Irwin & Irwin (Van R. Paterson, of counsel), for appellant. Williams & Witmer, for respondent.

GAROUTTE, J. This is an action in equity, involving the ownership of certain mining property. Plaintiff became financially embarrassed, and the property was sold under execution sales, and also sold for nonpayment of taxes. Deeds passed to Morey, the defendant, under these execution sales, and also under the delinquent tax sale. Plaintiff appeals from the judgment rendered against it, and also from the order denying its motion for a new trial.

There are many questions discussed by counsel in their respective briefs, but at the threshold of the case a single matter presents itself, which, upon consideration, we think necessarily points the judgment. The regularity of the proceedings leading up to the execution sales and the tax sale are not attacked, but it is insisted that Morey during all these times was a director and trustee of the corporation plaintiff, and, as such director and trustee, all his dealings with the property of plaintiff must be held to have been for its benefit, and that, by reason of his fiduciary relation, whatever title to plaintiff's property came to him is held as trustee for plaintiff. Of course, this principle of law is elementary, and must prevail here if the facts present those conditions. But we think they fail to do it, as may be readily seen from the following finding of fact made by the trial court. After hearing all the evidence the court found: "That on the 19th day of June, 1883, H. L. Robinson, owning the entire stock of the plaintiff, held a stockholders' meeting for the election of trustees. That said Robinson conducted the election, and cast a ballot for the election of five trustee, as follows: H. L. Robinson, 64,000 shares; A. Everett Ball, E. D. Sawyer, E. W. Scott and C. A. Darby, each 64,000 shares. That none of said parties owned any stock of plaintiff, except Robinson. That, immediately after the election aforesaid, a trustees' meeting was held, and Sawyer, Scott, and Darby resigned. That thereupon E. S. Chester, James Blair, and H. S. Morey were elected to fill the vacancies caused by the resignations of Sawyer, Scott, and Darby. That, at the time of said election, the said Morey was not a stockholder, had no interest in the corporation, had no knowledge of the meeting of the stockholders or trustees, or of his election, and in no manner consented to be elected or to act as trustee of plaintiff. That, on the 3d day of July, 1883, a certificate of one share of the stock of plaintiff was issued to said Morey. That said Morey did not know of the issuance of said share of stock, paid nothing for the same, nor did he authorize it to be issued to him. That at some time subsequent to the 3d day of July, 1883, and prior to the 23d day of February, 1886, said share of stock was delivered to said Morey by H. L. Robinson. That he (Morey) has had possession of said share of stock ever since. That said Morey, at the time of the delivery to him of said share of stock by said Robinson, learned that he had been elected a trustee of plaintiff. That said Morey at no time acted as a trustee of plaintiff; that he was not at any time consulted as trustee by any officer or agent of plaintiff; that he did no act or thing whatever as trustee of plaintiff; and when, for the first time, he was notified, in September, 1893, to attend a meeting of the trustees, he refused to act or to have anything to do with plaintiff or the other trustees at said meeting." Upon an examination of the evidence, we find this finding in all its material parts is fully supported; and such being the fact, the whole superstructure of plaintiff's case must fall, for the foundation upon which it was built has been absolutely undermined and taken away. We think such is the necessary and only construction to be placed upon this finding. It discloses that Morey was neither a director de jure nor de facto. Morey was not a director de jure, for he was not a stockholder of the corporation when elected. Section 305 of the Civil Code declares that the directors must be selected from the stockholders, and also declares that directors must be holders of stock in an amount fixed by the by-laws of the corporation. Conceding that the by-laws of the corporation plaintiff fixed no amount of stock to qualify a stockholder for election as a director, still, under the provision of the Code quoted, the director must be a stockholder. He must own stock in some amount, or his election is invalid. The fact that Robinson gave Morey one share of stock, weeks, and perhaps months, after the day of election, of which share of stock "Morey has had possession ever since," entirely fails to meet the case, and is wholly lacking in curing the invalidities existing in his election. Neither is Morey a director de facto. The rule of law for the protection of third parties as to the acts of de facto officers may well be doubted when applied between the corporation and its own illegally elected officers. It is said in State v. Curtis, 9 Nev. 339: "In order to protect third persons transacting business with such officers under such circumstances as to induce them to believe that they were dealing with legal officers, the law has reached out its strong arm to a dangerous extent, upon the principle that, although not officers de jure, they were officers in fact, whose acts public policy required should be considered valid. Such a principle ought not to be extended to a case where the rights of the public are not affected, nor where all the parties interested have knowledge that the person pretending to be an officer is not an officer de jure; for in such a case the reason of the rule no longer exists, and the law should not be invoked for protection." But, conceding this principle of law is a proper one to be here invoked, still there is nothing in this finding to indicate Morey to be a director de facto. Upon the contrary, the showing prevents the drawing of any such inference. He never did an act as a director. He never accepted the office. He was never consulted as a director by any officer of the corporation. He never held himself out as a director in any way, and, when notified of a meeting of the directors some 10 years after his alleged election, he repudiated his office. It is not necessary to cite authorities as to who are and who are not officers de facto, for we apprehend that no legal precedent may be found which would justify us in holding Morey a de facto director, as tested by the facts of this case. We conclude that defendant Morey was neither a de jure nor a de facto director and trustee of the plaintiff corporation at the times set out in its complaint, and for such reason plaintiff fails to prove a cause of action. We find no error in the record authorizing a reversal of the judgment and a new trial of the case. For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

111 Cal. 122

CALIFORNIA TITLE INSURANCE & TRUST CO. v. PAULY. (L. A. 66.)

(Supreme Court of California. Jan. 25, 1896.)

MORTGAGES — DESCRIPTION OF PROPERTY — PAROL EVIDENCE—APPURTENANCES.

1. Findings that a street-railroad company, after executing a mortgage, acquired pavilion grounds "for use on or about its said lines of railway"; that they were "adapted to" such use, and were operated and held by the company in connection with its railroad, and for use in and about it,—bring such grounds within the description of the mortgage: "Its real * * * property * * * that it may hereafter acquire for use, or adapted to use, on or about its said lines of railway."

2. A court having made findings bringing pavilion grounds acquired by a street railway, after making a mortgage, within the description thereof: "Its real * * * property * * * that it may hereafter acquire for use, or adapted to use, on or about its said lines of railway,"—the word "appurtenances," in its further finding that "such pavilion grounds, with said accessories, are an important and necessary part of the appurtenances and equipment of said railroad," will be construed as one that the grounds and improvements thereon, as used in connection with the railroad, are needful aids to the business of the road, in that they add to its income.

3. To bring pavilion grounds within the description of a street railway company's mortgage of real property, that it might afterwards acquire "for use or adapted to use, on or about its said lines of railway," parol evidence is admissible that the purchase of the grounds was contemplated by the road at the time of the mortgage, that one of the termini of its road was therein, and that the sole object of the purchase thereof was to increase travel on the road.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the California Title Insurance & Trust Company against Charles W. Pauly, assignee of the San Diego Cable-Railway Company, an insolvent debtor. Judgment for plaintiff. Defendant appeals. Affirmed.

James E. Wadham and Frederick W. Stearns, for appellant. Dorn & Dorn and E. W. Britt, for respondent. T. J. Bergin, Works & Works, E. Parker, A. E. Cochran, Luce & McDonald, and Gibson & Titus, for various interveners.

VANCLIEF, C. Action to foreclose a mortgage executed by the San Diego Cable-Railway Company, a corporation, to the plaintiff, in trust, to secure the payment of a series of bonds executed by the mortgagor. Before the commencement of the action, the said railway company had been adjudged an insolvent debtor, pursuant to the insolvent act of 1880, and all its estate, real and personal, had been duly assigned to the defendant, Pauly, who was the duly elected and qualified assignee of the estate of said insolvent debtor. The plaintiff prevailed in the lower court; and the defendant, Pauly, appeals from the judgment of foreclosure, and from an order denying his motion for a new trial. The appellant contends that the court erred in finding that a certain piece of land, known as the "Pavilion

Grounds," was embraced in the description of the mortgaged property, and in ordering a sale of those grounds as a part of the property mortgaged; and this is the principal point in controversy on this appeal. Subsidiary to this, however, a question is raised as to whether the court erred in admitting certain parol evidence, for the purpose of applying the description contained in the mortgage to the pavilion grounds.

The description of the mortgaged property in the mortgage is as follows: "All and singular the franchises and lines of railway, and appurtenances thereof, of the said San Diego Cable-Railway Company, which lines of railway commence at the corner of Sixth street and L street, in said city of San Diego, and thence extend along said Sixth street to C street, on C street to Fourth street, on Fourth street to Newhall avenue, and thence on Newhall avenue and connecting streets eastward to terminus at University Heights, in said city of San Diego,—a distance, including curves and switches, of five miles; and all the concrete subway, cables, cars, dummies, and other rolling stock, equipment, machinery, power houses, fares, rents, income, and other property of the said San Diego Cable-Railway Company, appurtenant to its lines of railway above described; and its real, personal, and mixed property, franchises, rights of way, privileges, interests, and appurtenances, of every kind and nature, that it now owns, or that it may hereafter acquire, for use, or adapted to use, on or about its said lines of railway; also the following described parcel and tract of land, situated in the city of San Diego, county of San Diego, state of California, to wit: Block three hundred and fifty-eight (358) of Horton's addition to said city of San Diego, according to the official map of said addition by Lockling, on file in the office of the recorder of said county; the same being the block of land containing the power house of the said cable-railway company, together with the appurtenances."

1. Appellant contends that "the only ground on which the court holds the pavilion grounds to be included in the mortgage is that said grounds are an appurtenance of the line of railway," and insists that whether or not those grounds are appurtenant to the railway is the only material question involved; and then proceeds to controvert the proposition that they are so, on the ground that land cannot be appurtenant to land, etc. But I think counsel mistaken as to the ground on which the court held the pavilion grounds to be included in the mortgage. The court found, as alleged in the complaint, that the pavilion grounds were acquired by the railway company after the execution of the mortgage, "for use on or about its said lines of railway," and that said grounds are "adapted to" such use, and were "operated and held by said cable-railway company * * * in connection with said railroad, and for use in and about such railroad." These findings brought the pavilion grounds clearly within the description in the mortgage as a part of "its real * * * property * * * that it may hereafter acquire for use, or adapted to use, on or about its said lines of railway," though not appurtenant to the railway in the technical legal sense of the word; and therefore it is wholly immaterial whether the pavilion grounds were appurtenances or not, in any sense of the word. The only ground upon which it is insisted that the court found the pavilion grounds to be appurtenant to the railway is that, after finding facts which bring those grounds within the mortgage description, and show that they could not be appurtenant to the railway in the legal sense of the word, the court added the following: "And that such pavilion grounds, with said accessories, are an important and necessary part of the appurtenances and equipment of said railroad." But it is quite apparent that the word "appurtenance" was not here used in its technical legal sense. Read in connection with its context, the legal technical meaning of the word cannot be attributed to it without making the finding inconsistent with other material findings to the effect that the pavilion grounds consist of about five acres of land which, by no legal possibility, could be appurtenant to the railway in the technical law sense of the word. Under these circumstances, the finding should be so construed, if possible, without doing violence to the language expressing it, as to make it consistent with all other material findings (Schultz v. McLean, 93 Cal. 329, 28 Pac. 1053; Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742; Kimball v. Lohmas, 31 Cal. 154); and that the word "appurtenance" may properly be used in a sense broader than its technical legal meaning,—as, for example, in the sense of the word "addition,"—has been judicially recognized. In Frey v. Drahos, 6 Neb. 10, Lake, C. J., speaking of the word "appurtenances," said: "It is, however, doubtless true that the word is frequently used in a more enlarged and comprehensive sense [than its technical legal sense], and when it can be gathered, from all the attendant circumstances, that it was so understood and used by the parties, a corresponding effect should be given to it in the interpretation of a contract." See, also, Harris v. Elliott, 10 Pet. 25, 54, and Cent. Dict., where the law meaning is distinguished from other senses in which the word may be used. I think the obvious meaning of the finding in question, read in connection with the other findings above stated, is that the pavilion land, and the improvements thereon, as used in connection with the railway, are important and necessary additions or appendages thereto; which meaning does not imply that they are appurtenances of the railway in the technical sense of the word, nor even that they are indispensable to the use of the railway for the purposes of transportation, but only that they are needful aids to the business, in that they increase the profits or

diminish the losses of the business. If, as claimed by counsel for appellant, the finding, as they construe it, is not justified by the evidence, this is an additional reason for adopting a different construction which is justified by the evidence, provided the language of the finding is susceptible of such different construction. My conclusions on this point are (1) that the judgment is supported by those unchallenged findings which bring the pavilion land within the description in the mortgage, as real estate acquired after the execution of the mortgage, and appurtenant to nothing; and (2) that the above-discussed finding relied upon by appellant is not inconsistent with those. It is not questioned that a mortgage may be given on property to be acquired by the mortgagor after the execution of the mortgage. As a case in point, see Omaha & St. L. Ry. Co. v. Wabash, St. L. & P. Ry. Co., 108 Mo. 298, 18 S. W. 1101. See, also, Jones, Mortg. §§ 152–157. It should also be noted here that it is not claimed by counsel for appellant, either in their brief or statement on motion for a new trial, that the findings of the court are not self-consistent. They have wholly ignored or overlooked those findings which identify the pavilion grounds as the after-acquired real estate described in the mortgage.

2. Counsel for appellant say: "The court erred in admitting parol evidence showing the general course and termini of the cable road, the location of the pavilion grounds, and the amount of travel induced by reason of the pleasure resort maintained thereon." In this connection, it was proved by undisputed parol evidence that the purchase of the pavilion grounds was contemplated by the railway company before, and at the time, the mortgage was executed; that one of the termini of the road was within those grounds; that the sole object of the purchase was to increase travel upon the road; that the grounds were used in connection with the road for that purpose only; that they were adapted to such use, and did increase the traffic on the road about 100 per cent.; that the grounds were improved at the expense of the railway company, and were opened to the public as a pleasure resort at the same time the road was finished and opened for travel, no distinct charge being made for admission of the public to those grounds; that the railway company furnished music, a dance hall, and other conveniences for visitors and picnic parties, on Sundays and holidays, at an expense of $200 to $300 per month; and that the grounds thus used by the railway company were worth three to four times as much as they would be for any other purpose. The purpose for which such evidence was introduced, and which it served, was to prove that the pavilion grounds were acquired by the railway company for use, and adapted to use, "on or about its said lines of railway;" and thus to identify them as being after-acquired real estate described in the mortgage, or, as may be otherwise expressed, to apply to those grounds the description contained in the mortgage, though the description of itself is unambiguous and sufficiently certain. That parol evidence is competent for this purpose does not admit of a doubt. Greenl. Ev. § 287; Hancock v. Watson, 18 Cal. 137; Began v. O'Reilly, 32 Cal. 11; Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386; Towle v. Coal Co., 99 Cal. 397, 33 Pac. 1126.

3. In their reply brief, for the first time, counsel for appellant contend that there is no allegation in the complaint to support the finding that the pavilion grounds were mortgaged otherwise than as appurtenances to the railway. It is alleged in the complaint, after exhibiting the mortgage, that "by said mortgage the railway company did mortgage to plaintiff * * * all its real, personal, and mixed property * * * that it then, on said 1st day of April, 1890, owned, or might thereafter acquire, for use, or adapted to use, on or about said line of railway. * * * That since said 1st day of April, 1890, to wit, on or about November 18, 1891, the said railway company * * * became the owner, and thereafter, until its assignment in insolvency, was the owner in fee, and in possession of," lots and blocks (particularly describing them) "known as the 'Pavilion Grounds.'" Then, after alleging the use of said grounds by the railway company, as above stated, "in and about said railroad," proceeds to allege that said pavilion grounds "were, as plaintiff is informed and believes, and therefore alleges, intended to be, and by said indenture were, mortgaged to this plaintiff to secure payment of said bonds." I think these allegations afford a sufficient answer to the contention that the judgment as to the pavilion grounds is not supported by the complaint. I think the judgment and order should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(5 Cal. Unrep. 254)

SMITH et al. v. SABIN. (No. 16,014.)[1]

(Supreme Court of California. Jan. 30, 1896.)

APPEAL—REVIEW.

Where there is a conflict in the evidence, the finding of the trial court will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by William F. Smith and others against John I. Sabin. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

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[1] Rehearing denied.

A. Heynemann, for appellants. Stanley, Hayes, McEnerney & Bradley, for respondent.

BELCHER, C. The plaintiffs were architects, doing business as partners under the firm name of Smith & Freeman. They brought this action in July, 1893, to recover the balance alleged to be due them for services performed at the request of the defendant, in 1891, in drawing plans and specifications, and procuring bids thereon, for a hotel, to be called "Hotel Edison," and to be situated at the corner of Sutter and Hyde streets, in the city of San Francisco, but which was never constructed. It is alleged that the hotel was to cost about the sum of $134,000, and that the reasonable value of plaintiffs' services was $3,350, of which sum $1,000 had been paid, leaving still due $2,350, for which judgment was asked. The answer of defendant denied that the proposed hotel was to cost about the sum of $134,000, and alleged that the plans and specifications prepared by plaintiffs were made under the express agreement that they should not require the expenditure of, and the hotel should not cost, any greater sum that $100,000; that all of the services performed by plaintiffs were performed under that special contract, and that the plans and specifications made and furnished by plaintiffs required the expenditure of $134,775, and that no other plans or specifications had ever been prepared by plaintiffs for defendant for the erection of said or any hotel. The case was tried by the court without a jury, and the findings were that the Hotel Edison was not to cost about the sum of $134,000, but, on the contrary, before the performance of any services by plaintiffs for defendant, it was understood and agreed between them that the plans and specifications to be prepared should not require the expenditure of more than about $100,000; that the plans and specifications made by plaintiffs were made under the express agreement that the hotel should not, under said plans and specifications, cost any greater sum than about $100,000; that the only plans and specifications made and furnished by plaintiffs required the expenditure by defendant of the sum of $134,775; that while the plaintiffs were engaged in drawing said plans and specifications, and while their contract to draw the same was unfinished and unperformed, the defendant, at the request of the plaintiffs, paid on account thereof the sum of $1,000; and that upon the trial of this case the return of said sum of $1,000 was waived by defendant; and, as a conclusion of law, it was found that the defendant was entitled to judgment against the plaintiffs for his costs. Judgment was accordingly entered that the plaintiffs take nothing by the action, from which, and from an order denying their motion for a new trial, they have appealed.

In support of the appeal it is earnestly urged—and this is the only point made—that the findings were not justified by the evidence, and hence that the judgment should be reversed. This position cannot be sustained. After carefully going over the record, we are satisfied that there was evidence tending to support the theory of the defense, and to justify the findings. This being so, the case comes within the well-settled rule of this court that where there is a conflict of evidence the findings of the trial court will not be disturbed on appeal. It would subserve no useful purpose to detail the evidence introduced by the respective parties, and it is therefore passed without more particular notice. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(111 Cal. 159)

POPE v. J. K. ARMSBY CO. (Sac. 81.)[1]

(Supreme Court of California. Jan. 30, 1896.)

PRINCIPAL AND AGENT—RATIFICATION OF AGENT'S CONTRACT.

Plaintiff wrote defendant that he had a contract for the sale of fruit, signed in defendant's name, "By W., Agent," and wanted to know if W. was in fact defendant's agent, and if the contract was correct. Defendant's manager replied that W. had bought some apricots "on our advice, but we are not aware he bought them in our name. We will handle them, however, and think there is no question on the money part of the transaction," adding that the writer would be in plaintiff's neighborhood shortly, and would arrange the matter. A few days later, and before plaintiff shipped the fruit to defendant, the manager visited plaintiff's locality, but made no effort to see him. *Held*, that defendant was estopped from repudiating the contract.

Department 1. Appeal from superior court, Colusa county; E. A. Bridgeford, Judge.

Action by J. H. Pope against J. K. Armsby Company to recover money due on a contract. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Daniel Titus, for appellant. H. M. Alberry, for respondent.

VAN FLEET, J. Action to recover a balance due upon a contract for the purchase of fruit, alleged to have been made by defendant with the plaintiff. Plaintiff had judgment, and the defendant appeals therefrom, and from an order denying a new trial. The only question involved is whether the evidence sustains the finding that defendant made the contract sued upon; and this question depends upon whether one F. W. Willis, who made the contract with plaintiff, in the name of defendant, was the agent of the latter for the purpose. Whether the evidence is sufficient to establish precedent authority in Willis, either express or implied, to make the contract in question, is one sharply mooted; the defendant claiming that it is not, and the plaintiff, with apparently equal confidence, contending that it is, ample. In the view we take of the case, however, it is unnecessary to state or discuss the evidence or the divergent views of counsel upon that phase of the controversy, since, in our judgment, the record very clearly discloses a subsequent ratification of the contract by defendant. Defendant's place of business is in the city of San Francisco, where it deals in dried fruits and other commodities. The contract with plaintiff was made on May 19, 1894, at the home of the latter, in the county of Colusa. It was made by Willis, who represented himself to plaintiff as the agent of defendant for the purchase of the fruit, and was in writing, and was signed, "J. K. Armsby Company. By Frank W. Willis, Agent." Subsequently, on May 25, 1894, and before the delivery of any fruit under the contract, plaintiff wrote to defendant this letter: "Colusa, Cal., May 25, 1894. J. K. Armsby Co., San Francisco—Gentlemen: I have sold my green fruit to you, and have a contract signed to that effect, signed 'J. K. Armsby Company,' by Frank Willis, as agent. Now, what I want to know, is F. W. Willis your agent for buying green fruit, and is the contract correct? Your immediate answer and oblige, Yours truly, J. H. Pope." In response, defendant, through its general manager, Mr. Freeman, on May 26, 1894, wrote: "San Francisco May 26, 1894. John H. Pope, Esq., Colusa, Cal.—Dear Sirs: We have yours of the 25th. Mr. Willis bought some apricots on our advice, but we are not aware he bought them in our name. We will handle them, however, and think there is no question on the money part of the transaction. The writer expects to visit your section within the next week or two, and will arrange the matter satisfactorily with you then. Yours truly, J. K. Armsby Co. Freeman." It is at once apparent that this letter from the defendant is not entirely open and ingenuous. It does not answer the question put by plaintiff, whether Willis was its agent in the premises, in a categorical manner, by saying, in terms, that he was or was not such agent. But the language used, and the assurances therein conveyed, authorize, we think, but one inference, and that the one put upon it by plaintiff, that the contract was all right, and defendant would see it carried out. If this is not what the defendant intended plaintiff to understand, it was exceedingly unfortunate in the choice of language to express its meaning. If defendant intended to repudiate the transaction, it was its duty to do so explicitly, and in such terms as to leave no room for plaintiff to be misled by drawing an inference which defendant did not intend to convey. It was not essential that the ratification should be in express terms, in order to bind the principal. If it is fairly inferable from the words or conduct of the party, it is sufficient. Like the act of conferring antecedent authority upon an agent, it may be either express or implied. Ralphs v. Hensler, 97 Cal. 296, 32 Pac. 243; Lumber Co. v. Krug, 89 Cal. 237, 26 Pac. 902. It is said that defendant's letter was not a ratification, because it was not written with a perfect knowledge of the transaction; that the terms of the contract were not stated in plaintiff's letter, and they were not known to defendant when its letter was written. In the first place, there was evidence tending to show that Willis, who was admittedly representing defendant in a certain capacity, talked with the manager of defendant over the telephone and told him about the transaction with plaintiff, the same evening the contract was made. But, in the next place, defendant was positively and plainly informed by plaintiff's letter that he had a written contract signed in its name; and it was clearly the duty of defendant, if it did not know the terms or purport of the contract, to inform itself thereof before writing as it did, if it did not wish to be bound thereby. It would have been a very easy thing to have asked plaintiff to send it a copy of the contract, before replying to his inquiry; and not to have taken this simple precaution was negligence on its part, and precludes it from denying the effect of its assurances to plaintiff, which induced the latter to proceed and deliver his fruit under what he had a right to suppose was a valid contract. Scott v. Jackson, 89 Cal. 262, 26 Pac. 898. The general rule is that "where a person by word or conduct induces another to act on a belief in the existence of a certain state of facts, he will be estopped, as against him, to allege a different state of facts." 7 Am. & Eng. Enc. Law, 19. Mr. Bigelow defines estoppel in pais to be "a right arising from acts, admissions, or conduct which have induced a change of position, in accordance with the real or apparent intention of the party against whom they are alleged." Bigelow, Estop. (4th Ed.) 445. Defendant did not excuse himself from further inquiry by merely asking its representative, Mr Willis, if he had made such a contract in its name, and getting his assurance that he had not. It knew that Willis was operating in plaintiff's neighborhood in buying fruit, in which he was to a certain extent representing the defendant; and being explicitly informed that he had made the contract with plaintiff in its name, it was charged with further inquiry of the plaintiff to ascertain the fact. This it had perfect and convenient opportunity to do, through its manager, Mr. Freeman, who was in Colusa only three or four days after the receipt of plaintiff's letter, and before plaintiff had acted under the contract. But Mr. Freeman made no effort to see plaintiff, notwithstanding the statement in his letter to plaintiff that he would do so; and the result was that plaintiff was left to indulge the inference that everything was all right, and he could count upon the contract being carried out. Under these circumstances we think the defendant clearly estopped from denying the contract. The judgment and order are affirmed.

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[1] Rehearing denied.

We concur: GAROUTTE, J.; HARRISON, J.

(111 Cal. 191)

COOPER v. WILDER. (No. 19,566.)

(Supreme Court of California. Jan. 30, 1896.)

PUBLIC LANDS—TIMBER-CULTURE CLAIM—INTEREST OF APPLICANT—DEVISABILITY—RIGHTS OF HEIRS.

1. Testator entered lands as a timber-culture claim, and before performance of all conditions precedent to obtaining title, died, leaving his wife sole beneficiary of his will. Plaintiff was excluded from its provisions, but would have taken as an heir by descent. The property was distributed to the widow, who mortgaged it to defendant, to whom it passed in fee under foreclosure. Subsequently a patent was issued by the United States, conveying the land in terms to the heirs of decedent. *Held*, that the claimant's interest was not devisable, and his heirs took as donees of the United States, and not by inheritance from the claimant.

2. A timber-culture claimant died before obtaining title, and the patent was issued in terms to his heirs. *Held* that, since the United States has no general law of succession, who are the heirs must be determined by the law of the state in which the land is situated.

3. Such heirs took equally, and not according to the laws of descent of the state where the land was situated.

In bank. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Suit by Chas. Edward Cooper, an infant, by his guardian ad litem, against H. G. Wilder, to quiet title to lands. From a judgment in favor of defendant, and an order denying a new trial, plaintiff appeals. Reversed.

W. H. C. Ecker and Haines & Ward, for appellant. James E. Wadham and F. W. Stearns, for respondent.

TEMPLE, J. Action to quiet title to 40 acres of land in San Diego county. The land was entered as a timber-culture claim, in November, 1879, by David Cooper, plaintiff's father. David Cooper died testate in July, 1881, leaving his widow sole beneficiary of his will, and expressly excluding plaintiff from any share of his estate. The property was duly distributed to the widow. In 1892 a patent was issued by the United States, conveying the land in terms to the heirs of David Cooper, deceased. In 1891, before the issuance of the patent, the widow, who was sole devisee of David Cooper, and the sole distributee of the estate, mortgaged the land to defendant, who subsequently foreclosed, and purchased the property at the foreclosure sale, and in due time received a deed therefor. Defendant at the trial proved his deraignment of title from the widow of David Cooper, deceased. The question is, in whom did the title vest? Appellant claims it as heir; the defendant, that it passed, by the will and the decree of distribution, to the widow of David Cooper, or, if it did not vest under the will and decree, then the widow and the son of David Cooper took equally.

The applicant for the government bounty is required to subscribe an oath to the effect that he makes the filing for the purpose of cultivating timber for his own exclusive benefit, and not for the purpose of speculation, and that he intends to hold and cultivate the land. He is required to break or plow five acres the first year; five acres the second year, and to cultivate the five acres broken or plowed the first year; the third year, to cultivate the five acres plowed the second year and to plant, in timber, seeds, or cuttings, the five acres first plowed, and to cultivate the remaining five acres; and the fourth year, to plant, in timber, seeds, or cuttings, the remaining five acres. To get his certificate he must prove, or, if he is dead, his heirs or legal representatives must prove, that he or they have planted, and for not less than eight years cultivated, that quantity and character of trees, and that there are then growing at least 675 thrifty trees per acre. A failure at any time to perform the conditions works a forfeiture. The property could not be taken in satisfaction of any debt contracted prior to the issuance of the final certificate, which could not be had until full proof of performance, as above stated, was made. Obviously, the privilege or right acquired by the entry and filing is personal, and cannot be transferred except as authorized in the act. The death of the applicant before performance renders him incapable of performance, and that event would end the claim but for the provisions of the act which authorize the heirs to prove that he or they has or have performed. Does the heir in such case take by inheritance from the applicant, or is he, by appointment in the act itself, a substituted beneficiary of the government, to whom the title goes by direct grant? It is admitted, at once, that the condition of the applicant prior to full performance is in no wise analogous to that of a pre-emptor, either before or after the pre-emptor has received his certificate of purchase. The applicant has a right in the land, of which the government cannot deprive him, but which will be lost if he fails to perform; and death, before performance, renders such failure certain, and ends the estate of the applicant. In view, however, of the hardship of such a result, the law continues its offer to certain persons whom it is presumed the applicant himself might have selected; but they take, not by inheritance from the deceased, but as grantees from the government. No case is cited under the timber-culture act, but cases have arisen under other acts of congress which are in all essential respects similar to the act in question. The Oregon donation act (9 Stat. 496) granted to qualified settlers on public land, who had occupied and cultivated the same for four years, and performed certain acts in regard to making application for the land, proving up, etc., 320 acres of land. The opening words of that act were, "That there shall be, and hereby is granted," and it was provided, in case of death before the expiration of the four years' possession required, "All the rights of the deceased under this act shall descend to the heirs-at-law of such settler." In 1852 one Loring, who had all the qualifications necessary to enable him to take and hold under the act, entered upon 320 acres of land in Oregon, with the intent to acquire the title under the act. He died within one year after his entry upon the land, having by his will devised all his estate. Whether the land or his right was devisable arose in Hall v. Russell, 101 U. S. 503. Chief Justice Waite, speaking for the court, said the question was whether "the heirs took by descent from the settler or as donees of the United States. If by descent, it is conceded the settler had a devisable estate; if as donees, he had not." It was held that by entering under the act the settler acquired at once a present right to occupy and maintain possession so as to acquire a complete title to the soil, but got no title until he had completed his four years' continued residence and cultivation. His rights were, however, statutory, and must be ascertained by the language of the act. It is said: "The object of congress undoubtedly was to allow a settler's heirs to succeed to his possessions, and thus keep his rights alive. But for some such provision, all the rights of the settler would have been lost by his death. As the law required full four years' residence by the person who claimed the grant, if no provision had been made for a continuance of his possession, the land would have become vacant on his death, and open for a new settlement by a new settler, if the law authorizing new settlements still remained in force. Hence it was provided that the possessory rights of a deceased settler should go to his heirs, and that they might get the land, on making requisite proof, without further residence and cultivation of their own. Their title to the land was to come, not from their deceased ancestors, but from the United States." Every word of this is as applicable to the timber-culture act as to the Oregon donation act, so far as concerns the question under consideration. Here, as there, a series of acts were to be performed, running through a number of years before the applicant was entitled to a patent, and a failure at any point during that time defeated the claim, and left the land open to another. In each case, the death of the applicant rendered performance impossible, and the right would have entirely lapsed but for a provision giving the heirs of the applicant the privilege of procuring the title which would have gone to the deceased. Hall v. Russell has been followed many times. The cases are reviewed in Hershberger v. Blewett, 55 Fed. 170.

Respondent contends that the position of a claimant under the timber-culture act is like that of a homestead claimant before full performance, and he thinks in such case a homestead claimant has a devisable interest. This is, I think, a mistake. The homestead act is, if possible, less doubtful than any of the others; for it is expressly provided that the right to complete performance and receive the patent shall go to the widow, if there be one; if there be none, to the devisee of the deceased, or to his heirs. Obviously, the right is not devisable in any just sense. If there be a widow, the right goes to her; if none, the settler may appoint the grantee. It was so held by the secretary of the interior in Dorame v. Towers, 1 Copp's Pub. Land Laws, 438, which is cited by respondent as an authority to the contrary. Towers was in possession of the land before he made his entry, but died within two weeks after the entry. Contest was inaugurated six months afterwards by Dorame, who sought to establish an abandonment, as the heirs did not reside on the land. The secretary said: "The death of the party casts whatever of title or estate the statute has created, directly, by operation of law, upon the first, the widow; second, the heirs or devisees. And, the substitution being effected, the requirement of proof of residence or cultivation attaches to the person or persons succeeding to the right, title, or estate." He further says that by the laws of California the executor was entitled to possession during administration, and that the right of the heirs to possession is subject to this administration, and therefore "the time allowed by the court for the settlement of the estate must either be counted for the heir or devisee, in making final proof, or excluded, in his favor, from the period required by the statute, and further time allowed him, on the ground that, the land being in the custody of the law, the time does not run against the party who is required to perform the acts of residence or occupation upon it." We must hold, therefore, that the land was not devisable, and is not affected by the decree of distribution in the estate of David Cooper, deceased. The grant is to the heirs of David Cooper, but they do not take by inheritance. The heirs will therefore take equally, regardless of the proportions in which they would have taken under the law of succession of the state. The United States has no general law of succession. The heirs must, therefore, be found by the law of the state or territory in which the land is situated. By the law of this state, the widow is an heir of the husband. The plaintiff and the widow would therefore take equally. It would follow that the one-half interest which vested in the widow was subject to defendant's mortgage. A new trial will be necessary, because the findings would not support the judgment as it would be modified by this opinion, and they are against law. The judgment is reversed, and a new trial ordered.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.

(111 Cal. 171)

PEOPLE v. SHAW. (Cr. 38.)

(Supreme Court of California. Jan. 30, 1896.)

HOMICIDE—EVIDENCE—IMPEACHMENT OF WITNESS.

1. Where an objection to a question is erroneously sustained, and it appears that, notwithstanding the ruling, witness immediately went on, without further objection, and answered the question, the ruling is without prejudice.

2. On a trial for murder, a witness was asked "Did [accused] ever take a meal at your house before?" An objection to the question was sustained. The question was an isolated one, and there was no intimation that the purpose was to show that witness and accused were not intimate acquaintances. *Held* that, in absence of such showing, the ruling was not erroneous.

3. The wife of accused was asked, on cross-examination, "What have you done with the pistol with which your husband killed M.?" The fact of the killing was admitted. *Held*, that the question was without prejudice.

4. The exclusion of evidence that accused was dissuaded from giving himself up to the officers was without prejudice, there being no evidence that accused attempted flight.

5. A witness for the prosecution, near whose house the shooting took place, testified that he stood in his yard at the time of the shooting, and had an unobstructed view of both men. A witness for the defense testified that the prosecuting witness had told him that he stood in the barn. A request for the recall of the prosecuting witness, for the purpose of laying a predicate for his impeachment was refused. All of the facts in the testimony sought to be impeached had been established by other witnesses, or admitted by accused. *Held*, that the ruling, while not commended, was not sufficient ground for reversal. Beatty, C. J., Henshaw, and Temple, JJ., dissenting.

In bank. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

H. M. Shaw was charged with the murder of Eugene Mason, and was convicted of murder in the second degree. From a judgment on the verdict, and from an order denying a motion for a new trial, the prisoner appeals. Affirmed.

S. F. Geil and J. J. Wyatt, for appellant. Atty. Gen. Fitzgerald, for the People.

McFARLAND, J. The defendant was charged with the murder of one Eugene Mason, and was convicted of murder in the second degree. He appeals from the judgment and from an order denying a motion for a new trial. It is not seriously urged that the evidence introduced is insufficient to justify the verdict, or that the court committed any material error in the matter of instructing the jury; but it is contended that there should be a reversal, on account of certain errors claimed to have been committed by the court during the progress of the trial, in ruling upon the admissibility of evidence. These alleged errors could and should have been avoided; but criminal cases are too often conducted upon the preconceived theory that defendant is guilty, and that if he be given a fair trial, according to the established rules of evidence, the jury may not convict him. Hence, embarrassing questions are frequently presented on appeal, unnecessarily caused by want of ordinary care and due consideration of the rights of the accused on the part of those who conduct the trial in the court below. The purpose of a criminal trial is to discover and determine whether or not a defendant is guilty; not merely to maintain, at all hazards, a theory of guilt entertained beforehand by any one man, or any community of men. An examination of the points made in the brief of appellant shows that one or two of the rulings of the court complained of were clearly erroneous, and that others, whether strictly erroneous or not, are not to be commended; but we think that it sufficiently appears that said rulings did not prejudice the appellant, or injuriously affect his substantial rights. We will notice them in detail.

1. Mrs. Mary Steele was a witness for the prosecution, and testified that an hour or two after the commission of the homicide the appellant came to her house and made some incriminating statements to her about the homicide. On cross-examination, she testified that Mr. Wyatt, one of appellant's attorneys, had called upon her, and asked her what she knew about the case; and counsel for appellant asked her if she had "refused to give him any information." An objection by the prosecution to this question was sustained. This ruling was clearly erroneous. As tending to prove bias and feeling of the witness against appellant, it was entirely legitimate to show, upon her cross-examination, that, while she had evidently informed the prosecution of her knowledge, she refused to give any information to the appellant. But, notwithstanding the erroneous ruling, the witness immediately went on, without further objection, and said: "I did not give him any information, and did not tell him why I would not give him any; I told him positively I would not tell him anything." This was an answer to the question asked by appellant's counsel; and it is apparent, therefore, that appellant was not prejudiced by the former ruling. (It seems that this witness had been "ordered" not to speak of the case to the appellant's attorneys, under the mistaken notion which some prosecuting officers have that they can order persons whom they want as witnesses not to speak to other persons about what they know.)

2. The same witness (Mrs. Steele) had testified in chief that the statements made to her by appellant were made while he was

eating supper at her house; and she was asked, on cross-examination, "Did Shaw ever take a meal at your house before?" Objection was made to the question, and it was sustained. It would, no doubt, have been proper and fair to have allowed an answer to this question. It was a small matter, and we can hardly see why the prosecution should have objected to it. But we cannot say that the ruling was absolutely erroneous. Appellant's counsel here now argue, correctly, that it was admissible for him to show that the witness and the appellant were not intimate acquaintances, because it would be improbable that he made to a comparative stranger the incriminating statements testified to by the witness. But the question ruled out was an isolated question; its purpose was not disclosed; there was no intimation that it was asked to show want of intimacy; and upon its face it was apparently irrelevant and immaterial, and asked without any legitimate aim in view. Therefore we do not think the exclusion of the question was, under the circumstances, erroneous. And the same may be said of another question asked this witness which was ruled out, namely, "Did you on that occasion request him [appellant] to perform 'some service for you?' "—the occasion being the morning after the homicide, when the witness had seen the appellant.

3. Appellant's wife was a witness for him, and on cross-examination she was asked, "What have you done with the pistol with which your husband killed Mason?" To the question appellant objected, and his objection was overruled. She answered: "I turned it over to Mr. Wyatt, one of the attorneys." Conceding that this question was not proper cross-examination, or was inadmissible on other grounds, it is apparent that the question and answer could have done appellant no injury. It was admitted that appellant did kill deceased with a pistol.

4. The refusal of the court to adjourn the trial of the cause from the middle of the afternoon until the next day was not, under the circumstances, an abuse of discretion.

5. When appellant was testifying on his own behalf, he stated that on the evening of the homicide he went to Paso Robles, and his counsel asked him, "For what purpose did you go to Paso Robles?" The district attorney objected to the question; and appellant's counsel stated to the court that he desired to show that appellant, immediately after the shooting, went to Paso Robles for the purpose of surrendering himself to the officers, but that, acting on the advice of a Mr. Korn, he returned home and waited for the officers to come after him. The court sustained the objection. This question might well have been allowed; and in many cases the refusal to allow such a question would be material error, but in the case at bar there was no evidence, or pretense, that appellant attempted flight, and therefore he could not have been prejudiced by the rejection of the testimony. The same may be said of the rejection by the court of the offered testimony of said Korn to the effect that he advised appellant not to surrender himself at Paso Robles.

6. We do not think that the alleged misconduct of the district attorney, in saying what he did about appellant's drinking beer, was of importance enough to be seriously considered as a ground of reversal. Neither is there any importance to be attached to the fact that the district attorney was allowed to ask appellant how many times his attorneys visited him.

7. The most serious question in the case arises out of the refusal of the court to allow appellant to recall the people's witness Christopher, for the purpose of laying a foundation for showing that he had made a certain statement contradictory of a part of his testimony. The shooting which resulted in the death of the deceased took place about 80 or 100 yards from the house of said Christopher, who testified to the circumstances of the shooting, and said that he stood in his yard, and had an unobstructed view of both of the men. Appellant called a witness named Eubanks, who testified that he knew Christopher, and had a conversation with him regarding the shooting; and he was then asked, "Did he [Christopher] inform you where he stood when the shooting took place?" To this the district attorney objected, on the ground that "no predicate had been laid for the impeachment of Mr. Christopher," and the objection was sustained. Counsel for appellant then said: "If the court so rules, I desire to have the privilege of recalling Mr. Christopher to lay the foundation. Our attention was just called to this information. We intend to show by this witness that Mr. Millard Christopher told him that he stood right in the barn at the time the shooting took place. It has taken us by surprise. We have just ascertained this information, and we ask the court to be allowed to recall Mr. Christopher for the purpose of laying the predicate." The court denied this request, and appellant excepted. The request was certainly not an unreasonable one; and we apprehend that most courts would have allowed it. But it was a matter of discretion of the trial court, and the question here is whether there was such a gross abuse of discretion as to warrant a reversal; and that depends, in great measure, upon the character and importance of the testimony of Christopher. If the fact that appellant shot the deceased, and thereby caused his death, had been an issue, and Christopher had been the main witness testifying to the shooting, then the judgment would have to be reversed for the said action of the court now under review. But the fact of the shooting was admitted and testified to by the appellant, who claimed that he shot the deceased (Mason) under reasonable apprehension of danger to his own life; and the cir-

cumstances of the shooting were testified to in detail by the witness Richardson who was traveling with appellant at the time, was much nearer the scene of action than Christopher, and had much better opportunity than the latter for closely observing what occurred, and, although called by the prosecution, was evidently not unfriendly to the appellant. And, upon examination of the testimony of Christopher, we do not perceive that it was in any important sense inconsistent with the testimony of Richardson. It is apparent, therefore, we think, that no substantial right of appellant was affected by the refusal to allow Christopher to be recalled at the time appellant made said request. It does not appear that he was in attendance on the court at that time. Moreover, Christopher was afterwards recalled as a witness by the prosecution; and when he was on the witness stand the appellant did not then offer to ask him about his statement to Eubanks. Under these circumstances, while we do not at all approve the court's refusal to allow Christopher to be recalled at appellant's said request, we cannot say that such refusal is sufficient ground for a reversal of the judgment. The judgment and order appealed from are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.

I dissent: TEMPLE, J.

HENSHAW, J. I dissent, being unable to agree with the conclusion reached in the matter discussed under paragraph 7. I think the refusal of the court to allow defendant to recall the witness Christopher, for the purpose of laying the foundation for his impeachment, was an abuse of discretion, which denied the appellant his right to a fair and impartial trial. Christopher's evidence, much more strongly than did Richardson's, indicated that the killing was willful, deliberate, and premeditated. If that evidence was false,—if it could be established to the satisfaction of the jury that Christopher did not witness the occurrences he described, or if his testimony could be legally discredited by showing that he made contradictory statements regarding the facts, a man on trial for his life should not have been denied the important right of proving it. If it does not appear affirmatively that Christopher was present when permission was asked, still the presumption is that he was within call, since the summons commands his presence during the trial of the cause, and it does not appear that he had been excused. To the contrary, it does appear that he was afterwards recalled by the prosecution. It is true that defendant did not then attempt to ask the impeaching question, but the reasons are obvious. He had once asked the privilege, which, under the circumstances, amounted to a right of, examining the witness upon these matters, and had been denied. He was not to expect that a different result would follow another application. He could not with propriety have asked the questions as tending to impeach the witness upon the evidence he had last given, as that evidence did not bear upon the occurrences of the killing, to which Christopher had declared he was an eyewitness, and upon which alone it was sought to impeach him.

I concur: BEATTY, C. J.

(111 Cal. 180)

WILLIAMS v. ASHE. (No. 15,656.)[1]

(Supreme Court of California. Jan. 30, 1896.)

PLEDGE—CONVERSION.

1. Where the pledgee sells the absolute property in the pledge to a bona fide purchaser, the purchaser is entitled to retain the pledge until the pledgor discharges the debt for which it was pledged.

2. In replevin by such purchaser to recover the property from the pledgor, who has taken it from his possession, the fact that he in good faith claimed the absolute title will not defeat his right to recover possession as owner of the pledgee's rights.

3. A complaint in replevin alleging that plaintiff was, "on and after" a certain time, the owner and entitled to the possession of the property, is sufficient, where defendant answered over, without demurring specially.

In bank. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Thomas H. Williams against R. P. Ashe. There was a judgment for plaintiff, and defendant appeals. Affirmed.

W. H. L. Barnes, Gaston M. Ashe, and Ryland B. Wallace, for appellant. W. W. Foote and T. C. Coogan, for respondent.

PER CURIAM. Appeals from the judgment in an action of claim and delivery, and from the order denying a new trial. The action was for the recovery of certain race horses, or their value in case a delivery could not be made, the horses having been taken by defendant from the possession of plaintiff after the sale of them to him by one Kelly. The defendant denied the allegations of the complaint, and averred that he was the owner of the horses, and that he was indebted to one M. J. Kelly in the sum of $4,721.50. To secure this indebtedness, he executed to Kelly bills of sale of the horses, which bills of sale, absolute in form, were understood by defendant and Kelly to be, and were in fact, mere evidences of a pledge of the horses as security for the debt. Kelly thereafter wrongfully, and without notice to defendant, executed a bill of sale for the horses to plaintiff. Plaintiff took possession of the horses from Kelly, without payment of any consideration, and with full knowledge of the transaction between Kelly and defendant. Defendant tendered to Kelly and to plaintiff the amount of the said indebtedness. Kelly refused to accept it, as did plaintiff, the latter

[1] Rehearing denied.

claiming absolute ownership of the horses. These allegations are set forth in the answer, as matter of defense, as the basis of a counterclaim, and by way of cross complaint. The evidence of the principal witnesses, more or less corroborated, amounted about to this. Defendant testified, as he had pleaded, that the bills of sale were, and were understood to be, only pledges of the horses to Kelly as security. Kelly testified that originally he had held the horses in pledge, but that, becoming dissatisfied with this arrangement, and being about to leave defendant's employ, he had insisted upon receiving, and had received, the horses, and bills of sale therefor, in payment of defendant's debt to him, the defendant being unable to pay him the money, and that he represented to plaintiff, before plaintiff purchased the horses from him, that his title to them was perfect. Plaintiff testified that he bought the horses after these representations in good faith, paying therefor over $4,000, and owing thereon nearly $2,000 more. The court instructed the jury that as they determined upon the evidence so should they render their verdict—First, for plaintiff as the owner of the horses, if they found that the bills of sale from Ashe to Kelly were absolute; second, for plaintiff as having an interest in and a lien upon the horses, to the extent of Ashe's indebtedness to Kelly, if they found that Kelly was merely a pledgee, and that the transaction between Williams and Kelly was had with knowledge by Williams of Kelly's position; and, third, for defendant, fixing the amount of any damages he might have sustained, if in their opinion he was entitled to such a verdict. The jury returned a verdict for plaintiff for the return of the property, and found "the value of his interest in said property to be the sum of $4,909.74." The judgment entered conformed to the verdict, and decreed a return of the horses and a lien upon them for the sum named. The jury thus found that Kelly was merely a pledgee of the property in question, and not the owner; that Ashe was the owner, but that Williams had a lien upon the horses for the amount of the indebtedness owed by Ashe to Kelly,—or, in other words, that Williams had succeeded to Kelly's interest as pledgee. As the corroborated evidence of Kelly was that he was the absolute owner of the horses, and so represented to Williams when the latter purchased from him; and, as Williams' testimony was that he purchased after due inquiry, and upon these representations,—in view of the fact that there is no evidence in the record to charge Williams with knowledge that Kelly was a mere pledgee, and in view of the further fact that Kelly, with possession of the horses under bills of sale from Ashe absolute in form, was thus, by Ashe's acts, enabled to hold himself out to the world as the owner of them, it is not easy to see how the jury could have arrived at any other conclusion than that Williams had acquired full title. This, of course, would have been the result to one purchasing under such circumstances, in good faith and for value. McNeil v. Bank, 46 N. Y. 325; Weirick v. Bank, 16 Ohio St. 304; Fullerton v. Sturgis, 4 Ohio St. 529; Smith v. Clews, 114 N. Y. 190, 21 N. E. 160. But, as Williams is not attacking the judgment, it may be assumed that the evidence warranting the finding that the sale did not vest absolute title in him was omitted from the statement.

The essential question thus presented is whether, under the pleadings and proofs, such a judgment can be upheld. Williams, it is to be remembered, is suing primarily for the recovery of the possession of the horses, and is basing his claim upon an absolute purchase of them from Kelly. Kelly insists that he was the owner, and sold the horses (and not any pledgee's interest in them) to Williams; that Ashe's debt to him had been completely extinguished, and that the relation of creditor and debtor did not exist between them at the time he made the sale. Ashe, upon the other hand, has the horses in possession, and asserts that Kelly was but a pledgee, and, having sold contrary to his rights as pledgee, having repudiated the pledge and asserted ownership,—in short, having made a wrongful conversion of the property,—the lien is extinguished, and he is entitled to retain possession against both of them. So far as concerns the rights of one who has a mere lien, as distinguished from one who claims as pledgee, the question has been answered repeatedly. It is the general rule that a lienholder who refuses, upon proper demand, to deliver property, without setting up his lien thereon, or who bases his refusal upon a claim other than that of lien, waives his right to claim a lien after action commenced. It is so held in this state by the cases of Lehmann v. Schmitt, 87 Cal. 15, 25 Pac. 161, and Sutter v. Stephan, 101 Cal. 545, 36 Pac. 106; and, from the number and uniformity of the authorities examined, it may with safety be said that this rule is universal. Section 2910 of the Civil Code enunciates the same principle. It is also the rule that, if one having but a lien is sued in replevin, and answers claiming absolute ownership, he will not be permitted upon the trial to assert any right as lienor. His lien is absolutely lost. Mexal v. Dearborn, 12 Gray, 336; Tuthill v. Skidmore, 124 N. Y. 155, 26 N. E. 348; Everett v. Saltus, 15 Wend. 474; Ballard v. Burgett, 40 N. Y. 314; Maynard v. Anderson, 54 N. Y. 641. The latter rule is, however, subject to this manifestly just limitation that, if one who has claimed as owner is afterwards proved to have but a lien, he shall not thereafter be deprived absolutely of his lien, if his claim was honestly, though mistakenly, entertained and pressed; but, before he can be allowed his lien, he must abandon the false claim of ownership. Hudson v. Swan, 83 N. Y. 552. The cases in which this question has arisen are usually those in which the defendant to the action has repudiated his lien, but the principle is no different when it is the plaintiff who maintains the untenable position. Hudson v. Swan, supra. We are, however, here concerned more particularly with the rights of one who, in the belief that he was purchasing an absolute title, has bought property from a pledgee under circumstances which, as found by the jury, did not vest that title in him. Does the purchaser under such circumstances obtain no property or interest in the goods, or does he at least succeed by purchase to the interest of the pledgee? In the case of a mere lienholder, in the case of bailees generally, and even of factors, it is the rule, as has been said, that a wrongful conversion forfeits the lien. But in the case of a pledgee the rule is otherwise. The reason for the distinction seems to be based upon two considerations,—the first, that the pledgee has a special property in the chattels, which the other class does not possess; the second, that a contract of pledge carries with it the implication that the security may be sold to discharge the obligation, while in the case of a lien (except as aided by statute) the right of lien is not understood to carry with it any general right of sale. Story, Bailm. §§ 311–325. But, whatever may be the foundations for the distinction, it is now most firmly established in the law that a pledgee may sell or assign either the property or his interest in it to a bona fide purchaser, who will be allowed to hold the property until extinguishment of the original obligation. Judge Story (Bailm. §§ 324, 327) thus states the proposition: "If the pawnee should undertake to pledge the property [not being negotiable securities] for a debt beyond his own, or to make a transfer thereof to his own creditor, as if he were the absolute owner, it is clear that in such a case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee. The only question which, under the circumstances, would seem to admit of controversy, is whether the creditor should be permitted to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as if the case was a naked tort, without any qualified right in the first pawnee." The hardship and injustice of the latter alternative have been so obvious to the courts that late decisions have removed the doubt expressed by Judge Story, until the rule may be taken as settled that the purchaser, under such circumstances, succeeds to the rights of the original pledgee. And there can be no reason seen why it should not be so. If one purchases what he believes to be the absolute title, he should not for his mistake be denied the right of taking the limited property which the seller (the pledgee) could convey. It works no hardship upon the pledgor who, as against the substituted pledgee, has all the rights he possessed against the original. In the leading case of Jarvis v. Rogers, 15 Mass. 389, the authorities are reviewed and the principle thus enunciated: "From these cases it appears that the pawnee may deliver the goods to a stranger without consideration, or he may sell or assign all his interest absolutely, or he may assign it conditionally, by way of pawn, without in either case destroying the original lien, or giving the owner a right to reclaim them on any other or better terms than he could have done before such delivery or assignment." This principle has been still further extended by the supreme court of Illinois under the following facts: Plaintiff had pledged some corn as security. The pledgee made an illegal sale of it to defendant. Plaintiff sued defendant in assumpsit for money had and received, seeking to recover the value of the corn. It was held that, as the original pledgee, had he been sued in assumpsit or for conversion, would have been permitted to set off the amount of his secured debt, the purchaser from the pledgee in such an action should be allowed the same right of recoupment, and should be permitted, even under an illegal sale, to hold the pledged property until satisfaction of the original secured debt. Belden v. Perkins, 78 Ill. 449. The supreme court of Colorado, in a case involving rights under an illegal sale of a pledge, has said: "The sale being void upon any hypothesis, the certificate in the hands of the purchaser remained a pledge, as it was before, and every right which Williams [the pledgor] had remained unaffected." Moffat v. Williams (Colo.) 36 Pac. 914. The case of Talty v. Trust Co., 93 U. S. 321, arose upon an unauthorized sale by the pledgee of a claim or warrant against the city of Washington to defendant. Plaintiff was the pledgor, and sued the defendant in replevin. The court decided that the defendant succeeded to the rights of the pledgee in the claim, quoting Judge Story to the effect that, in case of a strict pledge, if the pledgee transfers the same to his own creditors, the latter may hold the pledge until the debt of the original owner is discharged. In this case it is to be noticed that the pledgee made a sale, not of his interest in the pledge, but of the absolute property.

But, after this brief consideration of a few of the cases, it remains to be added that in this state the question was early considered, and decided in accordance with the foregoing views, in the case of Dewey v. Bowman, 8 Cal. 145, wherein it is declared that if a pledgee sells the property absolutely, without demand or notice to one having full knowledge of his title, while the absolute title does not pass, still the property remains in the hands of the purchaser as a pledge, with the rights to the purchaser which were enjoyed by the original pledgee. Williams, therefore, succeeded to Kelly's interest, and to his right of possession, and the verdict and judgment are within the evidence and responsive to the pleadings. For, as has been intimated, the fact that Williams mistakenly claimed a title larger than the jury found him to own cannot defeat his action of replevin, if he shows that he has even a limited interest in the property, coupled with the right of possession. Miller v. Adamson, 45 Minn. 99, 47 N. W. 452. And these propositions, at least, he established to the satisfaction of the jury. The objection that the complaint does not state facts sufficient to constitute a cause of action is not well taken. Plaintiff alleged that, "on and after the 17th day of November, 1892, he was the owner and in possession of the property." It is contended that the pleading contains the same defect which vitiated the complaints in the cases of Afferbach v. McGovern, 79 Cal. 268, 21 Pac. 837, and Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 750. But in both of these cases the radical error was in pleading ownership upon a day certain, and upon no other day, and there was no implication which could be construed as a pleading of continued ownership or right of action at the time of the commencement of the suit. Here, however, the averment is of ownership and possession on and after the date. It was insufficient against a special demurrer, doubtless, but defendant did not demur at all. He answered over. It was not obnoxious to a general demurrer; for, however imperfectly pleaded, there is still by fair intendment to be gathered from the complaint that he claimed ownership and right of possession at the time of the commencement of his action. Amestoy v. Transit Co., 95 Cal. 311, 30 Pac. 550; Alexander v. McDow, 41 Pac. 24. The evidence does not show a tender to Williams. The judgment and order appealed from are affirmed.

(111 Cal. 165)

DE LANY v. KNAPP et al. (L. A. 1.)

(Supreme Court of California. Jan. 30, 1896.)

PUBLIC LAND—HOMESTEAD—LIABILITY FOR PATENTEE'S DEBTS—BONA FIDE PURCHASER.

1. Where the patentee of land as a government homestead conveys it, on its subsequent reconveyance to him by his grantee the land is divested of its homestead qualities, and is liable in his hands for debts contracted prior to the issuance of the patent.

2. Where land so apparently divested of its homestead qualities is sold for a debt contracted prior to the issuance of the patent to the creditor who purchased in good faith, that the conveyance by the patentee was with intent to defraud his creditors subsequent to the issuance of the patent does not, as to the patentee or his grantees, affect such purchaser's title.

Department 2. Appeal from superior court, San Diego county.

Action by G. F. De Lany against S. E. Knapp and another. There was a judgment for defendants, and plaintiff appeals. Reversed.

E. W. Hendricks and W. J. Murphy, for appellant. Daney & Wright, for respondents.

HENSHAW, J. Appeals from the judgment and from the order denying a new trial. The action was to quiet title to 160 acres of land. The facts of the case are as follows: One Neil, from whom both plaintiff and defendants deraign title, entered the land in controversy under the United States homestead laws, and thereafter, pursuant to the statute, commuted and paid for the land, receiving a patent therefor, which, by way of preamble and recital, declared that "whereas, George Neil, of San Diego county, California, has deposited in the general land office of the United States a certificate of the register of the land office at Los Angeles, California, whereby it appears that full payment has been made by the said George Neil, according to the provisions of the act of congress of the 24th of April, 1820, entitled 'An act making further provision for the sale of the public lands,' and the acts supplemental thereto, for [the land, describing it], which said tract has been purchased by the said George Neil," etc. Upon March 18, 1893. Neil, by deed of grant duly recorded, conveyed the land to Mrs. A. L. Treanor. Upon the 5th day of May following, Mrs. Treanor, by like deed of grant, also duly recorded, reconveyed the same property to Neil. Upon May 10th, five days after, a deficiency judgment was docketed against Neil, and in favor of this plaintiff. The land in controversy was then subjected to levy, and on the 15th day of June, 1893, was sold at public auction, and purchased by this plaintiff. Thereafter, upon the 23d day of November, 1893, Neil executed his deed of grant to the same land to one Pauly, to whose title these defendants afterwards succeeded.

For the reasons hereafter given, we consider it unnecessary to pass upon the question whether, by his commutation, the character of the title Neil received from the government was that inuring under a homestead or that attaching to a pre-emption patent. For the purposes of this consideration, it will be assumed (though not decided) that Neil took the land as a government homestead. So taking, the land was not liable for any debt of Neil contracted prior to the issuance of the patent. Rev. St. U. S. 1878, § 2296. The deficiency judgment of plaintiff against Neil was for such a pre-existing debt. Neil's deed to Mrs. Treanor was upon the face of the recorded instrument a conveyance of all his interest in the property; and, when he subsequently acquired title from her by deed of grant, he took the land divested of its homestead exemptions. The patentee sells his land. It is protected in the hands of the purchaser from any debt of the grantor which could not have been enforced against it while the title remained in him, and this is all that the case of Russell v. Lowth, 21 Minn. 167, decided upon the matter. But as with a state homestead, so with a federal; its character and exemptions do not revive on a subsequent repurchase by the original holder, by whom it has been sold. Herbert v. Mayer, 42 La. Ann. 839, 8 South. 590.

But to overcome the effect of the deeds from Neil to Treanor, and from Treanor to Neil, defendants were permitted, over objections and exceptions, to call Mrs. Treanor, who testified that Neil, who was sick, sent for her, and said to her: "My creditors are pushing me pretty hard. Would you object to having my property put in your name, so that it will be beyond the reach of my creditors?" Mrs. Treanor consented, the deed was made under these circumstances, without consideration, and the property thereafter, in like manner, reconveyed by her to him. Plaintiff's claim was for a debt due prior to the issuance of the patent. The land was therefore not liable for it, and plaintiff was not one of Neil's creditors who could have been injuriously affected by the transfer. Upon the other hand, these transactions originated and were executed in fraud. Plaintiff had no knowledge of the secret trust. She bought at the execution sale in good faith and for value, upon the security of the title which stood in Neil, and which by the record was freed from homestead exemptions. Under these circumstances, is she protected against the effect of this private agreement? I think she should be, and is. It is true she was not one of those creditors who could complain of the original fraud, and cause the conveyance to Mrs. Treanor to be set aside. Nevertheless, she was a bona fide purchaser for value and without notice at the execution sale, and her rights are the same as those which would have attached to an innocent third person buying under like circumstances. She is protected against latent equities of which she had no notice. Riley v. Martinelli, 97 Cal. 575, 32 Pac. 579. The defendants, deriving their title from Neil after the rights of plaintiff as purchaser had accrued, occupy no better position than would he. Where he would be estopped, so are they; and what binds him concludes them. The fact that plaintiff was not one of those whose injury was intended by the original fraud would not be a reason for permitting Neil to prove it against her, if, in fact, she had innocently suffered by reason of it; and, if Neil could not prove it, neither could those claiming under him. If the transfers had been made with the understanding that they were designed merely to effect an apparent destruction of the homestead character of the land, no one would assert that Neil could prove this fact against one who had changed his situation under a belief in the bona fides of the matter. Yet this is the precise result which, if not intended, necessarily followed the fraud of Neil and Mrs. Treanor. Neil held out to the world that he had purchased the land under circumstances which, by operation of law, freed it from its homestead exemptions. An innocent third person dealing with this property relied upon these circumstances, and bought the property after a levy and sale, which were legal except for this secret and fraudulent transaction. Neil cannot, nor can those claiming under him, defeat the title thus obtained by proof of any such "latent equity." The admission of the evidence of Mrs. Treanor was thus error, for which the order denying a new trial must be reversed, and the cause remanded. So ordered.

We concur: McFARLAND, J.; TEMPLE, J.

(5 Cal. Unrep. 260)

SANTA CRUZ ROCK PAV. CO. v. LYONS et al. (No. 15,760.)[1]

(Supreme Court of California. Jan. 31, 1896.)

LIEN FOR STREET WORK—FORECLOSURE—"REPUTED OWNER"—CONTRACT BY HUSBAND—LIEN ON LAND OF WIFE.

1. Evidence that a husband signed a contract for street work in front of a lot the record title to which was in the wife, and stated to the contractors that the lot was community property, will sustain a finding that he was the "reputed owner," within Code Civ. Proc. § 1191, as amended, providing that any person performing work on a street in front of a lot at the request of the "reputed owner" shall have a lien on the lot for work and materials.

2. The presumption that property conveyed to a married woman becomes her separate estate (Civ. Code, § 164, as amended) is not conclusive.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the Santa Cruz Rock Pavement Company against Ellen Lyons and another to foreclose a lien for street work. Judgment for plaintiff, and defendants appeal. Affirmed.

Allen, McAllister & Frohman and John B. Carson, for appellants. Parker & Eells, for respondent.

BELCHER, C. This action was brought to recover the sum of $482.88, alleged to be due from defendants to plaintiff for setting granite curbs, and grading and paving the street, in front of a certain lot in the city of San Francisco, and to foreclose a lien on the lot for the said sum, together with the cost of verifying and filing the claim of lien and a reasonable attorney's fee. The defendants, James M. and Ellen Lyons, were husband and wife, and had been such for about 21 years. It is alleged in the complaint that the defendant Ellen Lyons was at all the times mentioned therein the owner of record of the said lot, and that the same was and is community property; that her husband was the reputed owner of it, and that he requested the plaintiff to do the work while he was such reputed owner; that he entered into a written contract with plaintiff for its performance, "both in his own individual behalf and as the agent of his wife, Ellen, and in her behalf, though in his own name"; that he individually, and on behalf of his wife, promised to pay plaintiff for the work done; and that she "had full knowledge of said contract and of the performance of said work prior to and during the performance of said work, and that she did not within three days after having obtained knowledge thereof, nor at all, give notice that she would not be responsible for the same, by posting a notice in writing to that effect, in some conspicuous place upon said land, nor upon any land, nor at all"; that the plaintiff duly performed all the terms and conditions of its contract, and that the work was completed on August 1, 1892, and was duly accepted by the superintendent of streets; that the amount due plaintiff under the contract was $482.88, no part of which had been paid; and that it filed its claim of lien on August 26, 1892. The defendants answered separately. The answer of Mrs. Lyons denied that the lot in question was the community property of herself and husband; denied that her husband was ever the reputed owner of the lot; denied that he, as her agent, ever requested the plaintiff to do the work for which it seeks to recover, or ever promised to pay plaintiff for said work, or ever entered into any written contract with plaintiff for the performance of said work, or any work; denied that at any time mentioned in the complaint she had full or any knowledge of the contract mentioned therein, or that she ever agreed to the same; and alleged that she never at any time entered into any contract with the plaintiff for the performance of any street work, or authorized her husband, as her agent, to enter into any such contract; that he has never had any interest in the property affected; and that she at all the times mentioned in the complaint was the sole and separate owner thereof. The answer of Mr. Lyons denied that the said lot is or ever was community property; that he was ever the reputed owner of it, or had any separate interest in or claim upon it; that he ever entered into any contract with the plaintiff, as the agent of his wife, to improve the street in front of the property, or ever promised on her behalf to pay any sum of money for any street work or improvements in front of it; and alleged that he was never authorized by her to enter into any contract with plaintiff for the performance of any street work in front of said lot. Upon the issues thus raised, the case was tried, and the court found, among other things, that, at all the times mentioned in the complaint, the "defendant Ellen Lyons was, and she now is, the owner of the lot of land described in said complaint as her separate property, but at all said times said James M. Lyons, individually, was the reputed owner thereof; that, while said James M. Lyons was so the reputed owner of said lot of land, he requested said plaintiff to do the work hereinafter named, and he, both in his own individual behalf and as the ostensible agent of his wife, Ellen, and in her behalf, though in his own name, entered into a written contract with the plaintiff for the performance of the same, and thereupon, at the request of said defendant James M. Lyons, said plaintiff improved the street in front of and adjoining said lot of land, and, in so doing, did the work and furnished the materials hereinafter mentioned." And, as conclusions of law, the court found that the plaintiff was entitled to recover from the defendant James M. Lyons, individually, the sum of $482.88, with interest thereon from August 26, 1892, and the cost of verifying and filing its claim of lien, its costs of suit, and an attorney's fee fixed at $50, the whole aggregating $611.22; and that it had a lien on said lot for the said amount. Judgment against Mr. Lyons, and a decree foreclosing the lien, and directing a sale of the lot, were accordingly entered, from which decree, and an order denying their motion for a new trial, defendants appeal.

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[1] Reversed in banc. See 48 Pac. 1097, 117 Cal. 212.

It is not claimed that the work for which plaintiff seeks to recover was not well and properly done, or that the amount allowed therefor was not justly due from Mr. Lyons, but it is contended that there was no legal obligation resting upon Mrs. Lyons to pay for the work, and hence that the court erred in determining that the amount allowed was a lien on her lot; and, in support of this position, the finding that Mr. Lyons was the reputed owner of the lot, and, as such, requested the plaintiff to do the work, and entered into the contract therefor, is assailed as not justified by the evidence. The lot in question is 87 feet wide, and is situated on the easterly side of Lyon street, between Post and Sutter streets, in San Francisco; and the contract relied on was to set granite curbs (where necessary), and to pave with bituminous rock Lyon street between the other two streets named. The contract was dated June 29, 1892, and purported to be executed by all the lot owners on both sides of the street to be paved, "whose names are hereunto subscribed, with the number of feet frontage of lots represented and owned by each, respectively, set opposite their respective names, each contracting severally," and each for himself, and not one for the others, promising to pay "for the work done in front of his or her own property, respectively," at certain stipulated rates. At the time the contract was signed, a contract to do the work was about to be let under an order of the board of supervisors. The plaintiff corporation desired to obtain a private contract for the work, and to that end sent two of its solicitors (Mr. Robertson and Mr. Gould) to interview the lot owners. The solicitors went out to the block, and met several of the lot owners, and talked the matter over with them. They were all invited into the house of one of the owners, and others were then sent for, and came in. Among others present was Mr. Lyons. The matter was talked over for a considerable time, and Mr. Lyons said he wanted basalt blocks put down. Mr. Gould told him that the order of the board of supervisors required bitumen. After further talk, according to the testimony of both Robertson and Gould, Mr. Lyons said he could not sign a contract that night. Mr. Gould asked him why, and he said, "I have got somebody else to see." Mr. Gould asked, "Who is it?" and he said, "My wife." Mr. Gould then asked if it was community property, and he said it was, and that he and his wife owned it together. It was then agreed that the parties would meet again the next evening, at the same place. At the meeting on the next evening, Mr. Lyons signed the contract, his name being the fourth in the list of 13; and, as he was doing so, Mr. Gould again asked him, "Do you own the property, or does you wife own it?" and he said, "We both own it." Mr. Gould then said, "All right; then you sign your name there." The work was commenced two or three days after the contract was signed, and was completed and approved by the superintendent of streets, and the lien filed, as alleged in the complaint. Mrs. Lyons testified that she purchased the lot about two years after her marriage to Mr. Lyons, and paid for it with money derived from the estate of her first husband, and money raised on mortgages, and that she never authorized her husband to sign the contract, and he never told her he had signed it until after the bill was presented; that she "was under the impression that these people were obtaining it from the city." Mr. Lyons testified that he did not own any real estate or other property, and that he was a carpenter, and used the money he earned to raise his family; and, when asked if he did not put his money into paying off mortgages on this property, he answered that he could not tell where it went; that, when he made a few dollars, he gave it to his wife. He also testified that his wife never authorized him to sign the contract; that he signed it of his own will, with the understanding that he would have time to pay for it; that he thought, according to the agreement, that he would have time to make the payment, and he assumed it as a personal affair; and that he never stated to Mr. Gould or Mr. Robertson that the property was community property, or that he had somebody else to see before he could sign the contract. He further said: "I never mentioned at home that I had signed the contract until after the work was going on. It was after everybody could see that it was started. On Thursday evening the contract was signed, and on Saturday morning the work was started. I told her that I would have to pay for it; that is all. Q. By the Court: When did you tell her that? A. After the work was started. Q. How long after that? A. Well, probably the next day or two. Q. You told her you had signed the contract? A. Yes, sir; I told her then."

In 1885, section 1191 of the Code of Civil Procedure was amended so as to read as follows: "Any person who, at the request of the owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the street or sidewalk in front of or adjoining the same, has a lien upon such lot for the work done and materials furnished." And in the same year a general law to provide for work upon streets within municipalities was passed (St. 1885, p. 147), by which, in section 16, the word "owner" was declared to be (for the purpose of this law) "the person owning the fee, or the person in whom, on the day the action is commenced, appears the legal title to the lots and lands, by deeds duly recorded in the county recorder's office of each county, or the person in possession of lands, lots, or portions of lots or buildings under claim, or exercising acts of ownership over the same for himself," etc. In 1887 section 1191, supra, was again amended by prefixing to the word "owner" the word "reputed," so that it has since read: "Any person who, at the request of the reputed owner of any lot," etc.

The question, then, is, what is meant by the words "reputed owner," as used in the Code? Counsel for appellants argue that there is no material difference in the meaning of these words and that of the word "owner," as used in the statute; and they say that "the legislature therefore could not have contemplated anything else by the expression 'reputed owner' than cases where a person contracts for street work who has the apparent title to property by deeds of record, or who has the apparent possession by reason of exercising acts of ownership over the property for himself." And hence it is insisted that, as shown by the evidence, Lyons was not, and could not have been, the reputed owner of the lot in question. But, if this theory be true, then it is evident that nothing was accomplished by the amendment, and it might as well not have been made. The Century Dictionary defines the words "reputed owner" as "a person who has to all appearances the title to and possession of property." Anderson's Law Dictionary defines the same words as "one who, from all appearance, or from supposition, is the owner of a thing; as of property subject to taxation or to assessment for a municipal improvement." And Burrill's Law Dictionary defines the word "reputed" as "considered; generally supposed." And it is added: "This word has a much weaker sense than its derivation would appear to warrant; importing merely a supposition or opinion derived or made up from outward appearances, and often unsupported by fact. The term 'reputed owner' is frequently employed in this sense. 2 Steph. Comm. 206." Prior to 1889 all property acquired after marriage by either husband or wife was presumed to be community property; but in that year section 164 of the Civil Code was amended by adding the provision that, "whenever property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." These presumptions are, however, only rules of evidence, which can be met and overcome by proofs, except where a right to property is involved which became vested in a third party before the amendment, in which case the presumption is said to be a rule of property as well as of evidence. Jackson v. Torrence, 83 Cal. 529, 23 Pac. 695; Jordan v. Fay, 98 Cal. 264, 33 Pac. 95.

Here it appears, as before stated, that the lot was acquired by Mrs. Lyons after her marriage, and hence the fact that she had the record title was not at all conclusive. It might, nevertheless, have been considered or supposed to be community property. And when Mr. Lyons signed the contract as the owner of it, and stated, as the court below must have believed he did, that it was community property, and was owned by himself and wife together, it would naturally be supposed that he was such owner. We conclude, therefore, that the court was justified by the evidence in finding that, for all the purposes of this case, he was the reputed owner of the lot.

Other questions are very elaborately discussed by counsel, but, in view of the conclusion reached on the first point, they need not be considered. We find no material error in the rulings of the court, and advise that the decree and order appealed from be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the decree and order appealed from are affirmed.

(111 Cal. 221)

SOUTHERN PAC. R. CO. v. SOUTHERN CAL. RY. CO. et al. (No. 19,500.)[1]

(Supreme Court of California. Jan. 31, 1896.)

EMINENT DOMAIN—RAILROAD COMPANY—RIGHT TO APPROPRIATE RAILROAD PROPERTY.

1. Under Code Civ. Proc. § 1240, providing that property appropriated for a public use shall not be taken unless for a more necessary public use than that to which it has already been appropriated, plaintiff railroad company had the right to appropriate part of a street which was purchased by defendant railroad company, subject to the right of the public for highway purposes, and on which it had laid its tracks; such appropriation being necessary for the construction of plaintiff's road, but not materially curtailing defendant's right to operate its road.

2. Defendant's construction of an unnecessary spur track across the line located by plaintiff for its right of way, after the location was made, did not affect plaintiff's right of appropriation.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Action by the Southern Pacific Railroad Company against the Southern California Railway Company and another to obtain a decree condemning a certain strip of land for the purpose of constructing a railroad. From the judgment rendered, defendants appeal. Affirmed.

W. J. Hunsaker, for appellants. Harris & Gregg, for respondent.

SEARLS, C. This action is brought to obtain a decree condemning a strip of land 26 feet wide, in and through Park avenue, Lugonia park, city of Redlands, county of San Bernardino, state of California, for the use of plaintiff as a right of way for a railroad from Redlands Junction to Crafton, all in said county of San Bernardino. Plaintiff had judgment, from which judgment, and from an order denying their motion for a new trial, the defendants appeal. The findings of fact by the court below may be epitomized as follows: Plaintiff is a railroad corporation engaged in building, constructing, and operating lines of railroad in the state of California and adjacent states and territories, and owns and operates a main line of railroad extending from San Francisco, in the state of California, to El Paso, in the state of Texas, which passes for many miles through the county of San Bernardino. That it intends to build, and has partially built, a branch or spur railroad from its main line at Redlands Junction, in said county, running in a northeasterly direction a distance, in all, of 7½ miles, passing through the city of Redlands, and terminating at Crafton, in said county, for the purpose of conveying freight and passengers, and for the purpose of conducting a general railroad business upon and over said spur or branch railroad. Park avenue is, and since 1887 has been, a public street or highway in the city of Redlands, and in the building and construction by plaintiff of its said branch railroad a right of way therefor through said Park avenue, having a uniform width of 13 feet, is necessary to the construction and maintenance of plaintiff's said road. The space condemned is described, and is on the southerly half of said avenue, and will be referred to again. Before the commencement of this action, the board of trustees of the city of Redlands, by ordinance, gave and granted to plaintiff a franchise and privilege to construct, maintain, and operate its said branch railroad on and over the south 30½ feet of said Park avenue, which franchise and privilege is still in force and effect. Defendant, the Southern California Railway Company, is also a railroad corporation, is the owner of the fee of Park avenue, subject to the rights of the public for highway purposes, and is the owner of, and for four years before the commencement of this action had owned, possessed, and had operated, and is still operating, a steam railroad for ordinary railway purposes. The center line of defendant's railroad is substantially identical with the central longitudinal line of Park avenue, which said avenue is 100 feet in width. The road of plaintiff, as laid out, will leave a space of 24 feet on the south side thereof, which the court finds will be sufficient to allow the traveling public to travel with safety. There will also be a space of, say, 21 feet, between the tracks of plaintiff's and defendant's roads, which the court finds will be sufficient for spurs or side tracks for defendant. The space condemned has not been used by the defendant, except as follows: (1) After plaintiff had graded its roadbed, defendant built a spur track thereon, for the purpose of preventing the plaintiff from using the right of way, which spur defendant does not need. (2) Defendant had a small depot building, 16x18 and one story high, on the said condemned right of way, which defendant does not need, and which can readily and without injury to defendant be removed, together with its spur track, from the place where now situate. The court also finds that the use by plaintiff of the land sought to be condemned is a more necessary public use than that to which it has been appropriated by defendant, and that the proposed right of way will furnish to plaintiff the most practicable, safe, and direct route and way for its road, and will be "most compatible with the greatest public benefit and the least private injury," and will not interfere with the successful operation and maintenance of defendant's road, and is not necessary thereto. No question is made as to the damages, and the findings relating thereto need not be noticed. Defendant F. H. Pattee, who is made a party defendant, owns certain lots abutting on Park avenue, and is awarded damages by reason of the construction of the road by plaintiff.

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[1] Rehearing denied.

The first point made by the appellants is that the findings are insufficient to sustain the judgment. This contention is based upon the fact that such findings show that the defendant is the owner of the whole of Park avenue, subject only to the rights of the public for highway purposes, that for more than four years prior to suit brought it had maintained a line of railroad upon the center line of said avenue, and had appropriated the same to a public use, and that, as the strip of land in question, to wit, Park avenue, is not in excess of the quantity authorized by law to be taken for railroad purposes, it cannot by condemnation proceedings be taken by plaintiff for the same public use, to wit, for another and parallel railroad. The power of eminent domain is one of the inalienable incidents of sovereignty, which, treated simply as a question of power, may be exercised in favor of public uses over any and all private, and even public, property. In this view, the property and franchises of corporations, as well as of individuals, although dedicated to public uses, may be taken for other public uses. A state may not annul or modify a grant of land, but it may take the land for public use, on making compensation. There is no such thing as extinguishing the right of eminent domain; and any attempt to do so by one legislature has no binding force upon its successors. But this inalienable power, like most others, is to be exercised under and by virtue of the legislative will, as expressed by the lawmaking power. This being so, it is an accepted canon of the law that the right to exercise the power of eminent domain must be found in some statute of the state, and that such right must be expressly given, or arise by necessary implication from powers expressly given. Among the powers conferred upon a railroad corporation by section 465 of the Civil Code is the right "to lay out its road not exceeding nine rods wide, and to construct and maintain the same with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same." The sixth subdivision of the same section authorizes a railroad corporation "to cross, intersect, join, or unite its railroad with any other railroad, either before or after construction, at any point upon its route, and upon the grounds of such other railroad corporation," etc. Turning to the subject of eminent domain, we find that it may be exercised in favor of a variety of public uses, among which are "steam and horse railroads." Code Civ. Proc. § 1238, subd. 4. Section 1240 of the same Code, in defining the private property which may be taken under the title on eminent domain, enumerates: "Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated." As early as 1863 the supreme court of this state, in Railroad Co. v. Moss, 23 Cal. 324, held that one railroad company could not locate its line along and upon the previously located line of another company, except at crossings and intersections, and that, as the law then stood, land appropriated by one company for the purposes of a railroad, and necessary thereto, could not subsequently be condemned by another company for a like use. In Boston & M. R. Co. v. Lowell & L. R. Co., 124 Mass. 368, Chief Justice Gray, now a justice of the supreme court of the United States, said, "The general principle is well settled, and has been applied in a great variety of cases, that land already legally appropriated to a public use is not to be afterwards taken for a like use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication." The authorities in support of this proposition are numerous, and usually uniform. See Housatonic R. Co. v. Lee & H. R. Co., 118 Mass. 391; Railroad Co. v. North, 103 Ind. 486, 3 N. E. 144; Pittsburgh Junction R. Co.'s Appeal, 122 Pa. St. 511, 6 Atl. 564; St. Paul Union Depot Co. v. City of St. Paul, 30 Minn. 363, 15 N. W. 684; Barre R. Co. v. Montpelier & W. R. R. Co., 61 Vt. 1, 17 Atl. 923; In re City of Buffalo, 68 N. Y., 167.

The foregoing cases, in the main, involve circumstances under which a former and a later public use may not stand together, or, in other words, cases in which the later use must supersede the former,—cases in which, as was said in Re New York, L. & W. Ry. Co., 99 N. Y. 23, 1 N. E. 27, "were the rule otherwise, this evil would result: A corporation, No. 1, having the right of eminent domain, takes land from a similar corporation, No. 2, having the same right. No. 2 thereupon proceeds again to condemn it for its own use, and No. 1 retaliates. And so the absurd process goes on. It is clear the legislature never intended any such result." The question is, does the well-understood rule indicated apply to the facts of the present case? We think the question must be answered in the negative for the reasons: (1) The condemnation proceedings here work no substantial injury to the plaintiff, and produce only such inconvenience as may be covered by damages awarded. The object of the rule which prevents the taking of property devoted to a public use for another and not more necessary public use is, not that there is anything sacred in the property as such, considered independent of the public use, but the protection of the use itself, in which the public as well as the owner is interested, and to save the use from annihilation. Defendant purchased from the abutting owners, subject to the right of the public for highway purposes, Park avenue, a strip of land 100 feet wide, and constructed its railroad on the center thereof. As such purchaser its rights were neither greater nor less than they would have been had it acquired a right thereto for a like purpose under the law of eminent domain. It was the intention to dedicate it to a public use, and the actual appropriation to such use, which consecrated it beyond lands held in private proprietorship. So far as it was not thus appropriated, and as it was not reasonably essential to such use, it stood in the same category with other lands held by individuals or corporations, and was liable to condemnation proceedings for a similar or different public use. It is property appropriated to public use which is, under subdivision 3 of section 1240 of the Code of Civil Procedure, protected from condemnation, except "for a more necessary public use"; and as to lands owned by defendant, but which have not been thus appropriated, and are not likely in the future to be needed for the existing public use, the inhibition does not apply. Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co., 17 W. Va., 812; Peoria, P. & J. R. Co. v. Peoria & S. R. Co., 66 Ill. 174. "Nor will the general rule be applied to prevent the taking of a small and immaterial part of some of the appurtenances of the company, when the taking is necessary for the right of way of another company or other imperative use." Lewis, Em. Dom. § 267; Chicago & N. W. Ry. Co. v. Chicago & E. R. Co., 112 Ill. 589; New York, H. & N. R. Co. v. Boston, H. & E. R. Co., 36 Conn. 196; North Carolina R. Co. v. Carolina Cent. R. Co., 83 N. C. 489; Northern R. Co. v. Concord & C. R. Co., 27 N. H. 183. (2) As before stated, our law permits the taking of "property appropriated to public use, but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated." Code Civ. Proc. § 1240, subd. 3.

The question then arises, is the contemplated use by plaintiff of the land in question a more necessary public use than that to which it has been already appropriated by defendant? We think this question must be answered in the affirmative. Treated as a mere question of right in the defendant, it must be admitted that it is the owner of a right of way 100 feet in width for the uses of its railroad, the tracks of which are laid thereon; but we are not now called upon to determine the question from that standpoint, but rather to view it in the light of the necessities of its ownership for a public use. As an incident of defendant's right to own and operate a railroad, it has not been used at all, except that portion covered by defendant's flag station and the small station building or depot, which, according to the findings, can be readily moved across defendant's track without inconvenience to the public or to defendant. All these franchises and rights of way are given and granted upon the theory of public necessity, and of the benefits accruing therefrom to the public. The fact that private persons and corporations, the owners of these franchises and rights, are the recipients of profits arising from the ownership and operation of the property, does not militate against the fundamental theory that the prime object is the benefit to the public. The multiplication of railroads, with the conveniences and competition they bring, all redound to the welfare of the people at large. Who shall say that the strip of land, 13 feet in width, condemned by the court below for the use of plaintiff for its railroad track, and to be used for a railroad, is not a more necessary public use than any to which it has been appropriated or used by defendant? It is not a case of taking, destroying, or curtailing defendant's franchise, or any property essential to its full and complete enjoyment. Were this the case, it would be a taking, not for another and more necessary public use, but the taking of one man's property and conferring it upon another for a precisely similar use,—a proceeding not tolerated in law. The fallacy of appellant's argument on this branch of the case is in confounding the incident with the thing itself,—the defendant's railroad, and its right to the full use and enjoyment thereof, with that portion of its right of way which the court expressly finds is not essential or necessary to such enjoyment. A railroad company is authorized to take a given quantity of land for a right of way, not as a reward for constructing a road, but because it is regarded as necessary to the construction and operating its line of railroad, and when a portion of such right of way is not used, and is not necessary for the purposes of its creation and use, either in the present or future, as in this case, then, as to the portion of such right of way not necessary to its operation, the appropriation by another railroad, where necessary to the use of the latter for a roadbed, is an appropriation to a more necessary public use, within the purview of the Code, and may be taken, upon compensation being made. The wisdom of this provision in our law becomes apparent, wherever railroads converge upon cities, towns, mountain passes, etc., and where the right of way of the first appropriator may be in part necessary to subsequently constructed roads, and may be taken by the latter with only such "tolerable interference" as does not materially curtail the rights of the first appropriator, and can be fully compensated in money. I repeat, the appropriation of a portion of the right of way of a railroad, not essential to its enjoyment of its franchise and property, as such, by another railroad, where essential to the construction and existence of the latter, is to and for a more necessary public use, and the fact that some interference may be occasioned thereby, but which does not materially curtail the rights and privileges of the former, does not take the case out of the wholesome rule adopted by our Code. Extended comment is not deemed necessary upon the fact that defendant, after the line of plaintiff's road was located, constructed a spur track across the line of the same, for the reason that the court found that defendant had no use therefor, and constructed the same for the purpose of preventing the plaintiff from having and using such right of way. In such cases, the authorities are to the effect that defendant could gain no advantage thereby. It follows from these views that the findings of the court support the judgment. Appellants further object that "the evidence is insufficient to justify the decision of the court." It must suffice, upon this head, to say that, upon all the points upon which the findings are assailed, there was a substantial conflict in the evidence, and were we to analyze and discuss the evidence at length, it would only lead to the inevitable conclusion that under such circumstances we are not authorized to disturb the findings. The errors of law complained of involve the same questions discussed under the head of the sufficiency of the findings to support the judgment, and need not be further noticed. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(111 Cal. 198)

STANFORD et al. v. CITY AND COUNTY OF SAN FRANCISCO. (No. 15,966.)[1]

(Supreme Court of California. Jan. 31, 1896.)

SURFACE WATER — DAMAGE CAUSED BY PAVING — LIABILITY OF CITY.

Surface water, which, before a street was paved, was absorbed by it, after the paving thereof, without any cesspools or other means to allow it to escape, flowed to the part of the street where the grade was lowest, and, collecting, overflowed the sidewalks and flooded a basement. *Held*, that the city was liable for the damage.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hibbard, Judge.

Action by J. B. Stanford and others, partners as G. W. Clark & Co., against the city and county of San Francisco. Judgment for plaintiffs, and defendant appeals. Affirmed.

Harvey T. Creswell, for appellant. Gordon & Young, for respondents.

HAYNES, C. Plaintiffs were the occupants of the basement of a building, No. 720 Mission street, which extended back to the southerly side of Jessie street, and had stored therein a large quantity of wall paper, and other goods used in their business. In the early part of 1888 the defendant caused a sewer to be laid in Jessie street from the center of Fourth street easterly to its termination, in a cul-de-sac at the westerly line of the Grand Opera House, which extends entirely across Jessie street, just east of the premises occupied by plaintiffs. The westerly end of said sewer connected with a sewer in Fourth street. The sewer in Jessie street had two manholes, with covers; but no cesspools were provided to carry the surface water from the street into the sewer, and none were provided for in the contract under which it was constructed. Shortly after the construction of the sewer the defendant also caused the same portion of Jessie street to be paved with basalt blocks, and granite curbs to be laid, and the sidewalks reconstructed. After the street was paved the southerly side was slightly lower than the northerly side, and the easterly end was about 26 inches lower than it was at Fourth street, the distance being about 600 feet. Prior to the paving the surface of the street was covered with loose planks, and, the street being sandy, the surface water was absorbed. On March 13, 1889, large quantities of water accumulated and collected at said easterly termination of Jessie street, by reason of rains; and the water broke over the curbing, and ran into the basement occupied by plaintiffs, and injured their merchandise, to the amount of $759.81, and this suit is prosecuted to recover damages in said sum. The cause was tried by the court without a jury, and findings were filed and judgment entered for the plaintiffs; and the defendant appeals from the judgment, and from an order denying a new trial.

There is no controversy as to the injuries sustained by the plaintiffs, nor as to the general facts above stated. Appellant, while contending that the findings do not support the judgment, also contends that the latter part of the eighth finding is not justified by the evidence, and quotes that part, as follows: "That said plaintiffs were damaged in said sum of $759.81 by reason of the failure of the said defendant to provide cesspools or any means to carry off any accumulation or collection of water from the aforesaid portion of Jessie street." Its contention, as to this finding, is that it was the paving of the street, and not the construction of the sewer, that caused the accumulation of the water, and the consequent damage. But the findings state all the facts connected with the improvement of the street, and the accumulation of the water thereon, as well as the fact that prior to these improvements the sand absorbed the surface water, and does not find that the construction of the sewer caused the water to accumulate upon the street, but attributes the injury to defendant's failure "to provide cesspools or any means to carry off" the water. The existence of the sewer doubtless suggested that cesspools connected therewith would have been a convenient and practicable mode of carrying away the water; thus preventing its accumulation, which was the necessary result of the paving. The question is, therefore, whether there was any legal obligation resting upon the city to provide means for conducting away surface water, the accumulation of which was the necessary consequence of paving the street. Neither of the contracts for the improvement of the street provided for the construction of cesspools, and the omission to construct them was not the result of the negligent performance of the work under the contracts, and therefore the case does not come within the class of cases where injury results from the neglect of the city to see that the contractor properly executes the plan adopted; the execution of the work according to the plan being a mere ministerial duty, and not the exercise of legislative power. Nor is this case within that numerous class of cases where it is held, with almost entire unanimity, "that a municipality is not bound to protect from surface water those who may be so unfortunate as to own property below the level of the street." Dill. Mun. Corp. § 1042. Here the grade of Jessie street was not changed, nor is there any claim that the premises occupied by plaintiffs were below grade. Here a street which, before it was paved, absorbed the water falling upon it, by the paving is made to retain and collect the same upon its surface, no means being provided for removing or conducting it away. The portion of the street so paved crossed no street or alley by which it could be diverted, and as the easterly end was more than two feet lower than its westerly end, and was absolutely closed at the lower end by a building which crossed it, it was inevitable that the water falling on that portion of the street below Fourth street would be collected and retained until it could escape by flowing over the curb and sidewalk, and into the basement occupied by the plaintiffs. It was not simply the water falling upon the street opposite plaintiffs' premises, but it was the collection of all the water falling upon the street below Fourth street; the work being so done that the accumulated water was raised above the grade of the street, and above the grade of plaintiffs' premises, which were up to the grade of the street.

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[1] Rehearing denied.

Counsel for appellant cites section 1039 of Dillon's Municipal Corporations, in support of the proposition that "the law regards surface water as a common enemy which every proprietor may fight or get rid of as best he may." That section, and the two following, are devoted to the subject of "Liability in Respect of Surface Water," and the last of these (section 1041) is devoted to the question of the "omission to provide drains." The learned author says: "It is clear that there is no liability on the part of a municipal corporation for not exercising the discretionary or legislative powers it may possess to improve streets, and, as part of such improvement, to construct gutters or provide other means for draining for surface waters, so as to prevent them from flowing upon the adjoining lots." But in note 2 to said section it is said: "If the necessity for the drainage is caused by the city, the doctrine of the text [section 1041], that it is not bound to supply the drainage, does not apply." Even as applied to property below the level of the street, the same learned author says: "It is possible there may be no middle ground, but we are unable to assent to the doctrine that by reason of their control over streets, and the power to grade and improve them, the corporate authorities have the absolute and unconditional legal right intentionally to divert the water therefrom, as a mode of protecting the streets, and to discharge it by artificial means, in increased quantities, and with collective force and destructiveness, upon the property, perhaps improved and occupied, of the adjoining owner." Section 1042. In a note to this section, in the fourth edition, he says, "The many cases since decided, cited in the notes, have found and defined the 'middle ground,' therein referred to, and adjudged the law to be as stated in the text." In Ashley v. City of Port Huron, 35 Mich. 296, it was held that where a city constructed a sewer in such manner as to throw a large quantity of water upon plaintiff's premises, which otherwise would not have flowed there, it was liable for the damage caused thereby. In the opinion in that case, after referring to a great many authorities, Chief Justice Cooley said: "It is very manifest, from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it, without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives, and never could give, authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of its streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other." In Seifert v. City of Brooklyn, 101 N. Y. 136, 142, 4 N. E. 321, it was said: "Municipal corporations have quite invariably been held liable for damages occasioned by acts resulting in the creation of public or private nuisances, or for an unlawful entry upon the premises of another, whereby injury to his property has been occasioned. Baltimore & P. R. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719. This principle has been uniformly applied to the act of such corporations in constructing streets, sewers, drains, and gutters, whereby the surface water of a large territory, which did not naturally flow in that direction, was gathered into a body, and thus precipitated upon the premises of an individual, occasioning damage thereto." See, also, note to Chalkley v. City of Richmond (Va.) 29 Am. St. Rep. 742, 14 S. E. 339, under the head "Surface Water," where a large number of cases from many different states are cited. In Los Angeles Cemetery Ass'n v. City of Los Angeles, 103 Cal. 461, 470, 37 Pac. 375, the same principle is asserted; and in the later case of De Baker v. Railway Co., 106 Cal. 257, 282, 39 Pac. 610, it was said: "But if the work was inherently, and according to its plan and location, a dangerous obstruction to the river, such as ordinary prudence should have guarded against, not only the author of the plan to obstruct the stream [the city of Los Angeles], but the person placing the obstruction, was severally liable for the entire damage." See, also, Reardon v. City and County of San Francisco, 66 Cal. 492, 6 Pac. 317, where the city was held liable for an injury to plaintiff's lot caused by work done upon the street, which was the immediate, direct, and necessary effect of the work done. Corcoran v. City of Benicia, 96 Cal. 1, 30 Pac. 798, and the other cases cited by appellant on page 5 of his brief, do not conflict with the authorities which we have cited above. Corcoran v. City of Benicia, supra, is to the effect that a municipal corporation is not liable for damages caused by the prevention of the flow of surface water from the lot of a private owner, by raising the street to the grade, where such water does not run in a natural channel across the lot. The distinction between that case and this is obvious, and the other cases cited by appellant rest upon similar facts. It is also true, as stated by appellant, that "there is no duty imposed by law upon the city to construct cesspools in connection with the sewer," if we add the proviso that the improvement of the street by the city does not create the necessity for cesspools.

It is also contended that "the court failed to find any negligence on the part of the city." All the probative facts being found, negligence, if shown thereby, as is the case here, need not be expressly found as an ultimate fact.

It is further contended that "the court erred in admitting evidence that defendant, subsequent to the overflow, put in cesspools." If such evidence is admissible for any purpose, it could only be as a demonstration that the flooding of plaintiffs' premises could have been avoided by that means. But, conceding that the court erred in admitting that fact in evidence, it does not appear that the defendant was, or could have been, prejudiced by it, and it does appear that without that evidence the result must have been the same. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(111 Cal. 206)

HAMMOND, JR., Referee, v. CAILLEAUD.

(No. 15,961.)[1]

(Supreme Court of California. Jan. 31, 1896.)

PARTITION — SALE — NONCOMPLIANCE WITH BID — RESALE—LIABILITY FOR SUFFICIENCY—DIFFERENCE IN TERMS OF SALE — CONCLUSIVENESS OF ORDERS.

1. An order confirming a sale under a decree in partition, not having been appealed from by the purchaser, is conclusive against him that he had no valid reasons for refusing to comply with his bid.

2. An order in a partition suit that the property be resold, at the risk of the purchaser at the first sale who refused to comply with his bid, is binding on him, it being recited that he had notice and was represented by counsel. If such recital were untrue, he should have moved to vacate or modify the order, and, on refusal of his motion, have appealed.

3. Where a referee, in partition to sell the property, makes it one of the conditions of the sale that the title shall be good, the purchaser, who refuses to take the property, cannot be held liable for the difference between his bid and the amount for which it is sold on resale; it having been stated at the second sale that there had been one sale, and the purchaser had refused to

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[1] Rehearing denied

take the title, and that the purchaser at the second sale would take the title as it was,—even if the referee had no authority to make the condition at the first sale,—unless it be shown that the difference in price at the two sales was not due to such difference in the conditions.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Richard P. Hammond, Jr., referee, against Henry Cailleaud. Judgment for plaintiff. Defendant appeals. Reversed.

A. Ruef, for appellant. A. C. Freeman, for respondent.

HAYNES, C. This action was brought by plaintiff as referee in the partition suit of Finnerty et al. v. Pennie et al., to recover the sum of $1,750 from the defendant. The action of Finnerty v. Pennie was for a partition of a certain lot situate on the corner of Natoma and Mary streets in the city of San Francisco, in which a decree was entered determining the interests of the several parties, the amount and priority of several liens thereon, and adjudging that said lot was incapable of partition, and ordering a sale thereof by Hammond, the plaintiff herein, who was duly appointed sole referee for that purpose, the sale to be subject to confirmation by the court. The referee offered said property for sale at public auction, and at such sale the defendant herein became the purchaser upon his bid of $7,500, and thereupon deposited with the referee $750, that being 10 per cent. of the amount bid. The purchaser opposed the confirmation of the sale, upon grounds hereinafter stated, but the court confirmed the sale, and the referee executed and tendered a deed in due form, and demanded payment of the remainder of the sum bid, but the defendant refused to pay said balance or accept the deed. These facts were reported to the court, and afterwards an order was made for a resale of the premises, and directing the referee, in case such resale should not realize said sum of $7,500, and the costs and expenses of the resale, to collect from defendant, by some proper proceeding, such deficiency. To these facts, alleged in the complaint, the defendant answered, and also filed a cross complaint and counterclaim. The answer, after denying the allegations of the complaint, alleged that said property was offered for sale at public auction on the following terms and conditions, namely: "The property to be sold to the highest bidder, the purchaser to receive a perfect and valid title, free from imperfections, otherwise there to be no sale; the bidder, upon acceptance of his bid, to deposit with plaintiff 10 per cent. of the sum bid, to secure the bid and sale to him, and the balance of the bid to be paid, if the title should prove perfect and valid, upon conveyance to the bidder of said property, with a valid and perfect title thereto, and after examination of said title by the bidder; and if the title should not prove to be perfect and valid and free from imperfections, nor made so within 30 days after notice by the bidder to plaintiff of defects therein, the said deposit of 10 per cent. to be returned by plaintiff to bidder on demand,"—and that he bid for said property said sum of $7,500, with the express agreement that if the title to said land should prove imperfect, invalid, and not free from all imperfections, there should be no sale, and that said deposit should be returned to him upon demand. He further alleged that the title to said lot was invalid, and not free from imperfections, that he notified plaintiff thereof, that plaintiff refused to make said title perfect, and that he thereupon demanded the return of his deposit. He admitted that said sale was reported to the court for confirmation, but denied that the terms and conditions thereof were reported; that he filed objections thereto, stating the terms under which his purchase was made, and specifying certain defects in the title, but that the court decided that he would not be bound by the decision of the court thereon, nor by such confirmation, and refused to hear or consider his objections thereto. He admitted the tender of the deed, but denied that such tender was in pursuance of the terms of sale, or that it would have conveyed a valid title, and averred his readiness and willingness to comply with the terms of the sale. He further alleged that the terms and conditions under which the property was resold were different from the terms and conditions of the first sale; that at the second sale it was expressly stated that the purchaser should take the title as it stood, without any agreement that it was perfect, or should be made so upon notice of defects; and that by reason of such change in the terms and conditions of sale the selling value of the property was greatly depreciated. At the second sale, one Denigan became the purchaser, at the sum of $5,000. The cross complaint and counterclaim were interposed for the purpose of recovering the deposit of $750. The cause was tried by the court, and findings and judgment were for the plaintiff for said sum of $1,750, with interest, and from said judgment, and from an order denying his motion for a new trial, the defendant appeals. Appellant's defense to said action is based upon two distinct propositions: (1) That his purchase was conditioned upon his obtaining a good title, and that the title was not good; and (2) that he is not liable for the deficiency or loss, upon resale, because the terms and conditions of the two sales were materially different. To these propositions respondent replies, in effect, (1) that the sale to appellant was confirmed by the court, and, that order not having been appealed from, appellant is concluded as to all questions involved in the confirmation; and (2) as the referee had no power to give or impose any conditions of sale not contained in the decree or authorized by law, and as the rule of caveat emptor applies to judicial sales, and as he is conclusively presumed to know the law, that he therefore purchased under the conditions imposed by the law, and not under different conditions alleged to have been made by the referee without authority, and, if so, the two sales were made under the same conditions.

1. That the order confirming the sale to Cailleaud, the first purchaser, was appealable, and became conclusive upon his failure to appeal, I think is clear. In Boggs v. Hargrave, 16 Cal. 560, it was held, in a foreclosure case, that the purchaser, by his act of purchase, submitted himself to the jurisdiction of the court in that suit as to all matters connected with the sale, and was entitled to apply for such relief as the facts of the case might justify, and that, upon his application, the sale could be set aside, and the satisfaction canceled. In Hickson v. Rucker, 77 Va. 135, it was said: "By buying at such sale the purchaser selects his forum, comes into the case, and submits himself to the court as to all questions concerning the sale and his purchase." That in sales under a decree in equity the purchaser becomes a quasi party to the suit, see note to Mount v. Brown, 69 Am. Dec., at p. 368, and cases there cited, and Jones, Mortg. § 1642. The confirmation of a sale often involves rights of vast importance. A purchaser at a judicial sale may thereby be deprived of a purchase of great advantage to him, or have improperly imposed upon him a burden he should not bear. But it is urged by appellant that there is no provision of the statute under which he could have appealed from that order; that the decree in partition was interlocutory, that he was not a party, and could not appeal therefrom But the decree in this case was not interlocutory, but final. It not only determined the several interests of the cotenants, and the amounts and priorities of the several liens, but also adjudged the property incapable of partition, and decreed that it be sold, and directed the distribution of the proceeds, which distribution is to be made by the referee when the decree so directs (section 773, Code Civ. Proc.), so that the sale and confirmation were simply steps to be taken in the execution of the decree, and the order of confirmation was an order made after final judgment. The appeal from an interlocutory judgment in partition, provided for in section 963, subd. 2, Code Civ. Proc., is only "from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties, and directs partition to be made." But if the decree did not become final until the sale was confirmed, it then became final, and the purchaser, being then a party to that which made the decree final, had the right to appeal from that part of the decree as to which he was a "party aggrieved." The defendant was, therefore, concluded by the order of confirmation as to all objections made to the confirmation of the sale, and became legally bound to complete the purchase. There are three modes of proceeding in a court of equity, when a purchaser, after confirmation, fails or refuses to complete his purchase: (1) Set aside the sale, release the purchaser, and order a resale; or (2) decree a specific performance of the contract; or (3) order a resale, holding the purchaser responsible for any deficiency. See Jones, Mortg. § 1642, and cases there cited. The third of the above modes of procedure is the one pursued in this case.

Upon the trial, the defendant, in order to prove that he never became liable as a purchaser, offered in evidence the following written terms and conditions of said sale (omitting the description): "San Francisco, December 14, 1891. We have this day sold to H. Cailleaud, at the price of $7,500, in gold coin, the following described property: seven hundred and fifty dollars, cash in hand paid, the receipt of which is hereby acknowledged; $6,750, payable ten days after date, or upon completion of the examination of title and the other papers connected therewith, as hereinafter specified; ten days (from date hereof) are allowed for the examination of the title. If the title is not found valid, nor made so in thirty days after notice to us of defect therein, the deposit (for which this is a receipt) is to be returned on demand. If the title is found or made valid, within the time herein specified, and the sale is not closed in accordance with the above terms, the sum of $750 (for which this is a receipt) is to be forfeited. The owner hereof binds himself, upon receipt of the purchase money, to deliver to H. Cailleaud a valid title to said property, unincumbered, unless it is specified above that certain liens are assumed. Time is of the essence of this contract. Subject to confirmation by the superior court of the city and county of San Francisco. Richard P. Hammond, Jr., Referee." "I hereby agree to buy the property above described upon the terms and conditions herein above expressed. Henry Cailleaud." An objection to its introduction in evidence for that purpose was properly sustained, the validity of defendant's purchase having been conclusively adjudicated by the order confirming the sale. The defendant afterwards offered to prove that at the second sale it was expressly stated that the purchaser would take the title as it was, that one sale had been confirmed, and the purchaser had refused to take it; and, in that connection, for the purpose of proving that the terms of the two sales were different, also again offered the writing above quoted. We have held that the order confirming the first sale was appealable, and that, having failed to appeal, the purchaser was bound by the order of confirmation, and could not relitigate the questions arising upon the motion to confirm. But, conceding for the moment that his objections to the title were groundless, and that therefore the terms and conditions of his purchase were fully complied with, and that, without cause or excuse, he refused to take the property, and deliberately intended to suffer all the legal consequences of such refusal, the resale could not be either a just or legal mode of ascertaining his liability, unless made upon the same terms and conditions as those under which he purchased. Riggs v. Pursell, 74 N. Y. 370; Shinn v. Roberts, 20 N. J. Law, 435. The court refused to permit the defendant to prove what the terms of the second sale were, as announced by the auctioneer, the court holding that the terms of the second sale were definitely fixed by the order of sale and the published notice, and that the defendant would not be allowed to contradict these; and also refused to permit proof of the terms and conditions of the first sale for the purpose of showing that the conditions of the two sales were different. Conceding that the rule of caveat emptor applies to judicial sales generally, and that the order of sale was silent as to any conditions relating to the validity or invalidity of the title to be acquired by the purchaser thereunder, and further conceding, for the purposes of this opinion, that the referee derived no power from the statute or the order of sale to stipulate with the purchaser that the title should be good and free from imperfections, or the sale be void, it does not follow that the purchaser was bound to accept an imperfect title, if it be true that the referee sold the property under the conditions alleged and offered to be proved by the defendant. If it be true that purchasers are conclusively bound to know the limits of the powers of the officer making the sale, it must follow that, as matter of law, they are not affected or influenced by any representation made by the officer, or by any terms or conditions given or imposed by him, and therefore the sale must, for the purposes of confirmation, as well as for all other purposes, be deemed to have been regular and valid. And not only so; upon that theory, it would be impossible that two sales, made by the same officer, of the same property, under the same order of sale, could be made on different terms; and if so, there could be no foundation for the established rule that, in order to hold the first purchaser liable for the loss upon a resale, the terms and conditions of the two sales must not be different. But that courts do not hold purchasers to such presumptive knowledge, in confirming sales, is well settled. In Woodward v. Bullock, 27 N. J. Eq. 507, bidders were misled as to the amount of the incumbrances to which the sale was made subject, both by the sheriff and the successful bidder. The sale was set aside. In Hayes v. Stiger, 29 N. J. Eq. 196, the court said: "Where surprise or misapprehension is occasioned by the conduct of the purchaser, or the officer making the sale, to the injury of a person interested, the court will interfere." In Black v. Walton, 32 Ark. 321, the syllabus is as follows: "A sale by a guardian of his ward's land, under an order of the probate court, is a judicial sale, and the rule caveat emptor applies; but if the land is purchased upon the representation of the guardian that the purchaser would acquire a good title, which turns out to be untrue, the purchaser will not be held, at law or in equity, although the guardian may not have known the falsity of his representations." In Veeder v. Fonda, 3 Paige, 94, the chancellor said: "As property to a vast extent is sold under the orders and decree of this court, much of which belongs to infants and others who are not able to protect their own rights, it has always been an important object with the court to encourage a fair competition at master's sales. For this purpose, it is necessary that purchasers at such sales should understand that no deception whatever will be permitted to be practiced upon them; that, in a contract between them and the court, they will not be compelled to carry the contract into effect under circumstances where it would not be perfectly just and conscientious in an individual to insist upon the performance of the contract against the purchaser, if the sale had been made by such an individual or his agent. It is, therefore, a principle of the court that the master who sells the property shall not, in the description of the same, add any particular which may unduly enhance the value of the property or mislead the purchaser." These authorities clearly show that for any error, irregularity, or misrepresentation of the officer, whether intentional or otherwise, whereby the purchaser has been misled to his prejudice to such extent as to make it unconscionable that his contract of purchase should be enforced against him, the sale will not be confirmed. But in this case, as here presented, it is not necessary to go further than to hold that if, by the alleged terms and conditions of the sale to appellant, he was led to bid more for the property—to any material extent, at least—than he would if he had been informed, as the purchaser was, at the second sale, that he must take the title as it was, whether defective or not, it is obvious that the resale did not furnish any just measure of damages. No fact or circumstance is disclosed by the record, other than the different conditions under which these sales were made, which tends in any degree to account for the difference between the final bids at these two sales; and, under such circumstances, we must conclude that all above the amount of the second sale which was bid at the first was induced by the condition that the purchaser took no risk as to the title. The owners are estopped from saying that the price obtained upon the second sale was inadequate, since they are not shown to have opposed confirmation upon that ground, and therefore the presumption is strengthened that the higher price obtained at the first sale was secured by the more favorable conditions given to appellant. If the referee had entirely omitted to publish notice of the sale, and had made a private contract for the sale of the property, and the owners (creditors not being affected) had been satisfied with the terms of sale and the price obtained, and, with knowledge of the facts, had obtained its confirmation, the sale so confirmed would have been valid, and they could not thereafter have objected that they were not bound by the acts of the referee, though made without authority. Here the owners were informed, before confirmation, of the terms of the written contract, and should be held to have ratified that contract as to all its terms and provisions. But, whether that be true or not, this action is brought by the referee, who alone is authorized to maintain the action, unless by assignment he confers that right upon another. Mayer v. Wick, 15 Ohio St. 548. In Galpin v. Lamb, 29 Ohio St. 529, 534, it was said: "The contract of purchase is made with the officer, as representing all the interests involved in the suit in which the judgment or decree of sale is rendered. He and the purchaser are the only parties to the contract of purchase; and he alone can maintain an action against the purchaser to recover the purchase money"; and, in commenting upon the case of Mayer v. Wick, supra, it was said: "In that case the sale had been confirmed, and the officer had thus become responsible for the purchase money. He had tendered the deed to the purchaser, and assigned his right of action to the plaintiff in the decree under which the property was sold, and the latter was allowed to maintain the action for the purchase money." See, also, Michenor v. Lloyd, 16 N. J. Eq. 38. If, therefore, the right of the referee to prosecute this action is based upon the contract he made with the purchaser, it would appear to be clear that he should not be permitted to say, "I am not bound by the written contract I made with you, because I had no power to make it, and therefore it did not constitute any part of the terms and conditions of the sale, and you cannot use it for the purpose of showing that the terms of the second sale were different." If, without a resale, the referee had brought suit against the defendant to recover the unpaid purchase money, the action could properly have been sustained, because the order confirming the sale, not having been appealed from, absolutely fixed the defendant's liability as a purchaser; but he was not concluded, by his failure to appeal, from showing the terms of his purchase to have been different from those of the second sale.

As to the order of resale at appellant's risk, made April 7th, I think appellant is bound thereby. It recites that the purchaser had notice and was represented by counsel. If that were untrue, he should have moved to vacate or modify the order, and, upon a denial of his motion, have taken an appeal. No other questions require notice. The judgment and order appealed from should be reversed, and the cause remanded.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded.

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5 Cal. Unrep. 273

PETERSON v. MACHADO. (No. 19,591.)

(Supreme Court of California. Feb. 7, 1896.)

DEED—EASEMENT—RIGHTS OF GRANTOR—INJUNCTION.

1. A deed conveying "a road and right of way over and across" land, "to be forever appurtenant to" adjoining land of the grantee, and providing that neither party shall, "nor shall his successors in interest, grant or give to any other person a right of way over said road," conveys only an easement for a right of way, and not a fee-simple title.

2. An injunction to enjoin a grantee of an easement for a right of way from interfering with the grantor's laying pipes beneath the right of way, to connect with a ram placed in a gulch which encroached on the right of way, should be granted, where the grantor offers to widen the right of way by moving his fence, or by changing the location of the ram, and filling up the gulch.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county.

Action by John Peterson against Domingo Machado for an injunction. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Graves & Graves and F. A. Dorn, for appellant. Wilcoxon & Bouldin, for respondent.

BELCHER, C. The plaintiff was the owner of a tract of land in San Luis Obispo county, which was bounded on its westerly side for a distance of about 2,400 feet by a natural stream of water, known as "Sycamore" or "Los Osos" creek. He resided on this land with his family, his dwelling house being about 1,500 feet distant from the creek, and was engaged in farming the same, and raising stock, consisting of cattle, horses, and hogs. The defendant owned two tracts of land, one adjoining the north side of plaintiff's land, and the other the south side thereof. In October, 1887, plaintiff, by an instrument in writing, granted and conveyed to defendant, and to his heirs and assigns, "a road and right of way for all purposes over and across the aforesaid land of Peterson, and to be forever appurtenant to the aforesaid land now owned by said Machado, which road shall be sixteen (16)

feet wide, shall run along the east side of what is known as 'Sycamore' or 'Los Osos' creek, connecting the aforesaid two tracts of land now owned by said Machado, and the easterly line of which road is described as follows: [Setting out courses and distances.]" The instrument was executed by both parties, and contained numerous covenants to be kept and performed by them, and, among others, that within eight months said Machado "shall build and thereafter perpetually maintain one hog-tight fence along the east line of said road, as above described"; and that "said Peterson shall not, nor shall his successors in interest, grant or give to any other person a right of way over said road granted to Machado across the land of Peterson; and said Machado shall not, nor shall his successors in interest, give or grant to any person or persons who may be owners of his said land, or some part thereof, a right of way over said road." Subsequently, and about two years before the commencement of this action, plaintiff placed a water ram in the bed of the creek, where the same borders upon his land, and connected therewith a pipe, through and by means of which he conveyed water from the stream to his house, to be there used for domestic and culinary purposes and for watering his stock. The pipe crossed the roadway, but was there placed under ground, and so as not to interfere with the use of the right of way. Afterwards, in June, 1894, defendant dug up, cut, and removed that part of the pipe which crossed the roadway, and thereby prevented the flow of any water from the said creek to plaintiff's house. This action was thereupon commenced to obtain an injunction restraining the defendant, his agents, servants, and employés, from cutting or in any way interfering with the said pipe. The case was tried, and the court found that the defendant was the owner of an easement or right of way over the strip of land described, and, among other things: "(10) That the said ram was placed by the plaintiff inside of said way, and inside of fourteen feet from the easterly line of said way, and the said plaintiff has placed eleven feet of pipe over and across the said way, under ground; that the defendant's enjoyment of said way has never been, and is not, obstructed by said water ram and pipe. (11) The said stream in which said ram is placed runs through a gulch about six feet deep. Said gulch is along the west side of defendant's said way, and said ram is at the bottom of said gulch. Said gulch encroaches about six feet into said way of defendant at the point where said ram is placed. The road of defendant is on the bank of said gulch, six feet above said ram." Judgment was entered granting the plaintiff the relief prayed for, but providing: "That defendant is permitted to widen his road along said way by filling up or bridging over the gulch described in said findings where the same encroaches upon his way. That plaintiff has no right to use said way in any manner that will prevent defendant from using said way for a convenient road, or to prevent defendant from repairing his road in any manner to fit the same for his convenient use." From this judgment, and an order denying a new trial, the defendant appeals.

1. The first point made for a reversal is that the plaintiff, by the instrument above referred to, granted to the defendant the fee-simple title to the strip of land described therein, and hence had no right to lay his water pipe across the strip. The Civil Code declares that "a fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended." Section 1105. But grants are to be interpreted in the same manner as other contracts (section 1066), so as to give effect to the intention of the parties, so far as that intention can be ascertained (section 1636); and, to ascertain that intention, "the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other" (section 1641). Pellissier v. Corker, 103 Cal. 516, 37 Pac. 465; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049. Tested by the foregoing rules, does it appear that the instrument in question here was intended to grant to the defendant a fee-simple title? If it was so intended, why did it provide that the "road and right of way" are "to be forever appurtenant to" the land then owned by the grantee? "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way * * * across the land of another." Civ. Code § 662. Again, if it was so intended, why did it provide that the grantor "shall not, nor shall his successors in interest, grant or give to any other person a right of way over said road," and that the grantee "shall not, nor shall his successors in interest, give or grant to any person or persons who may be owners of his said land, or some part thereof, a right of way over said road"? Obviously, if the grantor had no title left in him, he could not grant or give to any other person a right of way over the road, and the provision that he should not was useless; and, if the grantee had a complete title, he could give or grant a right of way over the road notwithstanding the provision that he should not. Looking at the whole instrument, we conclude, therefore, that its object and purpose were to grant a right of way, and nothing more.

2. The next point is that if the instrument conveyed only an easement, and not a fee-simple title, still defendant had a right to dig up and remove the said pipe, because it obstructed and interfered with his right of way. The court below found directly against defendant on this point, and we think there was evidence tending to support the finding. It

was proved that the bank of the creek where the ram was placed was from 6 to 10 feet high, and was nearly perpendicular, and that from the fence to the top of the bank was about 12 feet. The road was therefore narrow at that point, and, as stated by defendant, it was difficult, if not impossible, to drive a four-horse team with a loaded header wagon over it. This was because there was quite a sharp bend in the road there, and also because there was a large sycamore tree standing near, which made the passage round the bend more difficult. Defendant testified that he wanted to cut down the tree, but plaintiff objected to his doing so, and "said the tree belonged to him, and not to do it. He says he sold me the right of way, but never sold me the timber." And one of his witnesses testified that "if the tree would be taken down, and you drive four horses, it will give your leaders more room to swing around the road where the bend is." The plaintiff testified: "I am prepared, at any time that defendant wishes to widen his driveway by putting in a bulkhead, to take my ram further over, and would be willing to set my fence further away. I told Machado that, whenever the rams interfered with his road or his business, I would take them out of there; and, if he wishes to widen his road by putting in a bulkhead, I will take them away. The creek is very crooked; so is the road." In accordance with this offer, the judgment, as we have seen, permits the defendant to widen his road by filling up or bridging over the gulch described in the findings, where the same encroaches upon his way, and limits the plaintiff's right to use the way in any manner that will prevent defendant from using the same for a convenient road, or from repairing the same. As thus entered, the judgment promotes justice, and does no wrong to either party. There was no material error in the rulings of the court. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(114 Cal. 526)

MURPHY v. CLAYTON. (No. 15,914.)[1]

(Supreme Court of California. Feb. 4, 1896.)

ADMINISTRATORS — RIGHT TO PROPERTY SOLD BY DECEDENT.

A sale of chattels by decedent, though not accompanied by delivery, having been valid against him and his heirs, and therefore his administrator, recovery thereof by the purchaser from the administrator cannot be defeated, under Code Civ. Proc. §§ 1589, 1590, providing that, when there is a deficiency of assets in the hands of an administrator, he shall sue for, and may recover, for the benefit of creditors, property conveyed by decedent in fraud of creditors; it not appearing that the claims against the estate which have been allowed by the administrator, or are evidenced by judgment, exceed the assets in his hands.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Ann Murphy against Edward W. Clayton. Judgment for defendant. Plaintiff appeals. Reversed.

Geo. W. Lewis (J. H. Campbell, of counsel), for appellant. Kittredge & Craft, for respondent.

HAYNES, C. This action is in claim and delivery, brought by the plaintiff to recover from the defendant the possession of certain horses. The complaint is in the usual form, and was unverified. The defendant, in his answer, first pleaded a general denial, followed by two separate defenses, the first of which alleged that Daniel J. Murphy, in his lifetime, was the owner of, and in the exclusive possession of, and entitled to the possession of, all said property; that he died intestate June 20, 1893; that on July 21, 1893, the defendant was duly appointed administrator of the estate of said decedent; and that the said properties "all and singular were at the date of decedent's death, and ever since have been, and now are, a part of said estate, and defendant then took them, and has ever since held them, as part of said estate, and for the purpose of administration thereof, as administrator aforesaid, and not otherwise." The second special defense alleged the facts above stated concerning the death of Daniel J. Murphy and defendant's appointment as administrator, and further alleged "that said properties all and singular were at the date of decedent's death, and ever since have been, and are now, a part of said estate for the purpose of its administration, and for the payment of the debts of said decedent and of said estate; that defendant, as administrator, and not otherwise, took said properties, and has ever since held and now holds them, as part of said estate, for the purpose of administration thereof as aforesaid; that the value of the personalty of said estate, including said properties, does not exceed $15,000; that the debts of said estate aggregate $90,000, and are wholly unpaid." The action was tried by the court, without a jury. The court found that the plaintiff had acquired certain of the horses from her husband, James Murphy, in his lifetime; and these, together with their offspring, the court found she was entitled to recover, together with certain other of the horses which were purchased by defendant's intestate for the plaintiff with her funds; and that the deceased, Daniel J. Murphy, was at the time of his death the owner of two of said horses, known as "Viva" and "Viva Williams." There is no controversy here as to any of the horses above mentioned. The fifth and sixth findings are as follows: "(5) That on or about the 25th day of May, 1892, said Daniel J.

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[1] Rehearing granted.

Murphy, in settlement of his accounts with the plaintiff, sold and transferred to the plaintiff, in consideration of said settlement, certain horses in controversy in this action, namely, Carrie Malone, Danton Moultrie, Governor Pico, Clyde, Chloe Thorne, Alien, and her colt foaled in 1893. (6) That on and before the 25th day of May, 1892, and at the time of said sale and transfer, said Daniel J. Murphy was the sole owner of and in the sole possession and control of all said animals in his own name; that said sale was complete and valid between the parties thereto, but was not accompanied by an immediate or any delivery, or followed by an actual or continued or any change of possession of said animals, or any of them, mentioned in finding 5, but said animals remained in the sole possession of said Murphy continuously to the day of his death; that during the same period all other property of the plaintiff was in his keeping, as her general manager and agent." The court further found that Murphy died June 20, 1893; that defendant was appointed and qualified as administrator July 21, 1893; that notice to creditors had been published, but the time for the presentation of claims would not expire until May 27, 1894; that claims against decedent, aggregating, with interest, about $80,000, had been presented, allowed, and filed, and were unpaid; that the value of said estate is in personalty $14,377.75, and in realty $106,835.17; that plaintiff had brought suit, which is still pending, in which she asserts title in herself to a portion of said realty of the value of $17,500, and had also brought another suit, which is still pending, in which she asserts a life estate of the value of $10,000; that, in addition to said claims allowed and filed, suits are pending for the recovery of judgments against said estate amounting to $6,000; that plaintiff had also brought suit against said administrator to recover personal property aggregating in value $2,869; that the court had awarded to the widow of decedent the sum of $225 per month, from June 20, 1893, and also certain personalty, as exempt, of the aggregate value of $1,000, and also a homestead of the value of $3,000. The court further found "that plaintiff was at the commencement of this suit, and is now, the owner of all the animals mentioned in the complaint, except Viva and Viva Williams"; that she was then, and is now, entitled to the possession of all except Viva and Viva Williams and those named in finding No. 5; and "that she was not then, and is not now, entitled to the possession of said last-named animals." As conclusions of law, the court found that the transfer of the animals mentioned in finding No. 5 was void as to the creditors of the decedent; that the defendant, as administrator, is entitled to retain possession of them "for the purpose of applying the same, if necessary, to the payment of the creditors of said decedent, in due course of administration of said estate." Judgment was entered accordingly, and this appeal is by the plaintiff, upon the judgment roll, from that part of the judgment which awards to the defendant the possession of the animals mentioned in finding 5, "for the purpose of applying the same, if necessary, to the payment of the creditors of said decedent, in due course of administration of said estate of D. J. Murphy, deceased."

Counsel for appellant contends that the findings, so far as they relate to that portion of the judgment involved in this appeal, are outside of the issues; that, as between the plaintiff and her son Daniel J. Murphy, the sale of the horses to her was good and valid; and that in order to avoid the sale, in the interest of creditors, the facts which it is claimed made such sale void as to creditors must be alleged, and could not be proved under an allegation of ownership of the decedent at the time of his death, nor under a general denial of plaintiff's ownership and right of possession. In this contention I think that appellant is clearly right, though respondent asserts that the evidence upon which the findings were based was introduced without objection that it was inadmissible under the pleadings, and that, therefore, the judgment cannot be reversed upon that ground. This controversy between counsel becomes immaterial in view of the conclusion, hereafter reached, that the findings do not support that part of the judgment appealed from. The court found that, as between the plaintiff and her son, the sale was valid, and that she was the owner of the property in question; and therefore, unless other facts existed affecting the transfer or the property transferred, it could not have been part of Daniel J. Murphy's estate. The sale, being valid between the plaintiff and the heirs of the deceased, to whom his estate descended, and therefore valid as against the administrator, gave him no right of possession resulting merely from his appointment and qualification as administrator; nor could he assume the existence of any facts or circumstances which, if shown to exist, might authorize him to acquire the possession by a judicial proceeding. Besides, the possession of the deceased after the sale was as the general agent of the plaintiff, and his possession was her possession. The record contains no statement or bill of exceptions, and the circumstances attending the possession by the deceased, and giving it character, are not before us; and we must therefore accept the finding, and assume for the purposes of the case that the change of possession was not such as the statute requires.

The only authority given executors or administrators to recover, for the benefit of creditors, property conveyed or transferred by the deceased in his lifetime, is found in sections 1589 and 1590 of the Code of Civil Procedure. These sections are as follows:

"Sec. 1589. When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent in his lifetime has conveyed any real estate, or any rights and interests therein, with intent to defraud his creditors, or to avoid any right, debt or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditor all such real estate so fraudulently conveyed; and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance.

"Sec. 1590. No executor or administrator is bound to sue for such estate, as mentioned in the preceding section, for the benefit of the creditors, unless on application of the creditors, who must pay such part of the costs and expenses of the suit, or give such security to the executor or administrator therefor as the court, or a judge thereof, shall direct."

Assuming (without deciding) that section 1589, Code Civ. Proc., applies to transfers which are void as against creditors under section 3440 of the Civil Code, as well as to transfers and conveyances made with intent to defraud creditors, specified in sections 3439 and 1227 of the same Code, and that an administrator is one on whom a decedent's estate "devolves in trust for the benefit of others than himself" (sections 3439 and 3440, Civ. Code), the facts found by the court in this case would not have authorized the administrator to have prosecuted an action to recover the property in question, and therefore do not constitute a defense to this action, or sustain the judgment appealed from. In Field v. Andrada, 106 Cal. 107, 110, 39 Pac. 323, it was said: "The obvious intent and meaning of this section is that two things must concur to authorize the administrator to commence an action to set aside a deed of his intestate as void against creditors: (1) There must exist creditors to be paid; and (2) there must be an insufficiency of assets in the hands of the administrator to meet their demands. Both of these facts must coexist to bring the case within the limitations of the statute. Ohm v. Superior Court, 85 Cal. 545, 26 Pac. 244. If there are no creditors, or, there being creditors, the administrator has sufficient assets of the estate in his hands to meet their demands, in either case he is without power to maintain the action. * * * It is held in Ohm v. Superior Court, supra, that, to constitute a creditor within the meaning of the statute, 'he must be a creditor whose claim has been allowed by the administrator, or is evidenced by a judgment;' citing Mesmer v. Jenkins, 61 Cal. 153; McMinn v. Whelan, 27 Cal. 300."

Under these authorities, claims against the estate which have not been accepted or allowed by the administrator, or which have not been reduced to judgment, do not bring the claimants within the category of creditors; and it therefore appears from the findings that there is not a deficiency of assets in the hands of the administrator to meet the demands of creditors, and therefore the circumstances do not exist which would authorize a recovery against the plaintiff by the administrator. The findings therefore do not support the judgment appealed from, but require a judgment for the plaintiff as to all the property except the two horses Viva and Viva Williams. The statement in the eleventh finding "that she [the plaintiff] was not then, and is not now, entitled to the possession of said last-named animals" (the ones here in question), is an erroneous conclusion of law from the facts precedently stated. We therefore advise that that part of the judgment appealed from be reversed, with directions to the superior court to enter judgment in favor of the plaintiff for the animals mentioned in the fifth finding.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment awarding the defendant the possession of the animals mentioned in the fifth finding is reversed, with directions to the superior court to enter judgment upon the finding in favor of the plaintiff for the possession of said animals, or for the value thereof as found by the court in case a delivery thereof to the plaintiff cannot be had.

111 Cal. 237

KILBURN et al. v. LAW, Judge. (S. F. 287.)

(Supreme Court of California. Feb. 8, 1896.)

REMOVAL OF BANK EXAMINER—CRIMINAL PROSECUTION—WRIT OF PROHIBITION—JURISDICTION.

1. An accusation under Pen. Code, § 772, requiring the superior court, on presentation of a sworn statement accusing a public officer of malfeasance or neglect of duty, to cite such officer to appear, and to hear the accusation and evidence, and, if the charge is sustained, to enter decree of removal, and judgment of $500 in favor of the informer, is a criminal, and not a civil, proceeding.

2. Bank examiners cannot be prosecuted under Pen. Code, § 772, providing for the removal of public officers from office for malfeasance or neglect of duty, since, by Id. §§ 888, 889, prosecutions for removal can only be maintained against district, county, municipal, or township officers.

3. The fact that the objection that a complaint does not state a case is in the nature of a demurrer, of which the superior court has jurisdiction, cannot be urged against the jurisdiction of the supreme court to entertain an application for prohibition to stay proceedings in the superior court in a case where no facts could be alleged which would give the lower court jurisdiction.

In bank. Application by Paris Kilburn and others, bank commissioners of the state of California, against J. K. Law, judge of the superior court, for writ of prohibition. Granted.

R. B. Carpenter, for petitioners. Andrew J. Clunie and V. G. Frost, for respondent.

TEMPLE, J. This is an application for a writ of prohibition against Hon. J. K. Law, judge of the superior court of Merced county, commanding him to desist from any further proceedings against the petitioners as bank commissioners in the matter of the accusation of W. N. Sherman against them. October 8, 1895, said Sherman filed in the superior court of Merced county a verified accusation charging that the bank commissioners had willfully neglected to perform the duties of their office, in that, having the means to do so, they did not, up to September 1, 1895, ascertain that the Merced Bank was insolvent and unable to fulfill its obligations, and that it was unsafe to continue business, and that, having the means to ascertain these facts, they did not report the same to the attorney general of the state of California, as required by law, and that having ascertained on the 12th day of September, 1895, that said bank was insolvent and in an unsafe condition, they did not report, and have not since reported, such facts to the attorney general. The accusation also charged that the Merced Bank was insolvent and unsafe, and that on the 16th day of October, 1894, it suspended payment and closed its doors, and that said suspension has ever since continued, and the bank has paid no part of the sums due its depositors, and that the neglect of duty on the part of the bank commissioners has entailed great loss on the part of depositors in said bank. The petitioners state that neither of them was a citizen of the county of Merced, wherein the accusation was filed, but were then temporarily at Merced when this proceeding was commenced, engaged in the discharge of their official duty. Upon the presentation of said accusation to the superior court of Merced county, it is averred, the court issued a citation, which was served upon the petitioners, requiring them to appear and answer the accusation; and the petitioners charge that notwithstanding said accusation was filed without authority of law, and the proceeding is illegal, respondent will, unless restrained, entertain the same, and will enter judgment removing petitioners from office. The answer admits all the material allegations, except that respondent denies that he will proceed to remove petitioners from office, but avers that he will proceed to hear the accusation, and determine the same, as required by section 772 of the Penal Code.

Petitioners contend that, inasmuch as the bank commissioners are state officers, and not district, county, municipal, or township officers, they cannot be prosecuted and removed from office under section 772 of the Penal Code, and they claim that sections 888 and 889 expressly so provide. In answer to this it is suggested that, although section 772 is in the Penal Code, the proceeding there authorized constitutes a civil case; it is simply a law misplaced. It is even contended that an action upon a statute to recover a fixed penalty was at common law an action of debt,—that is, a civil action,—and the legislature cannot, by providing for such a case in the Penal Code, thereby convert that which is essentially a civil action into a criminal proceeding. That the legislature intended to make it a criminal prosecution is, to my mind, clear. It is a proceeding for the punishment of an offense in its nature criminal. No one denies that willful neglect of official duty is, or may be made by statute, a crime. It has always been so treated. That this section is in the Penal Code is, of itself, sufficient to indicate the legislative intent. But this is not all. Section 682 of the Penal Code provides that every public offense must be prosecuted by information or indictment, except (1) "Where proceedings are had for the removal of civil officers of the state," etc. Section 888, that offenses triable in the superior courts must be prosecuted by indictment or information, except as provided in the next section. Section 889: "When the proceedings are had for the removal of district, county, municipal or township officers, they may be commenced by an accusation or information, in writing, as provided in sections seven hundred and fifty-eight and seven hundred and seventy-two." Here is an express provision for the prosecution of certain officers for public offenses under section 772. This is equivalent to an express declaration by the legislature that the proceeding authorized by section 772 is the prosecution of a public offense. Is there anything in the nature of the proceeding authorized by section 772 which would make it a case at law, rather than a criminal prosecution? There are many civil actions, the result of which may be highly penal, and which partake of the nature of criminal prosecutions. And yet, since the purpose is to redress or prevent a private injury, they cannot be classed as criminal proceedings. But when the object is to punish the defendant for the commission of an act, and the public, and not individuals, as such, are interested in the judgment sought, and where, as here, the act is declared a public offense,—and especially if at common law it was so considered,—the presumption is very strong, if not conclusive, that the proceeding is a criminal prosecution. The features of section 772 which gave it the appearance of providing for a civil action are: (1) The defendant is cited to appear and answer; (2) the court must proceed to hear the evidence in a summary manner, which, it is claimed, means that a jury is not required; (3) the court must enter a decree depriving the accused of his office, and judgment in favor of the informer for $500 and costs; and, (4) as it is claimed, the proceeding is not in the name of the people, as directed by section 684 of the Penal Code. Probably no one would think any one of these provisions sufficient to constitute the proceeding a civil case, in view of the provisions alluded to, which declare that this is a criminal proceeding, but it may be thought that all together plainly indicate a civil case. The first cannot be of consequence. The legislature may provide for the prosecution of a criminal action without the arrest of the defendant. If the fact that it is a criminal proceeding implies the right to a trial by jury, it would follow that, in a prosecution under this section, defendants are entitled to a jury, and the decree and judgment provided would follow a verdict of guilty. The judgment imposing a fine, which, in whole or in part, shall go to the informer, is not such an anomaly in criminal practice as to require discussion. Perhaps a prosecution under this section ought to be in the name of the people. There is nothing indicating a contrary intent in the statute. The cases have been entitled as they were under the act of 1853. This was natural, as that act seemed to make it a proceeding by the informer against the person accused. The matter does not appear to be of much consequence; and it is enough to say that the statute has not provided that the action shall be in the name of the informer, and if section 684 is applicable, as I think it is, it ought to be in the name of the people. It follows that the point that such prosecution cannot be had, under this section, against the bank commissioners, must be sustained. They are not district, county, municipal, or township officers; and, by sections 888 and 889, prosecutions under section 772 can only be maintained against such officers.

It is said that the objection that the complaint does not state a case of which the court has jurisdiction is in the nature of a demurrer, and that the superior court has jurisdiction to consider all such questions, and they cannot be made the ground for a writ of prohibition. This point cuts too deep, and, if sustained so broadly, would deprive this court of all power to issue writs of prohibition in cases where a lower tribunal is exceeding its jurisdiction. It certainly is not good in a case like this, where no facts could be alleged which would give the lower court jurisdiction. Let the writ issue as prayed for.

We concur: McFARLAND, J.; HENSHAW, J.; VAN FLEET, J.; HARRISON, J.

BEATTY, C. J. I concur in the judgment.

GAROUTTE, J. I concur in the foregoing opinion, and cite the recent cases of In re Curtis (Cal.) 41 Pac. 793, and Wheeler v. Donnell (Cal.) 43 Pac. 1, as directly deciding that an accusation brought under section 772 of the Penal Code is a criminal proceeding.

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5 Cal. Unrep. 277

SILVA v. SPANGLER. (S. F. 104.)

(Supreme Court of California. Feb. 7, 1896.)

NUISANCE—PLEADING—DEMURRER—WAIVER—WAY—DEDICATION AS HIGHWAY.

1. Under Code Civ. Proc. § 430, the failure of a complaint, in an action to abate an embankment, to allege any damage to plaintiff different or peculiar from that resulting to the common public, is not a ground of demurrer, though, in a proper case, the objection may be urged, under a demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action.

2. Under Code Civ. Proc. § 434, providing that if objections to a complaint are not taken, either by demurrer or answer, the defendant must be deemed to have waived the same (with certain exceptions), the objection that a complaint is ambiguous or uncertain, that being a specific ground of demurrer, is waived, if not raised by demurrer.

3. The fact that a strip of land, over which a private right of way had been granted by the owner to two other landowners, to enable them to reach a highway from their land, is used, without objection, by others, going to and from their own lands, or the places of the two grantees, does not establish a dedication to the public.

4. In an action to abate an embankment, thereby throwing surface water over plaintiff's right of way, where there is no allegation that the right of way was a public one, it is unnecessary to allege any special injury differing from that resulting to the public.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Emanuel P. Silva against Antonio Spangler. Decree for plaintiff, and defendant appeals. Affirmed.

Wm. L. Gill, for appellant. C. L. Witten and Jackson Hatch, for respondent.

SEARLS, C. This action is brought to abate an embankment constructed by defendant, whereby the surface water is alleged to be prevented from flowing from and over a private right of way owned and possessed by him, the said plaintiff, and to enjoin defendant from maintaining such embankment. Plaintiff had a degree as prayed for, and this appeal is from the judgment, and from an order denying defendant's motion for a new trial. The amended complaint of plaintiff was demurred to, upon two grounds, viz., "that said amended complaint does not state facts sufficient to constitute a cause of action," and upon the further ground "that plaintiff does not allege any damage different or peculiar than that resulting to the common public." The last cause of demurrer assigned is not one for which a demurrer can be properly interposed, under section 430 of the Code of Civil Procedure. The same cause may, however, be urged, in a proper case, under the objection that the "complaint does not state facts sufficient to constitute a cause of action." The contention of appellant seems to be based upon the theory that the amended complaint contains no allegation that the roadway in question is a private road, and that the complaint does not state in any allegation whether the road in question is a private or public road. In support of the last proposition we are referred to the case of Grimes v. Linscott (not yet officially reported; decided May 24, 1895) 40 Pac. 421. In that case, there was a demurrer interposed, upon the ground of ambiguity and uncertainty, which was sustained. By failure to raise this objection by demurrer in the present case, it was, under section 434, waived. We are unable to agree with appellant in his deduction of facts from the amended complaint. Succinctly stated, the amended complaint avers that plaintiff and one J. P. Silva are now, and since October 27, 1884, have been, the owners and in the possession and enjoyment of a private right of way, for road purposes, over and along a tract of land, which is described by courses and distances and by metes and bounds, being 30 feet in width, and which was conveyed to them by Henry Curtner, by deed dated October 27, 1884, etc.; that plaintiff is the owner of a tract of land, containing 53 acres (describing it), used by him for farming purposes, and that his only means of egress and ingress thereto, and the only means of reaching any public highway therefrom, is by said private right of way described in the first paragraph of the complaint. Then follow allegations as to the ownership by defendant of 40 acres of land south of and adjoining the strip of land of plaintiff, 30 feet wide, as aforesaid; that the land on the north of said roadway is higher, etc., and the land of the defendant is lower, than the roadway; and that, down the slope to and over the roadway, and over the land of defendant, the surface water, which in the rainy season is in large volume, has been accustomed to flow, etc.; that defendant constructed an embankment upon said roadway, and upon his own land adjoining, whereby the surface water was prevented from flowing down, and was penned back on the roadway, rendering it unfit for travel, and destroying all connection by roadway from plaintiff's land to any county or public road, etc. The further allegations in relation to injury, etc., need not be stated. In all the complaint, we fail to find any intimation that the strip of land, and the private right of way thereon, is a public highway, or that the public has any easement or right therein or thereto. The complaint states a cause of action, and the demurrer was properly overruled.

2. It is further objected by appellant that the evidence is insufficient to justify or support either the first or ninth findings of fact. These findings are to the effect that the strip of land 30 feet in width was a private right of way for road purposes, held, possessed, and enjoyed by the plaintiff and J. P. Silva, as tenants in common, and that the said roadway so obstructed by defendant was at all times, "and is, a private right of way, and is not a public road or highway, and never has been." The evidence tended to show that in October, 1874, one Henry Curtner, owner of a larger parcel of land, conveyed to plaintiff and his brother, J. P. Silva, a parcel thereof, consisting of 113.57 acres, and also a strip of land 30 feet wide as a right of way, for the purposes of a road extending from the land so conveyed to a public road or highway, which strip of land is accurately described by courses and distances. Plaintiff has succeeded by mesne conveyances to the ownership of the 53 acres of land described in his complaint. In 1887, defendant purchased from said Henry Curtner a tract of, say, 40 acres of land, which is described as "commencing at a point in the southerly line of road, known as the 'Silva Road,'" and running thence along the southerly line of said road, etc., and as being bounded "on the north by said Silva road," etc. Henry Curtner, the former owner, testified as to his sale of the right of way to plaintiff and J. P. Silva, and said he had never conveyed this right of way to the county, or to any person other than the Silvas. He added: "It is, in fact, used by whoever chooses to pass over it, as every one does on private roads,—go through them when they wish,—generally pretty neighborly; * * * we let anybody go through that wishes it; it is an open thoroughfare. I don't shut up my place against no neighbors; there are no gates on it." Question: "Been used by the general public for years past?" Answer: "No, not by the general public, but those who have business in there," etc. Various of the witnesses spoke of the road as a public road or public highway, but generally without stating facts in evidence thereof, except that certain gates thereon had been removed; that the road was fenced, and that parties who have purchased land from Curtner bordering on the road have used it, or portions of it, to get to their land. All this was consistent with the idea of a license from plaintiff, and left the question of a dedication of the way to public use open to further inquiry. "No route of travel used by one or more persons over another's land shall hereafter become a public road or highway by use, or until so declared by the board of supervisors, or by dedication by the owner of the land affected." Pol. Code, § 2621. There is no claim that this road was ever declared a highway by the board of supervisors. It only remains, then, to inquire, did the owners thereof dedicate it to the public use? It is said that "if the donor's acts are such as indicate an intention to appropriate the land to the public use, then, upon acceptance by the public, the dedication becomes complete." Elliott, Roads & S. § 92. The question of intent is paramount, and, unless such intent expressly appears, or can be fairly inferred from the acts of the donor, there is no valid

dedication. People v. County of Marin, 103 Cal. 224, 37 Pac. 203. Tested by this rule, the court was justified in finding that the way in question never became or was a public highway, and that it was and is a private way. The findings are ample to support the judgment. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

111 Cal. 233

RUDOLPH et al. v. SAUNDERS, Constable.

(No. 19,579.)

(Supreme Court of California. Feb. 3, 1896.)

ATTACHMENT—VALIDITY—EVIDENCE.

A finding of invalidity of an attachment of growing crops, which can be attached only under Code Civ. Proc. § 542, subd. 5, by leaving with the person having such property in his possession, or under his control, a copy of the writ and a notice that the property is attached, will not be disturbed, the return failing to show that the officer served on defendant in attachment, who was in possession of and had the crops under his control, a copy of the attachment or notice that the property was attached, but merely stating that he attached the property "by taking in my custody," and the officer's testimony that a copy of the attachment and a notice, as required by statute, were served, being contradicted by the defendant in attachment.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by John Rudolph and another, partners, as J. & J. C. Rudolph, against J. N. Saunders. Judgment for plaintiffs. Defendant appeals. Affirmed.

W. I. Nichols, for appellant. Grant Jackson, for respondents.

SEARLS, C. This action was brought by the plaintiffs, as copartners, to recover from the defendant, as constable of township 5, county of Santa Barbara, $521.15, and interest, on account of certain beans levied upon by him under and by virtue of execution. Plaintiffs had judgment for $601.60, interests and costs, from which judgment, and from an order denying his motion for a new trial, defendant appeals.

One James S. McBride was indebted to plaintiffs upon a promissory note in the sum of $521.15, with interest at 12 per cent. per annum from the date thereof, viz. from June 8, 1893, and secured by a chattel mortgage executed by said McBride, under date of June 8, 1893, and duly recorded June 12, 1893. On the 10th day of June, 1893, a writ of attachment duly issued out of justice court, in an action therein pending against said mortgagor, James S. McBride, which writ of attachment was placed in the hands of the defendant as constable for service, and was by him, on said 10th day of June, 1893, either levied, or attempted to be levied, upon the same property covered by plaintiffs' chattel mortgage, to wit, upon about 30 acres of growing beans, upon that portion of the Salsipuedes rancho known as the "James Wells Tract," being farmed to beans by said James S. McBride. If the writ of attachment was properly levied, its lien was prior to that of plaintiffs' mortgage, and the judgment should have been for defendant. If not prior to such mortgage, it became the duty of the defendant, as constable, when thereafter an execution was placed in his hands in the same case, and upon levying on the mortgaged property, to pay off plaintiffs' mortgage, as provided in sections 2968 and 2969 of the Civil Code, and, having failed to do so, the judgment is proper.

The return to the writ of attachment was as follows: "I hereby certify that under and by virtue of the within and hereunto annexed writ of attachment by me received on the 10th day of June, 1893, I did on the 10th day of June, 1893, attach the following described personal property in the possession of James McBride: Thirty acres of beans, more or less, now growing on the Salsipuedes rancho, on the land formerly farmed by James Wells, and attached the same by taking into my custody, and not putting a keeper in charge. J. N. Saunders, Constable." Subdivision 5 of section 542 of the Code of Civil Procedure provides that "debts and credits, and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, belonging to the defendant, are attached in pursuance of such writ." In Raventas v. Green, 57 Cal. 254, it was held that a growing crop is personal property not capable of manual delivery, and may be properly attached, when in the possession of the defendant in the attachment proceedings, by compliance with the subdivision of section 542 quoted above. The return of the constable fails to show that he served upon the defendant any notice that the property was attached, or that he served a copy of the attachment upon him. The return is not as full as that in Brusie v. Gates, 80 Cal. 462, 22 Pac. 284, which was held invalid. It is true that was an attachment upon real property, but the requirement of the statute in reference to a service of copy of the writ and notice is in such a case similar to the requirement in attaching personal property not capable of manual delivery; and the reasoning of that case is applicable to, and conclusive of the insufficiency of, the return in the case at bar. See, also, Watt v. Wright, 66 Cal. 202, 5 Pac. 91; Sharp v. Baird, 43 Cal. 579. Proceedings by attachment are statutory and special, and the provisions of the statute must be strictly followed, or no rights will be acquired thereunder. Gow v. Marshall, 90 Cal. 567, 27 Pac. 422, and cases there cited. It is true the return states that defendant attached the property "by taking in my custody"; but the property, being a growing crop, not capable of manual delivery, could only be attached by service of the writ and a notice as provided by subdivision 4, § 542, Code Civ. Proc.

The return of the constable was insufficient to show a valid levy of the attachment. To remedy this defect, and to show, not in contradiction of the return, but that the requisite acts in addition thereto essential to a valid levy were performed, defendant was permitted to testify, and did testify, that a copy of the attachment and a notice as provided by the statute were served upon McBride, the defendant therein. On the other hand, McBride was called as a witness on the part of plaintiffs, and testified pointedly that no notice of attachment whatever was ever served upon him. The finding of the court below is in favor of the plaintiffs, and, in the face of this marked conflict of evidence, we are not at liberty to disturb such finding. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(111 Cal. 242)

PEOPLE v. THOMPSON. (Cr. 72.)[1]

(Supreme Court of California. Feb. 10, 1896.)

INDICTMENT—CHARGING OFFENSES CONJUNCTIVELY—SUFFICIENCY.

Under Pen. Code, § 218 (St. 1891, p. 283), making it felony for any person to throw out a switch, etc., with intent to derail any train, or board any train with intent to rob it, etc., an indictment charging defendant with throwing a switch with intent to derail a passenger train, "and" boarding a passenger train with intent to rob the same, and not specifically showing that the two acts were directed against the same train, was not bad for duplicity, it being inferable from the indictment that they were directed against the same train, and the case having been tried on that assumption. Beatty, C. J., and Temple, and Henshaw, JJ., dissenting.

In bank. Appeal from superior court, Los Angeles county.

W. H. Thompson was convicted of train wrecking, and appeals. Affirmed.

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[1] Rehearing denied.

Ben. Goodrich, D. K. Trask, and Wm. A. Harris, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. A few years past, the legislature enacted what is popularly known as the "Trainwrecking Act." It is entitled, "An act to add a new section to the Penal Code of the state of California," "to be known as section 218, relating to train wrecking and the punishment thereof"; and the act provides: "Every person who shall unlawfully throw out a switch, remove a rail or place any obstruction on any railroad in the state of California, with the intention of derailing any passenger, freight or other train; or who shall unlawfully board any passenger train with the intention of robbing the same; or who shall unlawfully place any dynamite or other explosive material, or any other obstruction, on the track of any railroad in the state of California with the intention of blowing up or derailing any passenger, freight or other train; or who shall unlawfully set fire to any railroad bridge or trestle, over which any passenger, freight or other train must pass, with the intent of wrecking said train, upon conviction shall be adjudged guilty of felony and shall be punished with death or imprisonment in the state prison for life, at the option of the jury trying the case." St. 1891, p. 283. Defendant Thompson was charged and convicted of violating certain provisions of this act, and sentenced to be hanged. He now brings this appeal from the judgment rendered against him. A demurrer to the information was overruled, and the reversal or affirmance of this judgment is dependent upon the legal soundness of the action of the trial court in that behalf. The material part of the information charged: "The said Kid Thompson, on the 15th day of February, A. D. 1894, at the county and state aforesaid, did willfully, unlawfully, and feloniously throw out a switch, at Roscoe station, on the railroad known as the Southern Pacific Railroad, with intent then and there to derail a passenger train; and did then and there willfully, unlawfully and feloniously board a passenger train on said railroad, at said station, with intent then and there to rob said passenger train." It is now insisted that the information charges two offenses, and that such duplicity compels a reversal of the judgment. The question presented for solution is not an easy one, and we will at the outset enter into a somewhat detailed analysis of the act here involved. The act is not well drawn. Upon the contrary, it is crude,—entirely too crude to leave the hands of a state legislature, especially when we consider the importance of the legislation with which that body was then dealing. We cite a single instance in illustration of these remarks, and then leave the act with the present Code commission, as furnishing ample material for substantial reconstruction. One clause provides that any person is guilty "who shall unlawfully board any passenger train with the intention of robbing the same." The meaning of the phrase "unlawfully board any passenger train," by reason of its indefiniteness and uncertainty, but serves the purpose of giving work to the lawyers and worry to the courts; but the last part of the clause, to wit, "with the intention of robbing the same" (passenger train), is worse than the first. As to what is meant by robbing a passenger train, we will not now indulge in surmise.

This act arose from the necessity of the times, and was created for the purpose of stopping train wrecking and punishing train wreckers. The act so declares its purpose in terms, and, aside from one clause thereof, such purpose is patent upon the most casual inspection of its provisions. It covers four distinct and separate branches of the subject, to wit: (1) Every person who shall unlawfully throw out a switch, remove a rail, or place any obstruction on any railroad in the state of California, with the intention of derailing any passenger, freight, or other train; (2) who shall unlawfully board any passenger train with the intention of robbing the same; (3) who shall unlawfully place any dynamite or other explosive material, or other obstruction, on the track of any railroad in the state of California, with the intention of blowing up or derailing any passenger, freight, or other train; (4) who shall unlawfully set fire to any railroad bridge or trestle over which any passenger, freight, or other train must pass, with the intent of wrecking said train. The whole tenor and purpose of the act is directed against train wrecking, and this is true as to subdivision 2 equally with all other subdivisions. At first glance, that clause would seem to be directed towards the suppression of the crime of robbery, but the offense of robbery is only incidentally involved, and the prevention of the wrecking of the train, and the consequent and natural results following, of injury and death to the passengers, is its prime purpose. Whatever else the clause means, it imports acts of violence upon the train. It imports, to a more or less degree, the subjection of the employés to the robbers, the menace and duress of the employés, a loss of control of the train by them, fright upon their part, and even death. These things being so, the probabilities of destruction to the train and passengers follow merely as necessarily as such probabilities would follow from the misplacing of a switch or the removal of a rail. Hence we say that every part and clause of the act is directed towards the suppression of train wrecking.

Does the information charge two offenses? In other words, may the prosecution charge the defendant with the four distinct acts, to wit, throwing out a switch, with the intention of derailing a passenger train; unlawfully boarding the said passenger train, with the intention of robbing the same; placing dynamite upon the track, with the intention of blowing up the said train; and setting fire to a bridge over which said train must pass, with the intent of wrecking said train. In the present case, the defendant is charged with but two of these acts, and it naturally and ordinarily follows, in statutes similar to this one, that if more than one of the acts may be charged, all or any number less than all may be charged. We think this information is not susceptible to the charge of duplicity, and base our conclusion upon the general principle declared in Bishop's New Criminal Procedure (section 436): "A statute often makes punishable the doing of one thing, or another, or another, sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore, the indictment on such a statute may allege in a single count that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction 'and' where the statute has 'or,' and it will not be double, and it will be established at the trial by proof of any one of them." This principle of law is universally recognized as sound, and the application of it to the facts of this case presents the only point of difficulty. If persons, for the purpose of wrecking a certain passenger train, should (1) throw out a switch, (2) place dynamite upon the track, (3) burn a bridge over which the train must pass, it would not be an open question but that those acts could be properly charged in one information, and the proof of any of them support a judgment of conviction; and the reasons why the legal soundness of such a pleading is so apparent would be because the three acts charged were forbidden by the same provision of law, because they were all directed towards one certain passenger train, and because all were done for the purpose of wrecking that train, and thus done as part of one and the same transaction. But when we come to consider clause No. 2, as to boarding a passenger train with the intention of robbing the same, we meet with more difficulty; for there the intention with which the act of boarding is done is to rob, and not to wreck. Yet, as we have already said, the intention of robbery carries with it the probable result of wrecking, and it was the wrecking and not the robbing that the act was primarily aimed to prevent. If the act had said boarding the train with the intention of wrecking it, instead of boarding it with the intention of robbing it, the entire act would have been in perfect harmony, and clearly the four specific acts could have been joined in the one charge as one offense. And we think that the mere fact that the boarding of the train is done with the specific intent of robbery, a different intent from that accompanying the other acts specified, is not sufficient to take it out of the rule we have quoted from Mr. Bishop. We hold it is not necessary that the acts coupled together should all be required by the statute to be done with the same intent, before they may be joined as one offense. This act is essentially one to prevent train wrecking. The lawmaking power concluded that certain acts, done with certain intents, would result in the wrecking of trains. That body, in effect, created a new crime, known as "train wrecking," and declared it a felony. While in terms it did not give such name to these acts, yet the statute taken altogether fully supports that construction; and if such be its construction, we think but one result can follow, and that is the validity of the information here involved. If the lawmaking power should declare that every person who unlawfully removes a rail from a railroad track, or burns a railroad bridge, or places dynamite upon the track, or turns a switch, or forces the employés of the train to leave their posts of duty, or kills the engineer, or gags and binds the conductor of the train, shall be guilty of a felony known as "train wrecking," we are clear that one or two, or all of these acts, if directed towards the same train and in the same transaction, could be, and if the facts shown justified it, should be, charged in one information as one offense. It should be so charged, for such form of information would thus limit the rascal's opportunity of escape from the clutches of the law to the smallest possible compass. In this illustration we have a series of acts prohibited, without mention by the statute of any specific intent in the doing of any of them; yet, if committed, they would constitute a felony. It is thus observable, from what we have said, that a series of prohibited acts may be joined together and charged as one offense, where the statute fixes the same specific intent in the doing of all of them; and, further, that they may be joined when the statute specifies no specific intent for the doing of any of them. And there is no reason in principle why the rule should be different when some of the acts prohibited by the statute must be done with a certain specific intent, and the others with no specific intent; or where some of the acts must be done with a certain specific intent, and others with a different specific intent. The question of intent with which the prohibited acts are done does not furnish the test by which the charge of duplicity in pleading is determined. We think that the boarding of the train, if done with a different intent than the act of burning the bridge or removing a rail, does not prevent the application of the principle laid down by Mr. Bishop. The specific intent or intention mentioned in the statute is an essential and material part of the felony. It is but a part of the description of the offense. It is just as essential to make out the felony as the doing of the abstract act, and the act and intention must be joined or there is no offense. Hence, it follows that the acts of themselves may be perfectly harmless, or they may constitute other offenses, but they are only enjoined by this statute when coupled with certain specific intents. As illustrative of this matter of intention: In Angel v. Com., 2 Va. Cas. 231, defendant was charged under a statute with unlawfully shooting, "with the intention to maim, disfigure, disable and kill," and a conviction was sustained.

As supporting generally the information here under consideration, against the charge of duplicity, we cite Hinkle v. Com., 4 Dana, 518. Defendant was there charged under a statute with having "set up and kept a gaming table, and induced others to bet at it." The court said: "Although the setting up of a gaming table may alone be an indictable offense, the keeping of such table and the inducing of any person to bet upon it, another, when each shall have been committed by different persons or at different times, nevertheless, as they are co-operative acts, constituting altogether one offense when committed by the same person at the same time, an indictment for that combined act in violation of law may properly charge the whole in one count, and but one punishment can be inflicted, as for one offense." In Com. v. Miller, 107 Pa. St. 276, an indictment was sustained charging a forcible entry and detainer. In State v. Murphy, 47 Mo. 274, an indictment was sustained charging "the keeping open a tippling shop and grocery, and selling to divers persons intoxicating liquors on the first day of the week." The court said: "When a statute in one clause forbids several things, or creates several offenses in the alternative, which are not repugnant in their nature or penalty, the clause is treated in pleadings as though it created but one offense; and they may all be united conjunctively in one count, and the count is sustained by proof of one of the offenses charged." In State v. Cooster, 10 Iowa, 454, an indictment was sustained charging the defendant with keeping a gambling house and permitting other persons in a place under the control of defendant to play for money and other things. The court said: "The objection has its origin in the idea that there is such a difference in the essential qualities of these two acts as to make them separate offenses. But is this true? They are found in the disjunctive clause of the same section of the Code, visited with the same penalty, and it is the better opinion that in their essence they are one and the same offense, the guilt of which may be incurred in one or other of these methods." In State v. Nelson, 29 Me. 329, an indictment was sustained charging defendant "with buying, receiving, and aiding in concealing stolen goods, knowing the same to have been stolen." To the same effect is Stevens v. Com., 6 Metc. (Mass.) 241, where the court said: "There is but one count in which the defendant is charged, and there is but one offense with which he is charged. It is made but one offense by the statute, although, according to the language used, it may be committed in one of three modes,—that is, by buying, receiving, or aiding in the concealment of stolen goods. Whether charged to be done in one, two, or all three of the modes mentioned, it is still but one offense, and the general finding of the jury is that the offense was committed as charged." In Wingard v. State, 13 Ga. 396, an indictment was sustained charging that certain defendants "did play and bet with cards for money at a game of poker, whist, faro, seven-up, three-up, and other games played with cards." It will be noticed that in the cases we have cited the various acts are charged in one and the same count of the indictment. The authorities of our own state go to the full length of those cited from sister states. In People v. De La Guerra, 31 Cal. 459, a case involving a statute which declared it a felony for certain county officers to issue, have in their possession with intent to circulate, or put in circulation, certain licenses, it was charged that the defendant had in his possession, with intent to circulate, and did actually put in circulation, one of these licenses. The court upheld the indictment against the charge of duplicity, and reversed the judgment. Here one of the acts was done with a certain specific intent, and the other was done without any specific intent whatever. Various violations of the gaming statute may be charged in one indictment. People v. Gosset, 93 Cal. 641, 29 Pac. 246. It is conceded that under the act declaring who are vagrants, and prescribing the punishment therefor, the entire series of acts there laid down may be charged in one complaint. Ex parte McCarthy, 72 Cal. 384, 14 Pac. 96. This is so though the act mentions no such offense as vagrancy, and it might be suggested that in nearly all of the statutes from which we have quoted like the case at bar the offense is given no technical name. In People v. Frank, 28 Cal. 513, the defendant was charged with falsely making a draft and also with passing the draft knowing it to be forged, and the indictment was sustained. Such an indictment would be good, even though the false making was done upon one day and the passing was done months subsequent thereto, and even though the false making was done with intent to defraud A., and the passing was done with intent to defraud B. People v. Harrold, 84 Cal. 567, 24 Pac. 106.

The information in this case is clumsily drawn in this: that it is not directly and specifically shown that it was the same passenger train towards which the two unlawful acts charged against defendant were directed. But we think such fact fairly inferable from the pleading, and the entire record indicates the case to have been tried upon such assumption. Indeed, appellant's counsel make no point that the information is defective in this respect. The further point is made that there can be no such thing as robbing a passenger train, and that the statute in that regard is meaningless. "Robbing a store," "robbing a safe," and "robbing a train" are every-day, ordinary, and common expressions. Very possibly it is in this sense that the legislature used the verb "rob," and not in connection with the technical meaning of the offense of robbery. But, aside from this, the trial court told the jury what constituted robbing a train, and no complaint is here made that such instruction as to the law was not sound. For the foregoing reasons, the judgment is affirmed.

We concur: McFARLAND, J.; VAN FLEET, J.; HARRISON, J.

TEMPLE, J. I dissent from the conclusion reached by the court in this case. The charging part of the information is that defendant "did willfully, unlawfully, and feloniously throw out a switch at Roscoe station * * * with intent then and there to derail a passenger train, and did then and there willfully, unlawfully, and feloniously board a passenger train on said railroad at said station, with intent then and there to rob said passenger train." Defendant demurred on several grounds, one of which was that the information charges more than one offense, to wit, (1) throwing out a switch with intent to derail a passenger train, and (2) boarding a passenger train with intent to rob the same. Both these acts are charged in the information, and, except by the use of the words "then and there," it is not shown that the two acts have any reference to each other. It does not appear that any train was derailed, or that if so it was derailed that defendant might board it, nor that he boarded it that he might derail it; nor is it charged that the acts were in pursuance of a common intent, as to wreck the train. In fact, it does not appear that he boarded the same train that he attempted to derail. In no way is it shown that the acts charged were a part of the same transaction. To derail a train may be one mode of wrecking a train, but to board a train for the purpose of robbing it cannot, in the nature of things, be either a mode or the means of wrecking it. Besides, the allegations of an information must be such that, if true, the guilt of the defendant inevitably follows. It must negative the possibility of innocence. That the defendant is guilty of any act which would tend to the wrecking of a train is not shown, for he is charged to have boarded the train for the purpose of robbing it while it was standing at a station, or sidetracked waiting for its right of way, and when no engine was attached to it. If it was intended to charge an act which was liable to cause the wrecking of the train, all such possibilities should be negatived. As long ago as 1865 this court considered the question as to what charges may be joined in an indictment. In People v. Shotwell, 27 Cal. 394, it was said, quoting from Wharton: "Where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a stage in the offense, it has in many cases been ruled that they may be coupled in one count." It has been held that where an offense consists of various acts which may be said to constitute different phases or ingredients of an offense, or, as is said in the above quotation, different stages in its commission, the legislature may provide that the commission of any one of these acts shall constitute the offense. In such case they may be joined, and proof of any one act will justify a verdict of guilty. Further than this, in my opinion, the rule relied upon to uphold this information has never been carried in any well-considered case. In considering authorities from other states, it must be borne in mind that our statute expressly provides that the indictment or information shall charge but one offense (Pen. Code, § 954), while elsewhere different offenses may be joined, provided they are charged in different counts and they are of the same general character and the mode of trial the same. Whart. Cr. Pl. § 285. The only authorities from other states, therefore, which will be of value here, are those referring to the joinder of different offenses in the same count. One point made on this appeal by the defendant is that robbing a train means nothing, and therefore the charge is not of an offense. In the leading opinion it is said: "As to what is meant by robbing a passenger train we will not now indulge in surmise." Yet the defendant has been convicted of robbing a passenger train, and sentenced to be hanged. He appeals to this court, as was his right, and makes the point that it is not a public offense. The court below instructed the jury that, "if they believed from the evidence that defendant boarded an express car in a passenger train on the Southern Pacific Railroad at Roscoe station in said county, and by force and violence, or by putting in fear of some injury to the person of the messenger in charge of said car, did rob, steal, and carry away any money of any value then in custody or in the control of said messenger, then the jury should find the defendant guilty." How can this court affirm the judgment on such an appeal, without determining what robbing a passenger train means, and that it means just what the trial court said it did?

HENSHAW, J. I concur in the dissenting opinion of Mr. Justice TEMPLE. To what he has said it may be added that there is involved in this dissent no doubt of the power of the legislature to pass the statute under review, nor any doubt of the validity of the statute as a penal law. The legislature might by a single enactment provide, for example, that every person who commits a murder, every person who commits treason against the state, every person who bears false witness against another by means of which that other loses his life, upon conviction shall be adjudged guilty of felony, and shall be punished with death. Such a law would violate no rule applicable to the enactment or interpretation of penal statutes. These offenses are all now punishable by death; yet would any one assert that under a system of criminal pleading such as ours, which commands that the indictment shall charge but one offense, these acts or any two of them might be charged in one indictment? With deference to the reasoning of the prevailing opinion, I think, until it became the law of the state, he would have been deemed a rash advocate who would have dared so to argue. And the reason is not far to seek. Such a law, though cast in one enactment, declares against several separate and distinct crimes. Is it less plain that the act under consideration does the same thing? Where a statute makes penal a single act done with one of several unlawful intents,—as the derailing of a train for the purpose of injuring property, or for the purpose of larceny, or for the purpose of killing or maiming its passengers (People v. Milne, 60 Cal. 71),—or where it enumerates a series of acts done with a single unlawful purpose, either of which acts separately, or all of which together constitute but the one offense, as making, altering, uttering, passing, or attempting to pass a forged and counterfeit instrument (People v. Ah Wo, 28 Cal. 205), an indictment charging the single act with the multifarious purposes, or the several acts with the single purpose, is not objectionable. This is as far as the rule goes; and from the illustrations which Mr. Bishop gives to support his text, it is as far as the learned author ever meant to be understood as carrying it. He says, in explanation of his statement quoted in the prevailing opinion: "'Thus, where the statute forbids the unlicensed sale of, for example, rum, brandy, whisky, or gin, the interpretation is that the offense may be committed by selling any one or two of the specified liquors, or all of them; and, whichever is done, in one transaction, there is but one crime. So it is not ill to charge in one count that the defendant did offer to sell and suffer to be sold intoxicating liquor. Under a statute the words of which are 'shall willfully destroy, deface, or injure,' etc., one may be charged with 'destroying, defacing, and injuring' a register. Under a statute to punish one who 'utters or passes, or tenders in payment as true,' any counterfeit money, it may be charged that the defendant 'did utter and pass as true,' etc. A statute made punishable anyone who 'shall sell or offer for sale' any lottery ticket, and it was adjudged not double to charge that the defendant did 'unlawfully offer for sale and did unlawfully sell' a lottery ticket." After having given these examples, the author is careful to point out that "the natures of the offense and of the act should be considered in determining whether or not a charge is double." 1 Bish. New Cr. Proc., § 437, and notes. It is no answer to the contention that boarding a train for the purpose of robbery is a distinct offense from derailing it to say that the unlawful boarding may tend to derail it. Even a man accused of crime is only chargeable with the natural consequences of his act, and the legislature itself may not declare that to be a natural consequence which in fact is not. But, indeed, in this case it is not the legislature, but this court, which has done so. The legislature has said only that for his attempted robbery he is guilty of a felony; this decision in effect says that he must be presumed to have intended that his robbery should result in train wrecking. Yet the defendant might have entered the train for purposes of secret theft. He might have entered undetected, and have escaped in like manner. It might have been furthest from his thoughts to disturb any person upon the train. It might have been his earnest wish and active endeavor to prevent the train from being wrecked or derailed while he was on it, since in that event he must share the common peril of the others. Still, for doing what he did he would have violated this law, and his conviction under it would be justified. Yet, can it be said that his act was "train wrecking," or had anything in common with the other acts and offenses enumerated in the statute? His acts do not import violence. And it is a part of common reading that when acts of violence are committed by robbers who are themselves upon a train, in consideration of their own safety they first bring it to a standstill that it may not be wrecked. Nor can I perceive that it would have relieved the embarrassment which seems to have been felt in interpreting this statute if the legislature had in fact designated the acts as "train wrecking." Plenary are the powers of that body. Its ipse dixit may create a crime, but there is no such magic in a name as will enable even the legislature to make robbery or rape or perjury "train wrecking," merely because it calls them that. If, in the instance above cited, the legislature had said that every person who commits murder, treason, or perjury which costs another his life shall be guilty of the unpardonable crime, and on conviction shall suffer death, a common name would thus have been conferred upon three distinct offenses. Could they for that reason have been charged in one indictment? The suggestion of Mr. Justice TEMPLE that it is incumbent upon this court to define what is meant by "robbing a train" is subsequently treated in the last paragraph of the opinion. But even by it the phrase is given no interpretation. It is suggested merely that "very possibly" the legislature intended to use the word "rob," not as it used it in creating and defining the crime of robbery, but as a mere colloquialism; and it is said that "robbing a store" and "robbing a safe" are every-day, ordinary, and common expressions. But would an indictment charging a man with robbing a store be upheld? And, if so, what is the definition of the offense? This is the precise question which the defendant in this case puts when he argues that there is no such crime known to the law as robbing a train; and if there be, he asks this court to define it and say whether it means burglary or larceny of goods in a train, or the robbery of some person upon the train. It would seem that a defendant situated as is this one, under a sentence of death, and appealing to this court, as is his right, for an interpretation of the law under which he is to be hanged, sentenced under a law which now for the first time is before the court for construction, is entitled to a forthright answer rather than to a mere conjecture as to what may or may not have been in the legislative mind. Nor is it an answer to say that he is foreclosed because he took no exception to the trial court's instruction upon the question. He is here within his right in asking the court of last resort to define the law, and it seems hardly to fill the measure of his just demand to tell him that he did not object in another forum to a definition given by somebody else. Moreover, it was not incumbent upon the defendant to take any formal objection and exception to the instructions. His rights in that regard are fully preserved by section 1176 of the Penal Code, which provides: "When written charges have been presented, given or refused, or when the charges have been taken down by the reporter, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges of the report, with the indorsement showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions." And when a defendant urges upon this court that the offense with which he is charged is not one known to the law, how can it be said that he is not objecting to instructions which purport to define the offense? The prevailing opinion may be taken, as deciding, against defendant's contention, that there is such a crime as "robbing a train," but whether that crime be the one defined by the instructions, or some other, appellant is not told.

To the further defect in the indictment which Mr. Justice TEMPLE points out, namely, that it does not even appear that the attempt to rob and attempt to wreck were directed against the same train, it is answered, not that the pleading does so show, but that it is fairly inferable therefrom, and that the record discloses that the case was tried upon that theory. But this defendant is demurring to the indictment, and an absence of necessary averment is conceded. Is its absence to be supplied by an inference? Then it is not necessary, even against demurrer, to charge that a defendant committed a crime; it is sufficient to plead circumstances from which it may be inferred that he committed a crime. This hearing is on demurrer only. What difference can it make to a logical decision of the question to say that the case was tried upon one or another theory? When the defendant's demurrer was overruled, there was nothing for him to do but to submit to a trial upon any theory which met the views of the prosecution and judge. But if the prevailing opinion looks for support to the trial of the cause, there can be no objection to scanning the record. The state of things there disclosed shows what the trial court believed to be the scope of the indictment, proves that the defendant was in fact tried upon two (if not three or four) distinct and separate offenses, and demonstrates the vice of the ruling which upholds this pleading. With the instructions, as declarations of principles of law, no fault need be found; but as dealing with a single crime they are anomalous in the history of the criminal jurisprudence of this state. The jury is instructed (1) that if defendant threw out a switch with intent to derail a passenger train, he is guilty; (2) if he unlawfully boarded a passenger train with intent to rob said passenger train, he is guilty (it is not charged to be the same train as that he attempted to derail); (3) if he boarded an express train at Roscoe station, and by force and violence, or by putting in fear the messenger, robbed and stole money in his custody, he is guilty; (4) if defendant abetted one Johnson in derailing a train, whereby one Masters was killed, then he is guilty. Here there are instructions touching train wrecking, and an attempt at train wrecking, boarding a train with intent to rob it, robbery of a messenger upon the train, and murder. The indictment, double as it is, charges no more than the throwing of a switch with intent to derail a passenger train, and the unlawful boarding of a passenger train at a station with intent to rob it. These instructions are addressed to evidence admitted under the indictment. But can it be said that they are applicable to a single crime, or to a series of acts having in view a single purpose? I am convinced that it can not.

I concur: BEATTY, C. J.

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111 Cal. 270

In re HATHAWAY'S ESTATE. (S. F. 376.)

(Supreme Court of California. Feb. 18, 1896.)

APPEALABLE JUDGMENTS — REVOKING APPOINTMENT OF GUARDIAN AD LITEM — DISMISSAL OF PETITION FOR REVOCATION OF PROBATE OF WILL.

1. Code Civ. Proc. § 963, subd. 3, authorizing an appeal from a judgment or order revoking "letters" of guardianship, refers to the guard-

ianship of the person or estate of a minor, or of an insane or incompetent person, for which provision is made in part 3, tit. 11, c. 14, and does not apply to an order appointing a guardian ad litem under section 372.

2. Though Code Civ. Proc. § 963, subd. 3, authorizes an appeal from an order revoking the probate of a will, it does not authorize an appeal from an order denying such revocation, or dismissing a petition for such revocation.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Petition by Charles W. Barrow, guardian ad litem of Harriet Coleman Barrow, an incompetent person, for the revocation of the probate of the will of Anna M. Hathaway, deceased. From a judgment granting a motion to vacate and set aside the order appointing such guardian ad litem, and to strike out and dismiss such petition, the guardian ad litem appeals. Dismissed.

Wm. T. Baggett and Walter H. Linforth, for appellant. E. J. Pringle, for respondent.

PER CURIAM. Motion to dismiss the appeal. The last will and testament of Anna M. Hathaway was admitted to probate in the superior court of the city and county of San Francisco in January, 1895, and thereafter, viz., June 21, 1895, upon his application therefor, Charles W. Barrow was appointed by one of the judges of said court guardian ad litem of Harriet Coleman Barrow, an incompetent person, claiming to be the heir at law of the deceased, and on the same day a petition was filed in said court in her name by her said guardian for the revocation of the probate of said will. Upon notice therefor to said guardian ad litem, a motion was made to said court to vacate and set aside the order appointing him as said guardian ad litem, and to strike out and dismiss the petition filed by him for a revocation of the probate of said will. This motion was heard upon affidavits filed on behalf of the respective parties, and on the 7th of September the court made an order granting the motion. From this order the guardian ad litem appealed to this court, and a motion is now made on behalf of the executor to dismiss the appeal upon the ground that the order is not appealable. The provision in section 963, subd. 3, Code Civ. Proc., authorizing an appeal "from a judgment or order * * * revoking letters of guardianship," refers to the guardianship of the person or estate of a minor, or of an insane or incompetent person, for which provision is made in chapter 14, tit. 11, pt. 3, Code Civ. Proc., and does not include an order appointing a guardian ad litem to represent the infant or incompetent person, authorized by section 372. No letters of guardianship are issued to a guardian ad litem, but his authority is evidenced by the entry in the minutes of the court appointing him. He is appointed by the court in which the action is pending in each case, and his removal, as well as his appointment, is under the control of the court in which the case is pending. If an appeal could be taken from the order removing him, it could with equal reason be taken from the order appointing him, and the very purpose of the appointment would be frustrated. Neither is that portion of the order striking out and dismissing the petition for the revocation of the probate the subject of an appeal. This court has appellate jurisdiction in such probate matters only as may be provided by law; and while section 963, subd. 3, Code Civ. Proc., authorizes an appeal from an order revoking the probate of a will, it does not authorize an appeal from an order denying the revocation of the probate of a will, or from an order dismissing a petition therefor. Estate of Sbarboro, 70 Cal. 147, 11 Pac. 563. See, also, Estate of Montgomery, 55 Cal. 210; Carpenter v. Superior Court, 75 Cal. 596, 19 Pac. 174; Estate of Ohm, 82 Cal. 160, 22 Pac. 927. The motion to dismiss the appeal is granted.

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5 Cal. Unrep. 281

YOUNGLOVE v. CUNNINGHAM. (S. F. 264.)

(Supreme Court of California. Feb. 18, 1896.)

Action on Note—Complaint—Frivolous Appeal—Damages.

1. In an action on a note the complaint need not specially aver a consideration.

2. Where an appeal appears to be frivolous, a mere oral assurance in argument, that it was taken in good faith, is insufficient to avoid the imposition of damages, but such assurance must find some support in the record.

Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by Dwight Younglove against James F. Cunningham on a promissory note. From a judgment for plaintiff, defendant appeals. Affirmed.

Spalsbury & Burke, for appellant. Z. N. Goldsby, for respondent.

PER CURIAM. Action upon a promissory note. Judgment went for plaintiff, and defendant appeals therefrom upon the judgment roll. The single point made in support of the appeal is that the lower court erred in overruling a general demurrer to the complaint, the contention being that there is no averment in the complaint of a consideration for the execution of the note, and that hence there is a failure to state a cause of action. There is nothing whatsoever of merit in the point. It is not essential to the statement of a cause of action founded upon a contract in writing to specially aver a consideration. The writing imports a consideration (Civ. Code, § 1614), and the presumption thus arising is one of law, which is not required to be averred (Henke v. Association, 100 Cal. 429, 34 Pac. 1089). Appellant in fact conceded at the oral argument that his contention was untenable, but, in response to the demand made by respondent for damages as for a frivolous appeal, urged that when the appeal was taken it was taken in good faith, and in the honest conviction that the point involved error. This assurance should come from the record, or at least find some semblance of support therein, which the record before us entirely fails to furnish. A party cannot be permitted to avoid the consequences of a wholly groundless appeal by indulging himself in a mere unsubstantial belief that there is merit in his case, when the slightest investigation would have assured him to the contrary. Such excuse, if held good, would require us to recall every penalty ever imposed in a like case. The judgment is affirmed, with $100 damages, to be recovered by respondent as a part of his costs of the appeal.

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111 Cal. 261

HUNTER v. HUNTER. (No. 19,555.)

(Supreme Court of California. Feb. 15, 1896.)

DIVORCE—SUMMONS BY PUBLICATION—EX PARTE PROCEEDING—DECREE—AFFIDAVIT—ESTOPPEL—PRESUMPTION—ALIMONY.

1. A woman was twice married, and, having heard that her first husband was living, began proceedings to obtain a divorce from him. The proceedings were ex parte, defendant having been served with summons by publication, and a decree was entered as prayed. *Held*, that the proceedings were strictly in rem, and determined only that plaintiff was no longer the wife of defendant, and did not determine that defendant was then living, and that she was his wife at the time of entering the decree.

2. The affidavit of plaintiff in such case, that she was the wife of defendant at the time of her subsequent marriage to another, does not estop her from denying such fact in an action by her second husband to annul the second marriage.

3. In divorce by the second husband it will be presumed that the first husband was dead at the time of the wife's second marriage, under Code Civ. Proc. § 1963, presuming a person innocent of crime or wrong, and the burden of proof is on the party asserting the negative.

4. The allowance of alimony is an incident to an action for divorce, and the determination as to its allowance is not the trial of an issue in the case.

In bank. Appeal from superior court, Los Angeles county; J. W. McKinleys, Judge.

Action by Jesse Hunter against Jane Elizabeth Hunter or Milam to annul a marriage between the parties. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Knight, Simpson & Harpham, for appellant. S. A. W. Carver, for respondent.

TEMPLE, J. The action was brought to annul a marriage between the parties, entered into on the 3d day of July, 1862, upon the ground that defendant had another husband, to wit, Joseph Milam. It is now conceded that defendant was married to Joseph Milam in February, 1858, when defendant was but 15 years of age; that she lived with Milam as his wife for 10 days, when she was taken away by her parents, and went to Salt Lake. It does not appear how long she was absent from San Bernardino, but it could not have been a very long time, for she testified that she lived at San Bernardino, after her marriage to Milam, about 4½ years, when she married plaintiff. Only about that period elapsed between her first and second marriages. She testified that Milam left a few days after her marriage to him, and she had heard nothing of him since. Plaintiff and defendant lived together as husband and wife at Los Angeles for about 22 years, when, as defendant testified, she was told by her nephew, who lived in Arizona, that he had met a brother of Joseph Milam, who said Joseph Milam was living at Walla Walla. This is all she has ever heard in regard to Milam since he left San Bernardino. She then commenced an action against Joseph Milam to secure a divorce. In her verified complaint, filed December 21, 1883, she describes herself as Jane Elizabeth Milam, and states that plaintiff and defendant were married in February, 1858, and ever since have been, and now are, husband and wife, and that defendant resides out of the state of California. On the same day she made and presented to the court her affidavit to procure the publication of summons, in which she stated that defendant resides out of the state, that his last residence within the state was in Pajaro, in Santa Cruz county; that through knowledge derived from his brother she believes he resides at Walla Walla, in Washington territory. Such proceedings were had in the action that on the 29th day of March, 1894, a decree was entered dissolving the marriage between Joseph Milam and the defendant, plaintiff in that action. Certain findings were also filed, and purport to constitute part of the judgment roll, but, as there were no issues to try, and judgment was entered on default, express findings were unauthorized, and add nothing to the necessary adjudication. Subsequently defendant commenced an action against the plaintiff to have her marriage with him declared void on the same ground on which plaintiff now seeks relief, to wit, that at the time of her marriage with him her first husband, Joseph Milam, was living, and she had not been divorced from him. The complaint in that suit was also verified. The action was finally dismissed by her before it came to judgment. Two of plaintiff's brothers testified that at the time the parties to this action were married they heard travelers say the man defendant married was still living there (San Bernardino). It is, however, pretty certain that he was not then living at San Bernardino. This is all the evidence contained in the record upon this subject.

It is contended, first, that the judgment in the divorce suit is conclusive upon defendant that she was divorced from Milam; that is, that Milam was then alive, and that until the decree was entered she was his wife. But this adjudication as such did not bind Milam. He was not served with summons, and was without the state, and the action was therefore strictly in rem. "No sovereignty," says Story, Confl. Laws, § 539, "can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions." The res before the court was the status of the plaintiff in the divorce suit. No service of summons being had, it was not an action inter partes, but a proceeding affecting only the status of the wife. "It did not establish, but recognized and presupposed, the relation of husband and wife as previously existing." Burlen v. Shannon, 3 Gray, 387. It was conclusive against all the world that the plaintiff in that suit was no longer the wife of Joseph Milam, and it was an adjudication of nothing else. No one would claim that Milam would be estopped by the decree to deny that he had ever been married to defendant, or, had he remarried and had children, that the decree would be evidence of their bastardy. Milam may have been previously divorced, and in such case there would be two valid decrees, which, on the theory that they constituted an adjudication of marriage at the time of the divorce, conclusive against the world, would contradict each other, and yet both be binding on all the world. See, on this point, Gill v. Read, 5 R. I. 343; Gouraud v. Gouraud, 3 Redf. Sur. 262; Freem. Judgm. 154. But since the court had jurisdiction to declare the status of Mrs. Milam as affected by an assumed marriage with Joseph Milam, and did adjudge that she was no longer the wife of Joseph Milam, it would follow that he could no longer be her husband. He was thus affected by the judgment as he would have been by the death of his wife, and this resulted simply from the fact that the status of his wife was changed. So far, and no further, the judgment bound him and all the world. That being so, it must follow that as an adjudication it bound her no further. Had she borne children to Hunter, the judgment would have estopped neither such children nor her to deny that she was the wife of Milam when she married Hunter.

It is further contended that her affidavits are conclusive evidence against her. Three times she stated under oath that she was the wife of Milam when she was married to Hunter. This is very strong testimony against her, but is only strong evidence. It is not an estoppel. She went upon the stand as a witness for herself, and explained that she made those affidavits upon the strength of a rumor she heard. This was all she had heard. The court found in her favor, and must have believed her statement. The statements made by plaintiff's brother do not show that Milam had been heard from, and if defendant's testimony was true, such statements must have been unfounded. The court could well find that there was no authentic information to the effect that Milam was alive.

But it is said the marriage of the parties to this suit took place only about 4½ years after the marriage to Milam, and it will be presumed that Milam was alive, in the absence of proof to the contrary. There was no proof tending to show that Milam was dead, or that his chance for life was below the average; therefore it is contended the court should have found that he was alive. This presumption of the continuation of life is, however, overcome by another. It is presumed that a person is innocent of crime or wrong. Code Civ. Proc. § 1963. There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid, and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years; or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement perhaps would be that the burden is cast upon the party asserting guilt or immorality to prove the negative,—that the first marriage had not ended before the second marriage. A few cases will best illustrate the rule. Rex v. Inhabitants of Twyning, 2 Barn. & Ald. 386, was a question as to a settlement, which depended upon the validity of a second marriage of Mary Burns. She was a pauper, and married about 12 months after her husband had enlisted as a soldier in foreign service. The second marriage was held good. The court said: "The law presumes the continuation of life, but it also presumes against the commission of crimes, and that even in civil cases, until the contrary is proved." This was the question in Rex v. Inhabitants of Harborne, 2 Adol. & E. 540. It was said that there was no absolute presumption, but that it was a question for the jury to determine under the circumstances of the case, and a verdict convicting a defendant of bigamy was upheld on proof that the husband was alive 25 days before the second marriage. See, also, Reg. v. Lumley, L. R. 1 C. C. 196. Murray v. Murray, 6 Or. 1, involved the legitimacy of the children of a second marriage. It was held that the presumption of innocence should be preferred, but the presumption was not absolute, and the question would depend upon the special circumstances of the case. In Lockhart v. White, 18 Tex. 102, Mrs. Waggoner had been separated from her husband about five years. One witness had heard of him since the separation. The court said: "There is no evidence that Waggoner had been heard of within twelve months (though that exact time is not necessary to raise a favorable presumption) prior to the marriage with Allsbrooks, and under the rule established in the above case the continuance of the life of Waggoner will not be presumed. The second marriage was consequently lawful and valid." It was also said that the presumption of the continuance of life was weaker, and must yield to the presumption of innocence. Sharp v. Johnson, 22 Ark. 79, was a case involving a question of heirship depending upon legitimacy. This depended upon the validity of a marriage. The court refused an instruction to the effect that the former wife, if alive within five years before the last marriage, was presumed to be still alive. The ruling was affirmed, and the court quoted from Mathews on Presumptive Evidence: "A charge of an act of immorality, or of disobedience of a positive law, will not be received unless supported by direct evidence. Circumstances showing probability merely are not enough; the fact averred must be conclusively proved." Klein v. Laudman, 29 Mo. 259, was an action of slander, and a similar ruling was made. Spears v. Burton, 31 Miss. 547, involved the question of legitimacy, and it was held that the presumption of continuance of life would not establish a crime, even in a civil case. To the same effect is Town of Greensborough v. Town of Underhill, 12 Vt. 604. The question in that case was as to settlement. Schmisseur v. Beatrie, 147 Ill. 210, 35 N. E. 525, was a case involving the question of legitimacy. It was proven that an absent husband was alive at the time of the marriage, and the court held that in favor of this second marriage it would presume that the absent party had obtained a divorce, and that the burden of proving that such divorce had not been obtained was on the party alleging the invalidity of the second. It is said that a contrary doctrine is established in People v. Stokes, 71 Cal. 263, 12 Pac. 71. This precise point was not there discussed, although it was raised. The court contented itself with asserting the general proposition, which no one disputes, that the presumption of life continues for seven years. The fact that there were conflicting presumptions must have escaped the attention of the court, otherwise the case is in conflict with all the cases upon the subject and with all the text-books. We cannot hold that this long line of decisions, in which there is no break, has been overruled by a case in which the point was not discussed.

The court found for the defendant upon all points, notwithstanding the fact that owing to her former statements under oath her testimony was justly subject to grave suspicion. If her explanation of the former affidavits was true, I think it sufficient. We cannot reverse the judgment for insufficiency of the evidence.

As the appeal from the judgment was taken too late, we cannot consider the objections to the allowance of alimony. A new trial is a re-examination of an issue of fact in the same court after a trial. The allowance of alimony is an incident to an action for a divorce, and, although the determination as to its allowance may involve a controversy as to facts, such determination is not the trial of an issue in the case. It may be before or after trial. The appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

We concur: McFARLAND, J.; VAN FLEET, J.; HARRISON, J.; GAROUTTE, J.; HENSHAW, J.

111 Cal. 272

LORBEER v. HUTCHINSON et al.

(L. A. 98.)

(Supreme Court of California. Feb. 20, 1896.)

CERTIORARI—REMOVAL AND APPOINTMENT OF OFFICER.

Certiorari does not lie to review the action of the board of trustees of a city declaring vacant the office of city marshal, and appointing a person to fill the same.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Certiorari by J. W. Lorbeer against E. H. Hutchinson and others to set aside and annul the action of the board of trustees of the city of Pomona declaring vacant the office of city marshal, and in appointing to the vacancy Thomas B. Atkinson. From the judgment rendered, defendants appeal. Reversed.

Edwin A. Meserve and C. E. Sumner, for appellants. Tonner & Fleming and A. W. Hutton, for respondent.

TEMPLE, J. This appeal is from a judgment of the superior court of Los Angeles county in a proceeding by certiorari to set aside and annul the action of the board of trustees of the city of Pomona declaring vacant the office of city marshal on the 18th day of June, 1895, and in electing and appointing to the vacancy Thomas B. Atkinson. The writ may be issued when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer (section 1068, Code Civ. Proc.); and the review cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer (section 1074, Id.). The appointment of a city marshal by the council of Pomona was not a judicial act, and cannot be reviewed by certiorari. People v. Bush, 40 Cal. 344. If Lorbeer was lawfully in office, the trustees could not, by declaring the office vacant, deprive him of his office. They have no power to remove from office or by any judicial inquiry to declare a vacancy. If Lorbeer failed to qualify, the office was vacant; and the trustees, on being informed of the fact, could appoint some one to fill the office. They got such information just as the governor and other executive officers obtain similar information. The failure to qualify—if he did so fail—ipso facto created a vacancy. People v. Shorb, 100 Cal. 537, 35 Pac. 163. In such case the board could fill the vacancy without declaring a vacancy. So declaring was a part of the order appointing, and does not indicate a judicial inquiry and determination. The superior court, therefore, erroneously issued the writ, and its judgment vacating and setting aside the order of the trustees of Pomona was without jurisdiction and void. The judgment is reversed, and the court directed to dismiss the proceeding.

We concur: McFARLAND, J.; HENSHAW, J.

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111 Cal. 286

JOOST et al. v. SULLIVAN et ux. (No. 16,035.)

(Supreme Court of California. Feb. 20, 1896.)

MECHANICS' LIENS—FORECLOSURE—EVIDENCE OF COMPLETION — MEMORANDUM OF CONTRACT — SUFFICIENCY—WITNESS—COMPETENCY.

1. In an action to foreclose subcontractors' liens, the architect, the defendant, and her daughter testified that the building was completed as early as October 10th. One of such contractors testified that he did not know whether it was completed before October 14th or not. The other completed his contract October 3d. There was evidence that, on the 12th, repairs were made on one of the closets; that at that time there was a door knob not on in the upper story, and a rim to a bath on the lower story had not been put on; and that the contractor removed his tools, etc., on the 12th or 14th. It appeared that the building was occupied by the owner and by a tenant before the 11th. *Held*, that a finding that the building was not completed until the 14th was not supported by the evidence.

2. Code Civ. Proc. § 1183, relating to mechanics' liens, provides that all contracts shall be in writing when the amount exceeds $1,000, and shall be subscribed by the parties thereto, and such contract, or a memorandum thereof, shall, before the work is commenced, be filed in the county recorder's office, etc. *Held*, that such memorandum need not be signed or subscribed by the parties.

3. Under such statute, where the memorandum does not disclose that there were any plans or specifications, such memorandum cannot be *held* insufficient. because plans and specifications are not filed therewith.

4. A memorandum of a building contract, filed in the recorder's office, recited that the general character of the work to be done was raising, and making alterations, additions, and repairs to, a two-story frame building, to be used for two tenements, etc. *Held*, that such memorandum sufficiently showed the general character of the work to be done.

5. Where an action to foreclose subcontractors' liens, on death of the owner, is revived against his administratrix, plaintiffs are competent witnesses.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by F. Joost and B. Joost, copartners as Joost Bros., W. E. Byron, and G. W. Bayreuther, against Eugene Sullivan and Kate Sullivan, his wife, to foreclose subcontractors' liens. Pending the action, Eugene Sullivan died, and Kate Sullivan, as administratrix of his estate, was substituted in his stead. From a judgment for plaintiffs, defendants appeal. Reversed.

John Heenan, for respondents.
Stafford & Stafford, for appellants.

HAYNES, C. Action to foreclose subcontractors' liens. Pending the litigation the claim of Joost Bros. was paid, and the only defendants served were Eugene and Kate Sullivan. The claims of Byron and Bayreuther were sustained by the court; and from the judgment enforcing their liens, and from an order denying a new trial, this appeal is prosecuted. Eugene Sullivan was the owner, and his wife, Kate Sullivan, was made a party; the complaint alleging that she claimed some interest in the property. Eugene Sullivan died before the trial, and Kate Sullivan, having been duly appointed administratrix of his estate, was substituted as such administratrix, in his stead, and as such, and as an individual, has taken this appeal.

A contract was made by Eugene Sullivan with one Westcott to raise, and make alterations, additions, and repairs to, a two-story frame building upon a lot situate at No. 625 Natoma street, city of San Francisco. Plaintiffs alleged that neither said contract nor any memorandum thereof was ever filed in the recorder's office, "that said building was completed on or about the 14th day of October, 1891, and further alleged the filing of their respective liens before the expiration of 30 days from and after the completion of the building." The answer denied each of these allegations, and alleged that the building was completed on October 10, 1891. Bayreuther's notice of lien was filed November 11, 1891, and Byron's on November 12th; and therefore, if the building was completed on October 10th, both claims were filed too late. The court found that neither the contract nor any memorandum thereof was filed, and that the building was completed on October 14th; and appellant contends that these findings are not justified by the evidence.

Byron's subcontract was for the brick work, for which he was to receive $235, and his work was finished September 24, 1891. He testified that he was at the house (the building in question) on October 14th; that it was then completed; that he did not know how long before that it had been completed; that he could not say when, prior to October 14th, was the last time he had been there; and that he did not know whether it was completed before October 14th or not. Mr. Bayreuther testified: That he furnished the material for four closets, two bath tubs, the kitchen sinks, etc. That he furnished the materials and completed the work, which included all the plumbing in the building, according to the specifications, and did some extra work, which consisted of tinning in gutters and one extra gas fitting in the two lower flats, and that he completed his work on October 3d. That he saw the building on October 11th and 14th. That the contractor took his tools away on the 14th. That he was called there on Sunday morning, October 11th, by Miss Sullivan, because one of the closets in the building made a rattling noise, and he sent a man there on the 12th to repair it. That he went the next day to see if everything was all right, and saw the contractor moving his tools away. That "the building was completed that day. The alterations consisted of raising an old house, making three flats of it,—two upper and one lower flat. The defendants were living at that time in the upper flat." He further testified that, when he called there, Sunday morning, October 11th, there was a door knob not on in the upper flat, and a rim to a bath on the lower flat had not been put on, and did not observe anything else unfinished; that putting on the door knob and rim of the bath tub was not his work; that the closet was not broken, but made a noise; that he had an agreement that, in case anything was wrong with the closets, he would repair them, and make them in good order; and that he formed the conclusion that the building was completed on the 14th from what others told him, and from seeing the contractor moving his tools away. Mr. Westcott, the contractor, was not subpœnaed by the plaintiffs, and was not at the trial. M. J. Welch, the architect in charge of the work, was called by plaintiff, and testified as to other matters, but was not examined as to the date of the completion of the work; and plaintiffs thereupon rested. Mr. Welch was then called for defendants, and testified that the building was completed on the 8th or 9th of October. Upon cross-examination, he testified that he was sure it was the 8th or 9th, because it took him several days to straighten out the business affairs before he issued the certificate for the payment which was to be made upon completion of the work; that he delayed because there was a doubt about the contractor paying his bills; that he wished to find out how his bills stood, and see that things were straightened out before the certificate was issued; that he was fully a week going to the bondsmen and seeing the creditors; and that it was fully a week after the building was completed before he issued the certificate, and the certificate was dated and issued October 15, 1891. He further testified that the building was partly occupied by the defendant and his family the first week of October, 1891. Miss Ella Sullivan testified that she was living with her parents in the house when she sent for Mr. Bayreuther on October 11th; that Westcott was there when Bayreuther called; that the house was then completed, and the men had all gone away, except Westcott; that they were then living on the upper floor; that the locks mentioned were on the old work, and not on the new; and that Westcott did not take his tools away until the 14th, because he was waiting for some one to lend him a horse and wagon for that purpose. Mrs. Kate Sullivan, one of the defendants, testified that the house was completed before Bayreuther was called to fix the closet, and she was then occupying the upper floor, and the ground floor was also rented and occupied. Upon cross-examination, she testified that it was completed a week before Bayreuther called, but afterwards changed the time to a week, or maybe more, before she paid the third payment, which was on October 15th.

The foregoing is the substance of all the evidence relating to the date at which the building was completed. The finding that the date of completion was October 14th is not justified by the evidence. Byron testified that he did not know whether it was completed before that date or not. Bayreuther completed his contract on October 3d, and there is no evidence that any work was done on the building after that date, except fixing a closet which "made a noise," and which was, confessedly, the "repair" of his completed work. Under these circumstances, the testimony of the plaintiffs could only be regarded as showing that the building was in a completed state or condition on the 14th, and not that the work ended on that day, and therefore does not conflict with the positive testimony of the architect, and of Mrs. Sullivan and her daughter, that it was completed at least as early as the 10th. Besides, the putting on of a door knob which appears to have been mislaid, and of the rim of a bath tub, were in themselves, "trivial imperfections," which would not have invalidated plaintiffs' liens if they had filed them on Monday, the 12th. Harlan v. Stufflebeem, 87 Cal. 508, 25 Pac. 686. Not only so, but the building was actually occupied by the owner and by a tenant before the 11th, and this was evidence of the completion of the work under Westcott's contract, and its acceptance by the owner, which is conclusive upon the plaintiffs, when not explained, and would also, under the like condition, have been conclusive upon the owner, if necessary to sustain the plaintiffs' liens filed upon the strength of such occupancy. Giant Powder Co. v. San Diego Flume Co., 78 Cal., at page 196, 20 Pac. 419. If it be conceded that the contract between the owner and Westcott was void, because not recorded, it would, nevertheless, furnish a test of completion. Barker v. Doherty, 97 Cal. 10, 12, 31 Pac. 1117. If, however, it had been shown that, notwithstanding the trivial character of the uncompleted work described by Bayreuther, work actually continued thereon, and was completed on the 14th, the finding would have been sustained.

Appellants also contend that the third finding, to the effect that neither the contract between the owner and contractor, nor a memorandum of it containing the matters required to be stated therein, was ever filed. A memorandum of the contract was filed, and the only question is as to its sufficiency. The memorandum having been put in evidence, the finding should have set it out, leaving its sufficiency to be found as a conclusion of law. It is contended by respondents that it is insufficient, in that it was not signed; that neither plans nor specifications, nor their equivalent, were filed; and that it does not show the general character of the work. So much of the memorandum as is material to the objections made is as follows: "Know all men by these presents, that a contract has been entered into for raising, making alterations, additions, and repairs to, the two-story frame house building, to be used for tenements, situate, etc. [describing the lot]. That the names of all parties to said contract are as follows: Eugene Sullivan and C. W. Westcott. That the following is a statement of the general character of the work to be done under said contract, to wit: raising, and making alterations, additions, and repairs to, a two-story frame building, to be used for two tenements, situated as above stated, and prosecuted under the direction of M. J. Welch, architect." Then follows a perfect statement of the total amount to be paid, the amount of each of the partial payments, and when they are to be made, and attached thereto was a bond, executed by two sureties, that Westcott would perform his contract. That part of section 1183, Code Civ. Proc., necessary to be considered is as follows: "All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto, and the said contract, or a memorandum thereof, setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable, shall, before the work is commenced, be filed in the office of the county recorder of," etc. It was not necessary that the memorandum should have been signed or subscribed by the parties. The statute requires that the contract "shall be subscribed by the parties thereto," but only requires that the memorandum shall "set forth the names of all the parties to the contract." The names of the parties are stated, and it is further stated that they are all the parties to the contract. This follows the statute, and is sufficient in that respect.

It is said, however, that neither plans nor specifications were filed. The memorandum does not disclose that there were any, and therefore this case is distinguishable from the cases where the memorandum was held insufficient, because plans and specifications were referred to as part of the statement of the general character of the work to be done, and yet were not filed with the memorandum in which the reference was made. This was the case in Willamette Steam Mills Lumbering & Manufacturing Co. v. Los Angeles College Co., 94 Cal. 235, 236, 29 Pac. 629, and in Butterworth v. Levy, 104 Cal. 509, 38 Pac. 897, and in Wood v. Transit Co., 107 Cal. 503, 40 Pac. 806. The question, therefore, is whether the memorandum states "the general character of the work to be done." If the statute had omitted the words last above quoted, and had simply said that the contract, or a memorandum of it, should be filed, it would have been understood that the word "memorandum," ex vi termini, implied that it need not contain a full and particular statement of the contract. Webster defines it thus: "(Law.) A brief note, in writing, of some transaction, or an outline of some intended instrument; an instrument drawn up in brief and compendious form." Before the amendment of 1887 the statute imperatively required that the "contract be filed"; and, as the plans and specifications—whenever referred to, at least—were part of the contract, it was properly held that the plans and specifications must also be filed. It is apparent that the design of the amendment was to require less than was required before; how much less must be determined from the language used, construed in the light of the purpose to be effected by the filing of anything giving information of the contract between the owner and the original contractor. The words "general character" do not mean a special, particular, minute, or detailed description of the work to be done. The adjective "general," as defined in Webster's Dictionary, means: "(1) Relating to a genus or kind; pertaining to a whole class or order; belonging to a whole rather than to a part. * * * (3) Not restrained or limited to a precise or detailed import; not specific; lax in signification." And, of the noun "character," he gives, as applicable here: "(9) Account; description." The definition given of the word "general" in Black's Law Dictionary, so far as pertinent, is: "Universal, not particularized; as opposed to special." The same author defines the word "character," only as applied to individuals, but it is nevertheless pertinent here: "The aggregate of the moral qualities which belong to and distinguish an individual person; the general result of one's distinguishing attributes."

Other cases are cited, by respondent, where the memorandum was held insufficient because it did not state for what purpose the building was intended, or did not state the kind of building, as "frame," or "brick," or "stone." Here the size of the lot, 25x75 feet, is given, and it is stated that a frame building already thereon is to be raised, repaired, and additions made thereto, and converted into flats for the purpose of being used as tenements. This is quite sufficient, as a statement of "the general character of the work to be done." It is not claimed that the memorandum was fraudulently made, or that plaintiffs, as subcontractors, were misled or deceived or injured because of any imperfection in it. It must therefore be assumed that the owner intended, in good faith, to comply with the statute, and believed that he had done so. The statute, imposing as it does a liability upon the owner beyond the price he contracted to pay, in favor of a subcontractor with whom he has no contract relations, is penal as well as remedial, and therefore, while it must have such construction as will reasonably effectuate its remedial purposes, must be strictly confined to such purpose. No merely technical construction can be indulged, for the purpose of visiting a penalty upon the owner, unless there has been a substantial failure to comply with the law, such as, if continued, would defeat the remedial purposes of the statute; but, if there be a reasonable doubt as to the construction of the statute, or as to whether the defendants complied with it, they should have the benefit of it. Suth. St. Const. p. 444; Chase v. Railway, 26 N. Y. 523, 525; Shanklin v. Gray, 43 Pac. 399. The memorandum in this case was a substantial and sufficient compliance with the statute.

As the case must be remanded, one or two other questions should be noticed. Appellant claims that there was no evidence of the reasonable value of the work done by the plaintiffs. As the memorandum of the contract between Westcott and the owner is sufficient, the contracts between the contractor and the subcontractors are conclusive, both as to their principal contracts, and as to contracts for extra work, so far as they fixed the value. Where the value was not fixed by contract, other proof of value must be made. To prevent misapprehension, it may be added that, if the memorandum filed was not compliance with the statute, the contract price agreed by the contractor to be paid to the subcontractors is evidence of value; but such evidence may be rebutted. See Booth v. Pendola, 88 Cal. 36, 23 Pac. 200, and 25 Pac. 1101.

Plaintiffs were competent witnesses, notwithstanding the death of Sullivan. Booth v. Pendola, supra. No other questions discussed by counsel need be noticed. The judgment and order appealed from should be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

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111 Cal. 281

ROGERS v. SCHULENBURG et al.

(L. A. 7.)

(Supreme Court of California. Feb. 20, 1896.)

JOINT DEMURRER — NONNEGOTIABLE INSTRUMENTS —GUARANTOR.

1. A joint demurrer by defendants is properly overruled if the complaint is good against any of them.

2. A third person writing his name on the back of a nonnegotiable note, either before or after delivery, becomes a guarantor.

3. Statements by defendant in the absence of plaintiff are inadmissible in his own behalf.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by W. R. Rogers against A. R. Schulenburg and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

E. W. Britt and Works & Works, for appellants. Jas. E. Wadham, for respondent.

BELCHER, C. This is an action upon a nonnegotiable promissory note for $340 made by the defendants Schulenburg and Chadwick to one Thompson, and by him assigned to the plaintiff before maturity. The complaint avers the making, delivery, and assignment of the note, in the usual form, but the only averment connecting the defendant Daley therewith is "that thereafter, and before the maturity of said note, the said defendant T. J. Daley duly indorsed said promissory note by writing on the back thereof as follows, to wit: 'Protest waived. T. J. Daley.'" Defendant Chadwick suffered his default to be entered. Defendants Schulenburg and Daley filed a joint demurrer to the complaint, which was overruled. They then answered, setting up, in substance, that, prior to the assignment of the note to the plaintiff, Thompson, the payee, had offered to accept from them, in full satisfaction and payment thereof, the sum of $125; that after such offer, and with notice thereof, plaintiff and defendants entered into an agreement whereby he was to advance and pay to Thompson, for the said note, the sum of $125, and take an assignment thereof to himself, and they were to repay him therefor the sum so advanced, with interest thereon at the rate of 10 per cent. per annum from the time of his payment to Thompson, and the further sum of $15 as a bonus to him for taking up the note in the manner agreed upon; that accordingly the plaintiff paid to Thompson the sum of $125, and no more, for the note, and received the transfer thereof; and that the assignment of the note to plaintiff was accomplished and made in virtue of and pursuant to the said agreement, and not otherwise. To this answer a demurrer was interposed by the plaintiff, and overruled. The case was then tried, and upon all the issues raised the court found against the defendants, and rendered judgment against them as prayed for in the complaint. From this judgment and an order denying their motion for a new trial the defendants Schulenburg and Daley have appealed.

1. Appellants contend that as against Daley the complaint does not state facts sufficient to constitute a cause of action, and hence that the court erred in overruling their demurrer. This contention is rested upon the fact that it does not appear when Daley indorsed the note,—whether before or after delivery,—and that no consideration for the indorsement is expressed in writing. There are two sufficient answers to the contention: (1) It is not claimed that the complaint was not sufficient as against the makers of the note. Conceding, therefore, that it was not sufficient as against Daley, still, as only a joint demurrer was filed, it was properly overruled. "A joint demurrer by all of the defendants to an action is properly overruled if the complaint is good as against either of them." Asevado v. Orr, 100 Cal. 293, 34 Pac. 777; Work, Prac. § 531; Pom. Rem. § 577. (2) When Daley wrote his name on the back of the note, whether it was before or after its delivery, he became a guarantor for its payment. Bank v. Babcock, 94 Cal. 96, 29 Pac. 415. And it was not necessary that the consideration be expressed in writing. Civ. Code, § 2793. "A written instrument is presumptive evidence of a consideration," and "the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." Id. §§ 1614, 1615. Crooks v. Tully, 50 Cal. 254, cited by appellants, is not in point. That case arose before the adoption of the Codes, when the statute required that a contract to answer for the debt, default, or miscarriage of another should express the consideration. That requirement is not now found in the Codes. Civ. Code, § 1624, and Code Civ. Proc. § 1973.

2. It is further contended that the findings were not justified by the evidence. The evidence is brief, and may be epitomized as follows: Schulenburg testified that he made the contract with the plaintiff as alleged in the answer, and he detailed the conversations that took place between them. Daley testified to certain conversations which he had with the plaintiff, and then, on cross-examination, was asked, "Was there ever any contract made between you and Rogers relative to your paying him $125 and the $15 bonus on his taking up the note?" And he answered, "No, sir." Rogers testified that he had some conversation with Schulenburg about the note; that he went to him, and inquired whether there were any set-offs against it, and was told that there were none, and that it would soon be adjusted. He was then asked, "Was there any agreement between you and Schulenburg that you would take less than the face of the note in payment thereof at the time the note was purchased?" and he answered, "No." The above is, in substance, all the evidence, and we think it shows a substantial conflict as to whether the agreement relied upon was made between the parties or not. The findings and judgment cannot therefore, be disturbed on this ground.

3. While giving his testimony, Daley stated that Schulenburg had informed him of the terms of the arrangement he made with

the plaintiff about the purchase of the note. Schulenburg was afterwards recalled, and was asked by his counsel, "What did you tell Mr. Daley as to the arrangement you had made with Mr. Rogers relative to Rogers' taking up the note?" The question was objected to by counsel for plaintiff upon the ground that it was immaterial, irrelevant, and incompetent, and the communication was not shown to have been made in the presence of, or communicated to, the plaintiff. The objection was sustained, and the ruling is assigned as error. We think the ruling was clearly right. The statements of a party, made without the hearing or knowledge of his adversary, are never competent evidence in his own behalf to prove the facts stated. The judgment and order should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

111 Cal. 274

PEOPLE v. BENDIT. (Cr. 46.)

(Supreme Court of California. Feb. 20, 1896.)

FORGERY—WHAT CONSTITUTES SIGNATURE AS AGENT.

When one without authority executes a receipt for money, purporting on its face to be executed by him as agent for the person whose name he signs, he is not guilty of forgery at common law, or under Pen. Code, § 470, which enumerates the kinds of writing which may be the subject of forgery.

Department 2. Appeal from superior court, city and county of San Francisco.

Simon Bendit was convicted of forgery, and appeals. Reversed.

Walter S. Hinkle, for appellant. Atty. Gen. Fitzgerald, for the People.

McFARLAND, J. The defendant was convicted of forgery, and appeals from the judgment and an order denying a new trial. The information charges that appellant on July 30, 1894, did unlawfully, feloniously, falsely, etc., and with intent to defraud, "make and forge a certain instrument in writing, in words and figures following, to wit:

"San Francisco, July 30, 1894. G. W. Hume & Co.—WilliamCluff Company, wholesale grocers and provision dealers, 18 to 22 Front St., corner Pine. Telephone 1819.

To balance	
July 23. To bill rendered	$15 50
Discount	30
	$15 20

"Wm. Cluff & Co., A. B."

It further charges, in brief, that on said July 30th he willfully, fraudulently, etc., passed the said instrument, "as true and genuine," to one J. Deming, with intent to defraud G. W. Hume and J. Deming, doing business under the firm name of G. W. Hume & Co. The instrument is admitted by appellant to be a receipt for money, although there is nothing on its face which acknowledges such receipt.

We do not deem it necessary to consider the points made by appellant that the information is insufficient, and that material errors were committed by the court in rulings upon the admissibility of evidence, for in our opinion there was no evidence sufficient to establish the crime of forgery. There was a conflict of evidence as to whether appellant was the person who did the acts testified to by the witnesses for the prosecution; but, assuming that appellant was identified as the person who did those acts, the acts themselves do not constitute the crime charged. The facts testified to were, in brief, these: The writing alleged to have been forged was sent by William Cluff & Co. to Hume & Co. the day before July 30, 1894, so that the latter might examine it, and be ready to pay when the collector of the former should call for payment. It was then simply an unreceipted account, with no name signed to it. On July 30th, according to the people's testimony, appellant went to the business place of Hume & Co., and asked J. Deming, one of the partners, for the payment of this account. Deming asked him the amount, and, as he did not give the correct amount, Deming refused to pay. Appellant said there must be some mistake, and that he would see about it, and went out. Deming testified, "I naturally thought he was a collector for them." Deming afterwards went out himself, leaving Fannie A. Berry as acting cashier. Afterwards appellant returned, and Miss Berry paid him the amount of the account, and appellant receipted it, by writing, in the presence of Miss Berry, "Wm. Cluff & Co., A. B." She testified: "I saw him sign, 'William Cluff & Company, per A. B.' I understood him to be the collector in the employ of the William Cluff Company, who came there to collect, and was authorized to collect, the bill." It is quite clear that the facts above stated do not constitute forgery. When the crime is charged to be the false making of a writing, there must be the making of a writing which falsely purports to be the writing of another. The falsity must be in the writing itself,—in the manuscript. A false statement of fact in the body of the instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what it is not. And there was nothing of the kind in the case at bar. There was no pretense that "Wm. Cluff & Co." was the genuine signature of that firm. It was written by appellant himself, in the presence of the party who paid the money. He added the initials "A. B." to it, and he was understood to be acting as the agent of the firm, and to have written the name "Cluff & Co." by himself as such agent. By these acts he may have committed some other crime, but he did not commit forgery. We have been referred to no authorities to the point that the signing of another's name as his agent is forgery, while there is a multitude of authorities to the contrary in text-books and adjudicated cases. "If a man accept or indorse a bill of exchange in the name of another, without his authority, it is a forgery. But if he sign it with his own name, per procuration of the party whom he intends to represent, it is no forgery; it is no false making of the instrument, but merely a false assumption of authority." 2 Archb. Cr. Prac. p. 819. The doctrine is fully discussed, and the views hereinbefore stated declared, in Reg. v. White, 2 Car. & K. 404. In that case the defendant brought a bill to a banker as from Tomlinson. The bill was not indorsed, but the defendant said he would indorse it. The banker wrote, "per procuration Tomlinson," beneath which the defendant signed his own name. It was held that this false assumption of authority was not forgery, as there was no false making. It has frequently been held that "the false instrument should carry on the face of it the semblance of that for which it is counterfeited," although it is not necessary that the semblance should be exact. 2 Archb. Cr. Prac. 866. This rule illustrates the nature of forgery. How, in the case at bar, could there be any question about "semblance"?

The American authorities are as pronounced on the subject as the English. In Re Heilbonn, 1 Parker, Cr. R. 434, the court, after having referred to other cases, say: "It might not be necessary to refer to these authorities, for it is the essence of forgery that one signs the name of another to pass it off as the signature or counterfeit of that other. This cannot be when the party openly, and on the face of the paper, declares that he signs for that other. There he does not counterfeit the name of the other, nor attempt to pass the signature as the signature of that other. The offense belongs to an entirely different class of crimes." In Mann v. People, 15 Hun, 155, the court, in an elaborate opinion, in which the authorities and the arguments for an opposite view are fully reviewed and discussed, holds that, "where one executes and issues an instrument purporting on its face to be executed by him as the agent of a principal therein named, he is not guilty of forgery, either at common law, or under the statutes of this state, even though he has in fact no authority for such principal to execute the same." (We quote from the syllabus, which is a correct condensation of the opinion.) In Com. v. Baldwin, 11 Gray, 199, the supreme judicial court of Massachusetts say: "It is not, says Sergeant Hawkins, the bare writing of an instrument in another's name without the privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery. If the defendant had written upon the note, 'William Schouler, by his agent, Henry W. Baldwin,' the act, plainly, would not have been forgery. The party taking the note knows it is not the personal act of Schouler. He does not rely upon the signature. He is not deceived by the semblance of his signature. He relies solely upon the averred agency and authority of the defendant to bind Schouler. So, in the case before us, the note was executed in the presence of the promisee. He knew it was not Schouler's signature." In Com. v. Foster, 114 Mass. 311, the court say: "The falsity of the instrument consists in its purporting to be the note of some party other than the one actually making the signature. The falsity of the act consists in the intent that it shall pass as the note of some other party." In State v. Young, 46 N. H. 266, the supreme court of that state say: "To forge or counterfeit is to falsely make; and an alteration of a writing must be falsely made, to make it forgery at common law, or by our statute. The term 'falsely,' as applied to making or altering a writing in order to make it forgery, has reference, not to the contents or tenor of the writing, or to the fact stated in the writing, because a writing containing a true statement may be forged or counterfeited as well as any other, but it implies that the paper or writing is false, not genuine, fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains,—a writing which is the counterfeit of something which is or has been a genuine writing, or one which purports to be a genuine writing or instrument when it is not." In State v. Willson, 28 Minn. 52, 9 N. W. 28, the court, referring approvingly to Mann v. People, supra, say: "The court decided that this did not constitute forgery, and held, in substance, that, when one executes and issues an instrument purporting on its face to be executed by him as agent of a principal therein named, he is not guilty of forgery, although he has in fact no authority from such principal to execute or issue the same. In fact, we found no authority to the contrary, and the text writers uniformly lay down or approve of the same rule." There are numerous other authorities to the same point, but further citation is unnecessary. Of course, the averment in the information that the appellant uttered and passed the said instrument "as true and genuine" is also, under the above views, unsupported by the evidence.

It is contended that the definition of "forgery" in section 470 of the Penal Code makes the crime different from forgery at common law, but, with respect to the question here under discussion, there is no such difference. At common law there were frequent embarrassing questions as to what kinds of writings were the subjects of forgery, while our Code, to avoid those questions, enumerates a very large number of writings as subjects of forgery. But, as to what constitutes forgery of instruments which are subjects of forgery, the definitions at common law and by our Code are the same. "Forgery, at common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." 2 Bish. Cr. Law (8th Ed.) § 523. In the notes to the section of Bishop just quoted, many other definitions are given, and it will be noticed that the leading descriptive words are "false making," or altering. In our Code the words are, "every person who with intent to defraud another, falsely makes, alters," etc., any of the written instruments enumerated. The definition is therefore essentially the same in both instances, and it is the same in the statutes of all the other states to which our attention has been called. But the meaning of the words "false making," when applied to forgery, is that hereinbefore stated. The broad and well-established distinction above set forth cannot be ignored by courts or jurors, even when, in their opinion, a more severe punishment should be imposed on a defendant than the one which the law prescribes for the offense of which he is guilty. As was said in Mann v. People, supra, "whatever his misdeeds, he must not suffer for a crime which he has not committed." Forgery is a grave and exceedingly dangerous crime. A very large part of the business of civilized countries is done by means of negotiable instruments. These are rarely presented by the makers, but are paid to others on the faith that the signatures and the bodies of the instruments are genuine. The business of a bank would come to a standstill, if the paying teller would not pay any check until he could communicate with the drawer. Hence, if there were many successful forgeries, there would be the utmost confusion in business circles. Consequently forgery, no matter how small the amount involved, is made a felony. But obtaining money or other property by false pretenses, where the party defrauded gives credit, not to the genuineness of a writing, but to the person who deceives him, is made a misdemeanor, or felony, according to the amount of money obtained by the false representation. For the foregoing reasons the judgment must be reversed, and, of course, another trial upon the theory on which the first trial was conducted would be useless. The judgment and order appealed from are reversed.

We concur: TEMPLE, J.; HENSHAW, J.

(5 Cal. Unrep. 282)

CALIFORNIA LOAN & TRUST CO. v. HAMMELL. (L. A. 5.)[1]

(Supreme Court of California. Feb. 24, 1896.)

APPEAL—REVIEW—QUESTIONS NOT PRESENTED TO TRIAL COURT.

Where questions, the determination of which is essential to the full adjustment of the equities between the parties, were not presented to the trial court for determination, and the findings of that court upon the issues submitted are supported by the evidence, its judgment, warranted by such findings, will not be reversed on appeal.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge

Action by the California Loan & Trust Company against James Hammell. Judgment for defendant, and plaintiff appeals. Affirmed.

Walter Bordwell, for appellant. Guthrie & Guthrie, for respondent.

TEMPLE, J. Appeal from judgment, and from an order refusing a new trial.

One Wilkins owned land at Azusa; Goldsberry, a tract at Clearwater. They agreed to exchange lands. Goldsberry was to convey his tract clear of incumbrance, and give $2,000 difference,—the $2,000 to be secured by a mortgage on the Azusa property which he was to get from Wilkins. It was found that his land was mortgaged to one Tring for $830; and Goldsberry, to pay this, agreed to mortgage the Azusa tract for $830 more, and Wilkins assented to the change. Wilkins owed plaintiff about $3,500, which was secured on the Azusa tract. Plaintiff consented to take, in lieu of this security, whatever Wilkins received in exchange. Accordingly, when the trade was consummated, Wilkins assigned the notes and mortgage which he received from Goldsberry to plaintiff, as collateral security, and also had the Clearwater tract conveyed to a trustee, also as security for his indebtedness to plaintiff. Subsequently Goldsberry paid both of his notes, and they were credited upon Wilkins' indebtedness. It appears incidentally—although neither party seems to think the circumstance of any importance—that plaintiff had assigned Wilkins' note with the security, and guarantied its payment. Afterwards plaintiff purchased the Tring mortgage, and brought this action to foreclose it.

It is contended by the defendant that, at the time of the execution of the $830 note to Wilkins, plaintiff agreed to take the note, and, in consideration of it, to pay the debt secured by the Tring mortgage; in other words, that the $830 note was not assigned to plaintiff as security for the payment of Wilkins' debt to it, but in consideration of its promise to pay the Tring debt. So far as it concerned the amount of Wilkins' debts, or the incumbrance upon the mortgaged premises, it did not matter upon which debt the $830 was credited; for Wilkins had assumed the Tring mortgage, and both constituted liens upon the same property. Upon whichever it was paid, therefore, Wilkins would get the benefit of it, and the premises would be relieved of the incumbrances upon it to just that amount. And the same is true as to defendant, who purchased the mortgaged premises from Wilkins. As both debts constituted incumbrances upon his land, upon whichever the $830 was paid, he was relieved to the same extent. The only possible difference it could make to either Wilkins or defendant would be that, if the Tring debt became due first, by paying that off the time of payment would be extended, and there would be but one mortgage on his land, instead of two. It would be quite natural, therefore, for the parties to agree that plaintiff would take care of the Tring mortgage, and see that it was not foreclosed. The court found—and the finding is sustained by the evidence—that plaintiff did agree to pay the Tring debt with the $830 received from Goldsberry. Instead of doing this, plaintiff assigned the Wilkins note, and passed to the assignee the $830 note as collateral security, and, when paid, the money was credited on the Wilkins debt. This mistake did not harm Wilkins or defendant, unless he is called upon to pay the Tring debt before the Wilkins debt is due. The mere fact that money received by the mortgagee was credited upon the wrong note will not deprive the creditor of his lien. If the notes were still owned by plaintiff, the error could now be corrected, and the result would be that the Tring mortgage would be canceled, and the plaintiff would be permitted to collect the money upon its second mortgage. And if the Wilkins debt has been fully paid, and the $830 was used in its payment, I see no reason why plaintiff should not be permitted to foreclose the mortgage in question here. It can make no difference to defendant on which mortgage he pays the money, which, in any event, is justly a burden upon his land. But the record does not show the facts which would entitle the plaintiff to that relief. Since no issue was made upon the question in the court below, and there is no finding, we are not permitted to conclude that plaintiff did guaranty to its assignee the payment of the Wilkins debt; and we do not know whether the Wilkins debt is due, or has been paid. Upon the facts found, plaintiff is not entitled to a foreclosure of his mortgage. The findings are sustained by evidence; and although I may feel that justice has, somehow, miscarried, I do not see how, under the circumstances, it can be prevented in this case. The judgment and order are affirmed.

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[1] Rehearing denied.

We concur: McFARLAND, J.; HENSHAW, J.

(111 Cal. 328)

McCARTHY v. MT. TECARTE LAND & WATER CO. (L. A. 85.)

(Supreme Court of California. Feb. 21, 1896.)

ACCOUNT STATED — JUDGMENT — CORPORATIONS— SERVICES BY DIRECTOR — COMPENSATION — IMPLIED CONTRACT—LIMITATIONS.

1. In an action based on a stated account the judgment cannot exceed the balance due on the face of the account in favor of the prevailing party.

2. In an action by a director of a corporation for compensation for services rendered by him to the corporation under an implied contract, evidence is admissible on the part of defendant corporation to show to what extent plaintiff was interested as stockholder, usage of defendant as to compensation paid to directors, and an agreement between the original incorporators that no salaries should be paid to officers.

3. A resolution of a board of directors of a corporation appointing one of their number superintendent, but containing no provision as to his compensation, which depended on the "understanding and expectation" that there should be a reasonable compensation, is not a contract in writing, within Code Civ. Proc. § 337, and an action for services rendered thereunder is within section 339, subd. 1, and barred by limitation after two years.

Department 2. Appeal from superior court, San Diego county.

Action by D. O. McCarthy against the Mt. Tecarte Land & Water Company on an account stated and for alleged services. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Jas. E. Wadham and F. W. Stearns, for appellant. McDonald & McDonald and Gibson & Titus, for respondent.

McFARLAND, J. Judgment went for plaintiff, and defendant, a corporation, appeals. There are two counts in the complaint. In the first it is averred that on September 11, 1891, there was an account stated between the parties for moneys before that time expended by plaintiff for the use of defendant, that the balance on said account stated was on said day $10,050.07, and that defendant agreed and promised to pay said balance. The alleged cause of action in this first count is purely an account stated. The second count is for $23,000, alleged services by plaintiff as general manager of defendant.

1. The court found, on the first count, that on September 11, 1891, defendant was indebted to plaintiff for moneys expended for defendant's use in the sum of $10,050.07, "and that on the said 11th day of September, 1891, the plaintiff stated his account for such moneys to the defendant in the said sum of ten thousand and fifty and seven one-hundredths ($10,050.07) dollars, and that defendant accepted the account as stated, and agreed in writing to pay the same." It is further found that defendant afterwards paid plaintiff $2,000, and that at the commencement of the action there was due thereon $8,050.07, with interest from said September 11th at 7 per cent. per annum, for which amount judgment was rendered. Appellant contends that the finding of an account stated on September 11th for $10,050.07 is not supported by the evidence, and is against law; and the contention must be sustained. As to the question whether there was any stated account at all on September 11th,—that is, whether the appellant then agreed to any account presented by respondent as a final settlement,—the evidence is conflicting. But, if we assume that there was an account stated on that day, it is clear that it was not for $10,050.07, but for only $3,550.07. The contract found is not the one proved. The statement on motion for a new trial contains

the following: "Said account was headed, 'Mt. Tecarte Land and Water Company in account with D. O. McCarthy,' and consisted of a large number of items of debit against the defendant running from May 15, 1888, to September 2, 1889, and aggregating the sum of $10,050.07, with a credit under date of July 2, 1891, of $6,500 and showing a net balance of $3,550.07; the aggregate of the account, the credit thereon, and the balance after deducting the credit, being as follows:

	$10,050 07
July 2, 1891, Cr. by issue to D. O. McCarthy of 65,000 shares of stock at ten cents per share....	6,500 00
Balance due	$3,550 07"

—And immediately following was an indorsement as follows: "Approved and ordered paid at a meeting of the board of directors held September 11, 1891. E. M. Dean, Secretary, by B. F. Moore, Ass't Sec'ty." (The respondent withdrew from his offer of the account the indorsement of the secretary, Dean. Appellant objected to this withdrawal, because then only a part of the account was offered, and his objection was overruled. If that indorsement be not considered, then there is little evidence tending to show that any account was agreed to by appellant; but that is not important here, because we are now assuming that there was some kind of a stated account on September 11th.) There is no evidence showing or tending to show any account stated on September 11th, other than the one described in the part of the transcript above quoted; and that account clearly showed a balance of only $3,550.07, and for the latter sum alone could the appellant be held liable upon the contract which is created by a stated account, which is a new and independent contract. See Coffee v. Williams, 103 Cal. 556, 37 Pac. 504, and cases there cited. The finding was no doubt based upon some occurrences which took place long after the alleged stating of the account on September 11th, and which, keeping in view the nature of a stated account, should not have been considered. The $6,500 worth of stock of the corporation defendant, with which respondent credited appellant in the alleged stated account of September 11th, had been purchased by respondent on July 2, 1891, and had not been paid for; and it appears that afterwards, on November 26, 1891, the board of directors of the appellant, —a new board having been elected about that time,—by resolution allowed respondent to surrender the certificates for said stock, and cancel said sale, and to be released of said credit, and it was resolved "that said D. O. McCarthy be, and he is hereby, requested and allowed to present his account against the company, together with the account of J. Harvey McCarthy against the company, to this board for examination and allowance, within the period of sixty days next ensuing from and after this date." There is a conflict of evidence on the question whether respondent ever did afterwards present another account; but this is immaterial here, because the transactions of November 26th did not change the liability of appellant upon the contract evidenced by the alleged stated account of September 11th,—unless, indeed, they showed that said alleged account was not intended to be a final stated account, or unless they worked a rescission of that contract. In this action respondent must rely upon the alleged stated account of September 11th, as it stood stated on that day. If it was afterwards opened up, it cannot stand as a cause of action. A judgment for $10,150.07 upon a stated account which shows a balance of only $3,550.07 cannot be sustained. If the account of September 11th was a stated account, the appellant is in the same position, except in some particulars, not important here, as it would have been if it had given its promissory note for the said balance of $3,555.07; and in an action based on the stated account a judgment for more than the balance due on the face of the account would be as erroneous as a judgment on a promissory note for more than the face of the note.

It is also averred in the complaint that the account was restated on or about the 24th of November, 1891; but, as the averment was denied, and the court made no finding on the subject, it must be disregarded.

2. In the second count it is averred that on or about February 1, 1888, the defendant employed plaintiff as its general manager, and agreed to pay him for his services as such a fair and reasonable compensation; that he accepted such employment, and remained its general manager continuously from about February 1, 1888, to about November 24, 1891; and that his services during that period were reasonably worth $23,000, no part of which had been paid. In the answer all these averments are denied, and it is averred that the cause of action, if it ever existed, is barred by subdivision 1 of section 339, and by section 337, Code Civ. Proc. During all the time mentioned in the complaint the respondent was a large stockholder and a director of the corporation defendant. The court found that on June 6, 1888, the defendant, by a resolution of its board of directors, appointed the plaintiff its superintendent, and that he then entered upon the duties of "said office," and discharged them until November 24, 1891; that during that time he assumed and discharged the duties of general manager with the knowledge and consent of the directors, but without any express appointment, until September 2, 1891; and that on said September 2, 1891, he was, by resolution of the board, appointed "superintendent and general manager." It was further found "that no order was ever made by the board of directors of the defendant, nor any contract or agreement by any of its officers, fixing the compensation of plaintiff for his services, or

the time of payment thereof; but that it was nevertheless the understanding and expectation of the plaintiff and the board of directors of the defendant, at the time of plaintiff's said appointment, and during the entire period of his services, that he was to receive reasonable compensation for such services." It was also found that the value of his services during said period was $150 per month; also that no part of this cause of action was barred by subdivision 1 of section 339, Code Civ. Proc.; but that his right to recover for services rendered prior to January 11, 1889,—four years before the commencement of the action,—was barred by section 337, Id. Judgment on this count was ordered and rendered for $5,175. Counsel for appellant contends that the evidence is insufficient to support the finding that "it was nevertheless the understanding and expectation of the plaintiff and the board of directors" that respondent was to receive compensation; but that, on the contrary, the evidence shows that the company was in poor financial circumstances, and that it was understood that none of the directors were to receive compensation for what they should do in the interest of all the projectors of the water scheme which they had in view. The preponderance of the evidence certainly seems against any understanding or expectation that respondent was to be paid; but, under our views of the case on other points, it is unnecessary to decide whether there was any material evidence sufficient to justify said finding. In the first place, we think that the court erred in ruling upon the admissibility of evidence offered on that point. As the respondent was a stockholder and director of the corporation, he was not entitled to compensation for services rendered by him for it, no matter under what name or official position, unless there was some kind of a contract for such compensation. Now, there is no pretense that there was any express contract for compensation; consequently, if there was any such contract, it must have been an implied contract arising out of and inferable from the situation and relation of the parties; and any fact which could reasonably throw light upon that relation, or tend to show the intention of the parties, was relevant and admissible. Barstow v. Railroad Co., 42 Cal. 465. And we think that the court erred in sustaining objections to evidence offered by appellant for that purpose. For instance, appellant asked the respondent when on the witness stand: "To what extent were you interested as a stockholder in the Mt. Tecarte Land and Water Company in the year 1888?" and he was asked the same question as to the years 1889, 1890, and 1891. Objections to these questions were sustained, and we think erroneously. The questions tended to show the relations of the parties, and the interest which respondent himself had in the property, and to throw light on the question whether or not it was intended that he should have compensation, or, if so, how much; and "the situation of the parties at the time—the relation, if any, in which they stood, of a business character or otherwise—is important to be known and considered in order to arrive at a correct solution of the ultimate question involved." Barstow v. Railroad Co., supra. Other questions of a similar character, not necessary to be here specially mentioned, were incorrectly ruled out; and it was particularly erroneous and prejudicial to sustain objections to the following question, asked by appellant of one of its witnesses, who was an original incorporator and director: "Was it not a usage of the defendant corporation that no compensation should be paid to the directors or its officers?" and to strike out the following statement of another of its witnesses: "It was agreed upon between the original incorporators that no officers should receive salaries for their services." The court found that there was an "understanding" by the appellant that there was to be compensation to respondent; and, as bearing on that question, the said testimony sought to be introduced by appellant was relevant and competent. Whether there was such a usage was a fact, and not a mere conclusion of the witness. Upon this point the case at bar is not distinguishable from Fraylor v. Mining Co., 17 Cal. 594. In that case the plaintiff was a stockholder in the corporation defendant, and had been appointed its secretary, and he sought to recover the value of services rendered as such secretary. The defendant "offered to show that by the usage and custom of the corporation no compensation was chargeable for services of this nature." Objection was sustained, and this court on appeal reversed the judgment. The court, in its opinion, quotes from Ang. & A. Corp. as follows: "The officers of a corporation who are to receive any compensation are usually provided for by regular salaries. If there is no salary, and no particular contract, much must depend, as in other cases, upon the custom with regard to compensation for the particular services, and the expectations of the parties growing out of it." The court then say: "The rule thus laid down covers the principle involved in the offer made by the defendant, and we think there was a violation of this rule in the rejection of that offer. * * * We have no doubt of the admissibility of the evidence; and, if the plaintiff was informed of the existence of the usage and custom referred to, the inference would naturally be that he accepted the office and performed its duties without any expectation of being compensated for his services. If any such usage in fact existed, his position as a member and officer of the corporation is sufficient prima facie to charge him with a knowledge of its existence." In the case at bar we gather from the evidence that the project of the corporation was to acquire and create water and ditch property with means to be obtained by the sale of its stock; and, while the record does not show affirmatively that the project was a failure, it does appear in the evidence that all the money it ever received and expended on its works did not exceed $10,000. Under these circumstances it might well have been the usage, custom, and understanding that the directors should not receive compensation for their efforts in helping along the enterprise in which all were interested; and the said testimony offered by appellant and excluded by the court was not only admissible but highly important.

There is another point in the case which demands notice. The court found that no part of respondent's cause of action for services was barred by subdivision 1 of section 339, Code Civ. Proc., but that the part of the cause of action which accrued more than four years before the commencement of the action was barred by section 337. The court, therefore, must have found that the action is upon a "contract, obligation, or liability founded upon an instrument in writing." We think that the court erred in thus holding. It is contended by respondent that the resolution of the directors of appellant appointing him superintendent or general manager is the instrument in writing upon which this action is brought. (It may be observed that, even under this view, there was no resolution appointing him "general manager" until September 2, 1891, which was only a couple of months before his alleged services ended, and that the complaint is for services only as general manager. The resolution of June 6, 1888, was for his appointment only as superintendent, and there usually is a great difference between the two positions. But, as appellant does not make this point, it may be assumed, we suppose, that the resolution of June, 1888, appointed him to the place for services in which he sues.) But a cause of action is not upon a contract founded upon an instrument in writing, within the meaning of the Code, merely because it is in some way remotely or indirectly connected with such an instrument, or because the instrument would be a link in the chain of evidence establishing the cause of action. In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing for the nonperformance of which the action is brought. In Chipman v. Morrill, 20 Cal. 132, it was held that an action by one joint maker of a promissory note against the others for contribution was not upon the note as "an instrument in writing," within the meaning of the statute, and was barred in two years. In that case Justice Field, delivering the opinion for the court, said: "Our conclusion is that it is not thus founded; that the statute, by the language in question, refers to contracts, obligations, or liabilities resting in or growing out of written instruments, not remotely or ultimately, but immediately." He further says: "The construction would be the same if the word 'founded' were omitted, and the statute read 'upon any contract, obligation, or liability, upon an instrument in writing.'" In the case at bar the contract—if any such there be—of the appellant to pay respondent for services is not the direct and immediate consequence of the resolution appointing him superintendent. Respondent, being a director of appellant, was not entitled to compensation for services rendered the corporation, unless the circumstances were such as to raise an implied assumpsit to pay what they were reasonably worth. But that assumpsit did not arise out of the mere fact of his appointment as superintendent, as might have been the case, perhaps, if he had been a stranger. In Smith v. Railroad Co., 102 N. Y. 192, 6 N. E. 397, where it was held that the employment by a corporation of a stranger as secretary raised an implied obligation to make compensation for services, the court put it on the express grounds that "he was neither stockholder nor director of the defendant, and stood in no relation to the company which entitled it to his gratuitous service, or which made it his interest to serve the company without compensation." And the court say further: "The rule that directors or trustees cannot recover for services rendered for the corporation upon an implied promise is an application of the general rule applicable to trustees. But we perceive no reason of policy or justice which should prevent a person appointed as secretary, and who is neither a director nor stockholder, from receiving a reasonable compensation for his services." See Tayl. Priv. Corp. §§ 646, 647, and cases cited; Brown v. Silver Mines, 17 Colo. 421, 30 Pac. 66. In most of the cases cited by respondent the officer or employé was a stranger having no relation to the corporation. In Rosborough v. Canal Co., 22 Cal. 557, the decision was upon the ground that there was a written order that the compensation of the plaintiff "be established at fifty dollars per month"; and what the court said in its opinion on the subject here involved was dictum, and was not clear, because it speaks of an "understanding and expectation" which "removes all presumptions that the services were performed gratuitously." The opinion refers to Fraylor v. Mining Co. (heretofore cited), in which the court say that "the right of the plaintiff to recover rests alone upon the fact of the rendition of the services." In the case at bar, therefore, respondent's cause of action is not upon a "written instrument," to wit, the resolution appointing him superintendent or general manager. Appellant could not have been precluded from showing affirmatively that no compensation was intended or expected, upon the ground that it would have been an attempt to contradict a written instrument. If respondent have any cause of action, it is upon an understanding of appellant and the expectation of respondent that he would be compensated, which may be implied, if the evidence be sufficient, from all of the circumstances of the case, and not upon any written instrument. Indeed, the finding of the court is, not that there was a contract in writing to pay compensation, but that there was "nevertheless the understanding and expectation" of the respondent and the board that there should be reasonable compensation. Our conclusion, therefore, is that the cause of action set up in the second count is not upon an instrument in writing, within the meaning of said section 337 of the Code of Civil Procedure, and that, as to all services rendered more than two years before the commencement of the suit, the cause of action is barred by subdivision 1, § 339, of said Code. The judgment and order denying appellant's motion for a new trial appealed from are reversed, and a new trial is granted.

We concur: HENSHAW, J.; TEMPLE, J.

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111 Cal. 302

CITY AND COUNTY OF SAN FRANCISCO v. BRODERICK. (S. F. 20.)

(Supreme Court of California. Feb. 21, 1896.)

MUNICIPAL CORPORATIONS—TAXATION—LIMITATION OF ELECTION EXPENSES—SUBDIVISION OF GENERAL FUND—AUDITOR.

1. Under Consolidation Act, § 71 (as amended St. 1865–66, p. 436), requiring the board of supervisors of San Francisco city and county, when making the levy of taxes for a fiscal year, to apportion and divide the taxes to certain specific funds, the board is limited to the funds therein named, and is not authorized to subdivide the general fund and limit the subdivisions to the objects indicated.

2. Under such section (subdivision 3), election expenses are payable from the general fund; and where the expenses incurred by the election commissioners exceed and have exhausted the amount estimated for elections by the board of supervisors in making the tax levy, the holder of an unpaid claim arising from an election is not restricted thereby, but may have it audited, and paid from the general fund, if there is money enough there to meet it.

3. If a demand on the county and city treasury has been approved and ordered paid by the proper board or officer, and presented to the county and city auditor in proper form, and he is satisfied that the demand is legally due and unpaid, and its payment is authorized by law, he is bound to audit it. and cannot be restricted in the exercise of his office by a city ordinance.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by the city and county of San Francisco against William Broderick to restrain him from auditing warrants made out by the board of election commissioners. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. C. Graves, for appellant. Thornton & Merzbach, for respondent.

HARRISON, J. At the time of levying the annual tax for the fiscal year ending June 30, 1895, the board of supervisors of the city and county of San Francisco fixed the sum of $150,000 as its estimate of the registration and election expenses for the general election to be held in November, 1894, and set apart and appropriated out of the general fund that amount of money for that purpose. Subsequently they adopted an ordinance purporting to limit the expenditures for this object to this amount, and directed the auditor not to audit, and the treasurer not to pay, any demand in excess thereof. In holding and conducting said election, however, the board of election commissioners and the registrar of elections incurred liabilities and charges against the city and county in a sum of upward of $40,000 in excess of the amount thus set apart, and made out and delivered warrants therefor, on the general fund, to the parties claiming to be entitled to the same. After warrants amounting to $150,000 had been paid, the plaintiff herein commenced the present action against the defendant, who is the auditor of said city and county, to restrain him from auditing and allowing or approving any warrant or warrants made out by said board of election commissioners, or by said registrar of elections, in excess of said sum of $150,000, upon the ground that after that sum had been set apart for this purpose, and while there was other money in the treasury to the credit of the general fund, exclusive of said sum of $150,000, it had, upon the faith of said moneys in excess of said sum, entered into contracts with divers persons for necessary and lawful supplies for its use, and, if the aforesaid warrants in excess of $150,000 were paid, the general fund would be so depleted that there would be no funds with which to pay the claim of said contractors; that said contractors had protested against the payment of said warrants, and had threatened to sue the plaintiff upon their contracts, and would vex and harass the plaintiff with a multiplicity of suits if said warrants were allowed and paid. To this complaint the defendant demurred, and, his demurrer having been sustained, judgment was rendered in his favor, from which the plaintiff has appealed.

Section 1 of the act of March 18, 1878 (St. 1878, p. 299), declares: "The conduct, management and control of elections, and matters pertaining to elections in the city and county of San Francisco, is hereby taken from the board of supervisors, and vested in a board of five commissioners * * * which board is hereby invested with all the powers and charged with all the duties, as to matters pertaining to elections, now vested in said board of supervisors." Other sections of the act point out the duties of this board of election commissioners and of the registrar, making it incumbent upon them to select rooms or places for registration, and polling places; to designate the officers of election, and, in certain instances, fix their compensation therefor, "to be paid out of the treasury of said city and county, in the manner now provided by law for the payment of such services"; to provide books, blanks, and stationery, and other matters requisite for the performance of their duties. And by section 1216 of the Political Code they are to exercise all the powers and duties which by that Code are conferred upon county clerks and other officers in relation to matters of election and polling places. Section 33 of the act of 1878 declares: "All provisions for carrying out the registration and election laws in said city and county of San Francisco shall be made by the board of election commissioners, and demands on the treasury authorized or allowed by them for such purposes shall have the same force and effect as if authorized or allowed by the board of supervisors."

It is not claimed by the appellant that the board of election commissioners had incurred any unnecessary expenses, or allowed any demands upon the treasury that were not proper claims for expenses incurred in the discharge of their duties under the statutes by virtue of which they acted, but it contends that the estimate and appropriation of $150,000 by the board of supervisors is a limitation upon the amount that may be expended for that purpose. The transfer to the board of election commissioners of the conduct, management, and control of elections in San Francisco gives to this board the same power and authority to incur expenses in reference thereto, and to make the same a charge against the city, as was previously held by the board of supervisors; and the provision in section 33, that "demands on the treasury authorized or allowed by them for such purposes shall have the same force and effect as if authorized or allowed by the board of supervisors," gives to their demands the same validity, and right to immediate payment from the funds of the city, as if their payment had been directed by the board of supervisors. The provision in section 71 of the consolidation act, requiring the board of supervisors, when making the levy of taxes, to apportion and divide the taxes to be collected to certain specific funds, "according to the estimate of said board of the necessities of said funds," is limited to an apportionment of the taxes to those funds which are therein designated, viz. "corporation debt fund, general fund, school fund, street light fund, and street department fund," and does not confer authority to subdivide those funds, or either of them, and restrict the several subdivisions to the objects for which they may be indicated. The third subdivision of the section, which declares that "the general fund shall be applied and used for the payment of all sums authorized by law to be paid out of the general fund, and not otherwise provided for in this act," implies that the whole of the general fund shall be so applied and used, and that the holder of any claim against the city which is payable out of the general fund is entitled to have his claim audited, and also to have it paid, if, at the time of presentation for payment, there is sufficient money therefor in the general fund. Section 76 of the consolidation act declares that "the general fund consists of all moneys in the treasury not designated and set apart by law to a specified use, and of the overplus of any special fund remaining after the satisfaction of all demands upon it"; and in section 83 it is declared that "the term 'law' or 'laws,' as used in this act, is never to be understood as applicable to any regulation of the board of education, or of the board of supervisors, but only applicable to the constitution, and the laws made or adopted by the legislature in pursuance thereof." The estimate which the board of supervisors is directed to make of the necessities of the several funds, as the basis of the tax which they will levy, is not a conclusive determination of the amount that may be expended for these several necessities; and, although the failure to levy a tax which shall raise a sufficient amount of money for these needs will prevent the expenditures, yet, if the money has been collected and is in the treasury, applicable thereto, its expenditure or disbursement is not limited by the amount of the estimate. In the present case the board of supervisors were required to estimate the expenses that would be incurred at the general election for the year 1894, and, in the exercise of their judgment, they deemed it necessary to provide the sum of $150,000 therefor. As the incurring of these expenses was not under their control, it would not be competent for that body to determine the amount that should be expended, and their estimate would be, at most, only an approximate opinion of the amount of the expense. Nor does the fact that their estimate was too low deprive the holders of claims for the excess above this estimate of the right to payment, so long as there is money in the treasury applicable thereto. See Cashin v. Dunn, 58 Cal. 582; Welch v. Strother, 74 Cal. 415, 16 Pac. 22.

The duties of the defendant are defined in the consolidation act and other statutes, and it is not competent for the board of supervisors, by any ordinance or resolution, to restrict him in the exercise of his office, or to absolve him from the performance of these duties. If a demand upon the treasury has been approved and ordered paid by the proper board or officer, and is presented to him in proper form, and he has satisfied himself that the money is legally due and remains unpaid, and that payment thereof from the treasury is authorized by law, it becomes his duty to audit the demand, and the holder of the demand has a right to the enforcement of this duty. He is not justified in showing any favoritism by auditing the claim of one person in preference to that of another, upon the theory that there may not be sufficient money in the treasury to meet all demands upon it; and, as the appellant herein can, in law, have no choice as to which of its creditors shall first be paid, it cannot restrain the defendant from auditing demands against it which have been properly allowed and ordered paid. The judgment is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

CITY AND COUNTY OF SAN FRANCISCO v. WIDBER. (S. F. 21.)

(Supreme Court of California. Feb. 21, 1896.)

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by the city and county of San Francisco against J. H. Widber. Judgment for defendant, and plaintiff appeals. Affirmed.

W. C. Graves, for appellant. Thornton & Merzbach, for respondent.

PER CURIAM. This case is a companion to S. F. 20, this day decided (43 Pac. 960); that action having been brought to prevent the auditing, while this was brought to prevent the payment, of certain demands against the appellant. The principles therein declared are applicable to the present case, and upon its authority the judgment appealed from is affirmed.

111 Cal. 297

HAVENS v. DONAHUE. (S. F. 16.)

(Supreme Court of California. Feb. 21, 1896.)

CONTRACTS—PERFORMANCE—ARCHITECTS.

1. Under a contract with an architect to furnish the necessary drawings, specifications, and details for the construction of a building for a certain percentage on the total cost of the construction of the building, the architect, after furnishing the drawings, etc., is not limited, in case his employment is terminated before the construction of the building is completed, to a recovery of the percentage on the cost of the building in so far as it was at the time completed.

2. An architect employed to furnish plans for the erection of a building on a site on which there is another building, occupied by tenants, is not liable to the owner by disclosure of the intended erection of the new building—the architect having neither contracted nor been requested to keep such fact a secret—for the loss of rent caused by the vacation of the building by the tenants.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Charles I. Havens against Annie Donahue. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Stanley, Hayes, McEnerney & Bradley, for appellant. Boyd, Fifield & Hoburg, for respondent.

GAROUTTE, J. This is an action to recover for the services of an architect. Judgment went for plaintiff, and defendant appeals from the judgment, and also from an order denying her motion for a new trial. Plaintiff's contract was to furnish all necessary general drawings, specifications, and details for the construction of a building, upon a commission of 2½ per cent. upon the total cost. He was paid $3,750 under the contract, and seeks to recover the balance.

Defendant's first claim is that under such contract, plaintiff was only entitled to recover his commissions upon the cost of construction as far as the building had proceeded at the time his employment was terminated. This contention cannot be sustained. Plaintiff had nothing to do with the construction of the building. His contract was simply to furnish the plans, drawings, and specifications, and this he did. The actual construction and cost of construction are only material to him as fixing the amount of defendant's liability for the services rendered. Again, the complaint also charged upon a quantum meruit, and the court found the value of the plaintiff's services at the amount fixed by the judgment. This would seem to dispose of any question upon such contention.

The defendant, by her pleading, set up a counterclaim to the amount of $500. This counterclaim is based upon allegations to the effect that she (defendant) employed plaintiff, as an architect, to furnish the plans, etc., for the erection of a certain building upon a site where a building of hers was then standing, which was occupied by tenants; that plaintiff improperly notified a reporter of the San Francisco Chronicle of her intention to erect a building upon such site, and also furnished the paper a drawing of said building. And it is alleged that these things were published in that paper as a matter of public news, and thus came to the knowledge of defendant's tenants. It is charged that, by reason of these facts coming to their notice, some of them removed from her building; thus depriving her of future prospective rents and profits, and damaging her to the extent of such prospective rents. We attach but little importance to this contention. Aside from the remoteness of the damages sought to be recovered, and their contingent and speculative character,—matters which we will not discuss,—there is no cause for relief stated. There is no allegation that plaintiff agreed not to make disclosure of defendant's intentions to erect the building, nor was he requested not so to do. Neither did the law cast upon him any duty to keep his knowledge as to these matters to himself. It necessarily follows that no cause of action is stated. The relations arising between the plaintiff and defendant came solely from the contract, and we cannot see that they were in any sense confidential. Section 1881 of the Code of Civil Procedure treats of confidential relations existing between certain parties, but the facts of the present case do not bring it within the provisions of that section. We do not think the disclosures here made were any more confidential than if the dealer furnishing the lumber, or the contractor who was to do the work, had given notice to the public that the building was to be erected.

It would appear that the principal controversy in this case centers around the location of a certain stack of chimneys, and damages are claimed from plaintiff for an alleged mislocation of these chimneys upon the plans. The building was to be seven stories in height. The six upper floors were arranged for offices, and each was a duplicate of the other. During the progress of construction the seventh floor was changed to a photographic gallery. The chimneys were located according to the original plan, which contemplated this floor to be devoted to offices, and were not located in the proper place for a gallery, and this fact was the occasion of the controversy arising between these parties. The trial court found in favor of plaintiff upon the charge of negligence, and as the evidence is conflicting the judgment will not be disturbed upon this ground. The claim of defendant at the trial of the case was that plaintiff furnished a gallery plan for the seventh floor, locating the chimneys in the partition wall, and that when actually located they came through the floor at a distance of five feet therefrom. But this unfortunate condition was not attributable to the architect, and the court has so found. It arose from the delay practiced by the defendant in arriving at a determination to change the seventh floor from an office floor to that of a gallery; for, at the time this change was determined upon, the chimneys had been erected by the contractors according to the original plans. This fact is undisputed. When the gallery plan was adopted the chimneys were already there. The mischief was done, and there was no remedy for it. It may be assumed, for present purposes, that, prior to this time, plaintiff had furnished a gallery plan, showing the location of the chimneys to be in the partition wall; but at that time the chimneys had not been built, the contract for their building had not been let, and then they could have been placed according to such plan. A witness (Sullivan) was sworn, and placed upon the stand, when counsel for defendant said: "I want to prove that Mr. Sullivan got this sketch from Mr. Havens between the 18th and 20th of July, 1892. (Counsel referred to a lithographic sketch of the gallery, which was sent East to various photographers for the purpose of securing a tenant, but was not, and did not purport to be a copy of defendant's Exhibits D and E.)" An objection was sustained to the offer. Appellant's attorney stated at the time that he offered this evidence for what it was worth. The trial court concluded that as evidence it was worth nothing, and we think the conclusion right. The offer to prove this sketch was too general to be of any service. If the evidence had been introduced as offered, it would have been entirely too vague and indefinite to have given the court any light upon the issue then under consideration. And under any circumstances, in view of all the other evidence in the case, it is a matter of too slight importance to demand a reversal of the judgment. We find nothing further in the record demanding our consideration. For the foregoing reasons the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

(111 Cal. 313)

ROSENBERGER v. PACIFIC COAST RY. CO. (L. A. 86.)[1]

(Supreme Court of California. Feb. 21, 1896.)

MASTER AND SERVANT—TERM OF EMPLOYMENT—WRONGFUL DISCHARGE.

1. Under Civ. Code, § 2010, providing that "a servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages, a hiring at a yearly rate is presumed to be for one year," an employment at a stated yearly salary, without other agreement as to the time, constitutes a contract for one year, and this will not be changed by the fact of the monthly payment of salary, nor by the custom of the employer, a railroad company, or of all railroad companies, to employ only by the month.

2. In an action by an employé wrongfully discharged to recover wages, he is not required, as a condition of recovery, to show whether or not he has endeavored to secure other employment, and, if so, with what result, such facts being matters of defense, as to which the burden of both pleading and proof rests on defendant.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by E. B. Rosenberger against the Pacific Coast Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wilcoxon & Bouldin and J. M. Wilcoxon, for appellant. Graves & Graves, for respondent.

PER CURIAM. This cause was tried by the court and a jury, the plaintiff had judgment, and the defendant appeals therefrom, and from an order denying a new trial. The plaintiff claimed that he was employed by the defendant as an accountant for the period of one year, commencing November 24, 1893, at a salary of $1,800 per annum, payable in monthly installments of $150, and that he was discharged without cause March 24, 1894. This action was commenced, July 17, 1894, to recover three months' salary, from March 24 to June 24, 1893, amouting to $450, and for that sum he recovered judgment. The defense was that the employment was not for any definite time, and that his discharge was justifiable, because of his failure to give bond for the faithful discharge of his duties.

Prior to the employment in question, plaintiff was employed in a similar capacity in the offices of the Union Pacific Railway at Omaha, and had made an application for employment to the auditor of the Oregon Improvement Company, with which company defendant is connected. C. O. Johnson, defendant's superintendent, wrote plaintiff, November 4, 1893, to know whether he was still an applicant, and for information as to experience, salary required, etc. To this letter plaintiff replied, saying, as to salary, that it should be worth $1,800 or $2,000 a year. To this Johnson replied by telegraph, saying: "Yours ninth. Salary eighteen hundred. Change immediate if possible. Could probably arrange transportation. Wire earliest date." Plaintiff arrived at San Luis Obispo the night of November 24th, and on the morning of the 25th talked with Mr. Johnson an hour and a half, but plaintiff was unable to state with any particularity what was said, but, as he expressed it: "As near as I can give it, we arrived at an understanding to furnish me one year's employment upon satisfactory performance of my duties which I had undertaken. * * * I say that, as near as I can recollect, we arrived at that understanding." Mr. Johnson testified that, in this conversation, nothing was said as to salary, or the term for which he was employed, but that it related wholly to the duties he was to perform. Though plaintiff was paid monthly, up to the time of his discharge, at the rate of $150 per month, the correspondence constituted a hiring for a year. Section 2010 of the Civil Code provides: "A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring by piece work, for no specified time." The payment by the month, at the monthly proportion of the yearly rate, would not, of itself, be sufficient to change the contract to a hiring by the month; nor would the custom of the defendant, or of all railroad companies, to hire by the month convert the contract, created by the correspondence between the parties, which, under the Code, constituted a contract for a year, into a contract by the month. If the correspondence had not fixed the term for which the plaintiff was hired, section 2011 of the Civil Code, as well as the custom, would have made a hiring by the month. Upon this point, the instruction to the jury was right, and the verdict justified by the evidence.

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[1] Rehearing denied.

The second defense, viz. the failure of the plaintiff to give a bond for the faithful discharge of his duties, was not established at the trial. This was an affirmative defense, alleged by the defendant in its answer, and, unless established by evidence, would not prevent a recovery by the plaintiff. The appellant does not claim that the giving of a bond was originally made a condition of the employment, or that any reference thereto was made in the correspondence between the parties prior to the hiring, or until after the plaintiff had entered upon the discharge of his duties, but alleged, in its answer, that there was a general usage among railroad companies to require bonds from those of their employés whose duties required the handling of money, and that the plaintiff was aware of this usage, and contends from this that it entered into and formed a part of the contract of employment. To establish this defense, it was, therefore, necessary for the defendant to show, not only the existence of the usage, but also that the plaintiff was aware of its existence at the time of the hiring. The record, however, fails to show that any evidence of this nature was presented to the jury. Mr. Johnson, who was the only witness on the part of the defendant at the trial, testified that the plaintiff was discharged for the reason that he failed to furnish such a bond, but no question was asked him on behalf of the appellant respecting the usage of railroad companies in requiring bonds to be given, or the knowledge of the plaintiff of such usage. Upon his cross-examination, after he had stated that there was no other contract with the plaintiff with reference to the employment than the correspondence which was in evidence, he was asked what right he had to require him to give a bond, to which he replied: "Because he, in his letter, showed that he was sufficiently familiar with railroad usage to know the necessity of a bond in connection with his duties." This is the only evidence in the case with reference either to the usage or the knowledge of the plaintiff, and falls far short of establishing either. The letter referred to is entirely silent upon this subject, and gives no ground for inferring either the existence of the usage or the knowledge of the plaintiff. The request of the plaintiff that he give a bond, which was made by the defendant after he had entered upon his duties, did not make it one of the terms of the employment, nor were those terms varied by the fact that, in pursuance of that request, he filled out the blank application which was handed him.

The court properly refused the instruction asked by the defendant. While it is the duty of an employé who has been wrongfully discharged to seek other employment, and thus diminish the damages sustained by him, he is not required, as a condition of recovery, to show that he has made such endeavor and failed. The burden is on the defendant to show that he could, by diligence, have obtained employment elsewhere. Whatever compensation may have been received in such employment is also to be shown by the defendant in mitigation of damages; otherwise, the damages will be measured by the salary or wages agreed to be paid. Suth. Dam. § 693; Costigan v. Railroad Co., 2 Denio, 609; Howard v. Daly, 61 N. Y. 362; Utter v. Chapman, 43 Cal. 279. The judgment and order are affirmed.

111 Cal. 358

THOMAS et al. v. SAN DIEGO COLLEGE CO. et al. (No. 19,560.)

(Supreme Court of California. Feb. 25, 1896.)

JUDGMENT — RIGHT TO CONTROL EXECUTION — PRACTICE—SUSPENDING SALE UNDER DECREE OF FORECLOSURE.

1. Trustees to whom a mortgage securing bonds is made payable, and who have foreclosed such mortgage, have not such absolute control over the decree as will preclude the court from ordering a sale of the property thereunder, over their objection, on motion of one of the bondholders, though he is also owner of the equity of redemption in the property.

2. An error in granting an order on a motion of which no notice was given the adverse party is without prejudice, where a motion to set aside the order is afterwards made and heard.

3. The depreciation of property owing to general business depression is not a sufficient reason to justify a court in ordering a suspension of the sale of mortgaged premises under a decree of foreclosure, and a plaintiff is not entitled to such an order, against the objection of other parties in interest, where the conditions have not changed since he took his decree and had an order of sale issue, under which no sale was made because of an irregularity.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by R. A. Thomas, William Collier, and J. E. Fishburn, trustees, against the San Diego College Company, George Hannahs, assignee, and O. J. Stough. Plaintiffs appeal from two orders after decree. Affirmed.

Trippet, Boone & Neale, for appellants. Conklin & Hughes, for respondents.

HAYES, C. This appeal is by the plaintiffs from two orders, made after judgment; the first directing the immediate issuance and execution of an order of sale, made upon the ex parte application of defendant Stough, and the second an order denying plaintiffs' motion asking that the order of sale be recalled, or that its execution be postponed.

The San Diego College Company issued 298 bonds, for the sum of $100 each, together with interest coupons thereto attached, and executed to the plaintiffs, as trustees, a mortgage upon several parcels of real estate to secure the same, the most valuable of which is known as the "College Campus," upon which there was a large building. The above-entitled action was brought to foreclose said mortgage, and a decree of foreclosure was entered therein December 22, 1893. The findings set out the names of the holders and owners of said bonds, and the number held by each, from which it appeared that defendant O. J. Stough was the holder of 157 of said bonds, 132 of which he owned, and the remaining 25 he held as collateral security, the college company being the owner, subject to the pledge thereof. Defendant Hannahs is the assignee of the college company, an insolvent debtor. Prior to the commencement of the foreclosure proceedings, and also prior to the insolvency of the college company, defendant Stough became the owner of the mortgaged property, but took it subject to said mortgage, and was, therefore, a necessary party to the foreclosure suit. The decree directed certain parcels of the mortgaged property to be first sold, and, on March 13, 1894, an order of sale was issued, and under it the sheriff sold all the property except that known as the "College Campus." But this sale, made on May 21, 1894, did not realize enough to pay the interest due on the bonds, and the condition upon which the remainder of the property could be sold was thereby fixed, and the "College Campus" property was afterwards advertised to be sold on July 2, 1894, but by direction of plaintiffs' attorneys it was readvertised, and was offered for sale on August 1, 1894, and on that day L. L. Boone and O. A. Trippet (two of plaintiffs' attorneys), "on their own responsibility and not for their clients," bid therefor $3,000, but refused to complete the purchase, because, as they claimed, the sale was made without legal notice. On August 28, 1894, the first of said orders was entered in said cause upon motion of Conklin & Hughes, attorneys for defendant Stough, but without notice to counsel for plaintiffs. The order recited that it appeared "to the satisfaction of the court that O. J. Stough, named as defendant in said cause, is the person most largely interested in the enforcement of said decree." A writ was accordingly issued that day, and counsel for plaintiff moved, upon notice to counsel for defendant Stough, to recall said writ, and postpone the sale until the further order of the court, upon the grounds (1) that said writ was issued without their request, knowledge, or consent; (2) "that it is against the interests of plaintiffs' cestuis que trustent to have a sale made of the mortgaged premises at the present time;" and (3) "that equity and justice to the bondholders named in the judgment herein demands that the sale of said premises be postponed." This motion was denied, and plaintiffs appeal from the order denying it, and from the ex parte order directing the writ to issue. The facts appear in a bill of exceptions.

In support of the second and third grounds of said motion, an affidavit made by L. L. Boone was read, to the effect that, as he was informed and believed, the improvements on the "College Campus" property cost $40,000; that the buildings thereon were designed for college purposes; that their chief value depends upon the use to which they might be put; that it is the opinion of real-estate agents that a purchaser could be found at the price of $12,000, but that, owing to the present depressed financial condition of the country it would take some time to find a purchaser at that price, say six months; that, since the last attempted sale, the attorneys for the bondholders, other than Stough, have been making efforts among themselves to raise sufficient money to enable them to bid $6,000; but, as the principal bondholder, Mr. Groh, lives in Nebraska, it would take some time to complete arrangements, in which event affiant believed a bid of $6,000 would be made; but that, if a sale were forced immediately, not more than $3,000 would be obtained.

Appellants contend that a writ for the enforcement of the judgment could not properly issue without their request or consent. There is no doubt about the general proposition laid down in Freeman on Executions (section 21), that, "as the judgment is the property of the plaintiff, he alone, while the property remains his, is entitled to exercise dominion over it," and "to allow another to control the writ is to turn the dominion of the property over to some one who is not entitled to it." But, it will be observed that the learned author is speaking of cases where the plaintiff "is the only one entitled to the fruits of the judgment," and in the same section he further says: "A stranger may acquire an equitable right to the benefit of the execution, or to the property upon which it is levied; and such equitable right may, in most cases, given him authority to sue out and conduct the process." So that it is the ownership of or interest in the judgment, or in the fruits of the execution, or in the property upon which it is levied, which authorizes a party to cause it to be issued. In Cortez v. Superior Court, 86 Cal. 274, 24 Pac. 1011, it was held that a commissioner in partition who is allowed a fee for his services, the amount of which is fixed by the court and made a charge upon the land, is a "party in whose favor judgment is given," within the meaning of the word "party" as used in section 681 of the Code of Civil Procedure. In Kelly v. Israel, 11 Paige, 147, cited by respondent, there were several mortgages, in favor of different parties, and a decree of foreclosure had been entered in each, and the property ordered sold by a master under one of the decrees, but for the benefit of all. The master, having advertised the sale, postponed it at the request of the complainant's solicitor. One De Launy, the assignee of a junior mortgage for $20,000, but who was not made a party because his assignment had not been recorded, but who came in and stipulated to be bound by the decree, thereupon tendered to the complainant the full amount of the three decrees, with interest and costs, upon condition that he would assign the decrees to him; which offer was declined. Thereupon Rogers and Sagory, De Launy's assignors (who had assigned the mortgage as security only), and De Launy, petitioned the chancellor, praying that the complainant might be required to proceed and sell the premises, or that he should assign the decree to De Launy upon payment of the amount due. An order was thereupon made permitting such payment, and authorizing the party paying the same to proceed to sell the property. Upon appeal from this order, made by the vice chancellor, the court, among other things, said: "If the complainant neglects to proceed to a sale with due diligence, the court, upon the application of any other party interested in the execution of the decree, will commit the prosecution thereof to him; or, if the decree has already been placed in the hands of a master to be executed, will direct him to proceed to a sale without delay, notwithstanding any directions he may receive to the contrary from the complainant or his solicitor. Indeed, it is the duty of the master, without any special order of the court for that purpose, to proceed to a sale of the property with all reasonable diligence, if requested to do so by any party to the suit who must necessarily be injured by the delay if the sale is stayed without a sufficient cause."

In that case, the circumstances requiring the action of the court were stronger than here, and the action of the court was invoked by petition; but the principle involved there and in the case at bar is the same. The case here was also equitable. The decree required the sale of the property, and, as no provision was made in the decree for delaying the sale, it was the duty of the plaintiffs to proceed without unreasonable delay to have the decree executed; and, upon their failure to do so, it became the duty of the court, upon the complaint of any party to the suit interested in its execution, to direct that its execution be proceeded with. It would be a vain thing to bestow upon a court of equity the power to make a decree which it had no power to enforce, and yet such would be the case if its execution depended upon the pleasure or convenience of the plaintiffs. It is quite true, as urged by appellants, that the trustees were the proper plaintiffs in the action, and that the duty of prosecuting it rested upon them; but it does not follow that they had such absolute control of the action, or of proceedings under it, as is necessarily accorded to those who litigate in their own right, and not for the benefit of another. If, for example, they had refused to bring the action to foreclose the mortgage, it appearing that the circumstances made it their duty to do so, such refusal would not have tied the hands of the court or of the bondholders, and thereby prevented a foreclosure. They had no personal interest in prosecuting the suit or enforcing the decree, and were only instruments in the hands of the court, after they brought themselves within its jurisdiction, for the enforcement of the trust created for the benefit of others, and were therefore peculiarly within the power and control of the court. The respondent O. J. Stough owned 132 of said bonds, and held 25 more as collateral security for a debt of the college company, and was found by the court to be the person most largely interested. But it is contended that his interest was adverse to that of the other bondholders, inasmuch as he was the owner of the mortgaged property, subject to the mortgage, and therefore interested in having the property sold for a small sum, in order that he might redeem at a small cost. But the fact that defendant Stough was the owner of the mortgaged property is an additional reason in support of his right to make the application, as it shows that he was not only interested as a bondholder, but was interested in the property to be sold, and the question was, therefore, not one affecting his right to apply for the issuance of the order of sale, but one to be considered by the court as a ground for granting or refusing his motion.

But it is contended that the first order was granted upon the ex parte application of defendant Stough, and that plaintiffs have not consented to or ratified the order. Whether the court erred in granting the order without notice need not be considered, as plaintiffs were heard upon the motion to recall the order, or to stay its execution; and, if their motion was properly denied, they were not prejudiced by the first order. The interest of Mr. Stough was known from the beginning. He was made a party because he held the legal title to the mortgaged premises. Nor does there appear to have been any change in the condition of the property, or in the financial condition of the country between March 13, 1894, on which date an order of sale was issued at plaintiffs' request, and October 5, 1894, when the motion to recall the order was denied; and, between those dates, and after the sale of the other property, the "College Campus" was twice advertised for sale under plaintiffs' instructions, first for July 2d, and then for August 1st, and on the last-mentioned day the property was struck off to Boone and Trippet, who afterwards refused to complete their purchase because of some alleged irregularity or defect in the notice of sale. If July or August were a proper time to sell said property, it is difficult to understand why it might not properly be sold in September or October. In McGown v. Sanford, 9 Paige, 290, it was held that the fact that property was depressed in consequence of the general derangement of the finances, affidavits of the defendants and others of their belief that the politics and finances of the country would be settled at an extra session of congress, so as to greatly increase the value of property, were insufficient to justify the court in ordering a suspension of the sale of mortgaged premises under a decree of foreclosure; and in Astor v. Romayne, 1 Johns. Ch. 310, it was decided that the actual existence of war (1814), where there was no immediate danger of an invasion of the place where property was advertised to be sold, formed no sufficient ground for suspending the sale of mortgaged premises under a decree.

Of course, what has been said does not conflict with the well-established power of a court to refuse to confirm or to set aside a sale where special circumstances have prevented competition, and assurance is given that, upon a resale, a better price can be obtained, sufficient to justify the delay and additional expense. The uncertainty of any agreement or combination of the stockholders being effected, as suggested, is too great to justify a postponement of the sale. The condition of the country affecting the value of the property was well known long before, and ample time had elapsed after the decree was entered to consummate the arrangements, if such consummation were practicable. The orders appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the orders appealed from are affirmed.

(111 Cal. 308)

SMITH v. LUNING CO. (No. 15,940.)[1]

(Supreme Court of California. Feb. 21, 1896.)

MUNICIPAL CORPORATIONS — OPENING OF STREETS —LAYING OF SEWERS—CONTRACTS.

1. In an action on a contract whereby plaintiff undertook to lay a sewer in front of defendant's premises, it appeared that the city ordinances required for such work the consent of the superintendent, and that, before the superintendent could issue a permit for street work under a private contract, such contract must be for work on the entire length of a block, and be signed by the owners of three-fourths of the frontage; that the contract between the parties was for work in front of defendant's premises only, which occupied but one-fourth of the frontage. *Held*, that it was implied that plaintiff should procure the necessary signatures of other property holders, and a permit from the superintendent, and that, in the absence of such acts, he acquired no rights under the contract.

2. In such case, in the absence of evidence that plaintiff had a contract with the owners of the necessary frontage, he had no authority to do the work, and could confer none on another.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by plaintiff, Smith, against the Luning Company, to foreclose a lien acquired under an alleged contract for the construction of a sewer in front of defendant's premises. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. P. Langhorne, for appellant. J. C. Bates, for respondent.

HARRISON, J. The plaintiff and the defendant entered into an agreement June 7, 1893, by which the plaintiff was to construct an ironstone pipe sewer in front of the property of the defendant on Leavenworth street, between Greenwich and Lombard streets, in San Francisco, to the satisfaction of the superintendent of streets and highways of said city and county. There was at this time an ordinance in force in the city and county making it a misdemeanor, punishable with fine or imprisonment, for any person to break up or disturb any public street, without the permission of the superintendent of streets and highways, and providing that that officer should not issue a permit for the doing of any street work under a private contract, unless said contract provided for doing the work on the entire length of the block, and was signed by the owners of three-fourths of the frontage of the property in said block. The defendant was the owner of one-fourth of the frontage on Leavenworth street between Greenwich and Lombard, and prior to this date, viz. April 11, 1893, one Daniel O'Connor had entered into a contract with the owners of the other three-fourths of the frontage on said street for building a sewer therein, and had obtained a permit from the superintendent of streets for constructing said sewer, which he afterwards completed, and on the 10th of August received from the superintendent of streets a certificate of his acceptance of said work. The plaintiff never received a permit from the superintendent of streets to do any work on this portion of Leavenworth street, and did not do any of the work in constructing the sewer. The plaintiff brought the present action to foreclose a lien upon the land of the defendant by virtue of its agreement with him for the construction of the sewer. Judgment was rendered in his favor, and the defendant has appealed.

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[1] Rehearing denied.

As the construction of the sewer in front of the defendant's lot, without obtaining a permit therefor from the superintendent of streets, would have been in violation of the city ordinance, and have constituted a misdemeanor, any agreement between the plaintiff and defendant to construct it without obtaining such permit would have been unlawful, and could not form the basis of a civil action. Parties to an agreement are, however, deemed to have intended a lawful, rather than an unlawful, act; and their agreement is to be construed, if possible, as intending something for which they had the power to contract. As the obtaining a permit from the superintendent of streets was essential to rendering the agreement between the plaintiff and defendant valid, and as the instrument in question is silent upon that subject, the obtaining of such permit must be implied as a condition of the agreement between them, and the instrument signed by them as merely an inchoate agreement, which would become effective and binding only in case such permit should be issued. This construction is corroborated by the terms employed by the parties to the instrument. It purports to be made between the plaintiff, as party of the first part, "and certain owners of property, lots, and lands fronting on Leavenworth street, whose names are hereunto subscribed, each contracting severally, parties of the second part"; and in the body of the agreement the plaintiff agrees to and with the said "parties" of the second part, and they, "each for himself, and not one for the other," agree to pay "for the work done in front of his or her own property, respectively, and not in front of others, according to the ratio that his frontage bears to the whole frontage here represented." In view of the requirement of the ordinance that the owners of three-fourths of the frontage on the block should sign the contract before a permit could be granted, it is evident that in signing the instrument there was implied a condition that, before the defendant was to be bound thereby, the plaintiff was to procure other parties thereto sufficient to entitle him to obtain the permit. If the plaintiff had refused to obtain such permit, and the defendant had attempted to enforce the agreement in the form in which it is found, or to recover damages from the plaintiff for its breach, it would have been a sufficient answer for the plaintiff to say that the ordinance forbade him from doing the work.

The plaintiff, moreover, failed to show that he had performed the contract on his part. He testified that he "had not himself performed any of said work, but all of said work had been performed by one Daniel O'Connor"; and O'Connor also testified to the same effect. The plaintiff offered in evidence "a written instrument, signed by him," by which he purported to appoint Daniel O'Connor "my true and lawful attorney, for me, and in my name, place, and stead, to do and perform the work of constructing an ironstone pipe sewer in front of the property of the owners of lots and lands on Leavenworth street, under a certain written contract, heretofore entered into between the owners of lots and lands fronting on said Leavenworth street, between Greenwich and Lombard streets, and myself." The record does not show that this instrument was ever delivered to O'Connor, or that he accepted the appointment, or acted under its terms, or did any work for the plaintiff. But, irrespective of this, the plaintiff acquired no rights against the defendant by reason of this power of attorney, or any act of O'Connor in the performance of the work. At the time this instrument was signed, O'Connor had already entered into a contract for constructing the sewer throughout the entire block; and whatever work was performed by him in the construction of the sewer was done under the obligation assumed by him in this contract, and not by virtue of any authority derived from the plaintiff. The finding "that said O'Connor, under authority from plaintiff, performed for plaintiff the work described in plaintiff's said contract," is without any evidence to support it. The finding that the plaintiff and O'Connor "had a contract with all the owners of the 550 feet frontage of the lots and lands fronting the proposed work, except the frontage of defendant's property, for similar work to that mentioned in the contract between plaintiff and defendant," is also unsupported by the evidence. There is no evidence that the plaintiff was a party to any contract with the owner of any frontage on the work, excepting the frontage of the defendant; and, as the contract with the defendant gave him no authority to do the work of building the sewer, he could not, by virtue of that contract, confer any authority upon O'Connor to build the sewer. The defendant's liability to the plaintiff does not depend upon the construction of the sewer, but upon its construction by the plaintiff, and it was not sufficient for the plaintiff to show that the sewer had been constructed. He was also required to show that it had been constructed by him. The judgment and order are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(5 Cal. Unrep. 267)

WITTER v. McCARTHY CO. (L. A. 67.)

(Supreme Court of California. Feb. 21, 1896.)

TRUSTS—RATIFICATION BY BENEFICIARIES—PRINCIPAL AND AGENT—PRINCIPAL CHARGEABLE WITH KNOWLEDGE OF AGENT.

1. In an action to quiet title to an undivided interest in land, it appeared that defendant's grantor, as owner of a tract of land, after contracting to convey undivided interests in it to several persons, of whom plaintiff was one, and receiving part of the purchase price, by agreement with them dated March 1, 1888, conveyed the land to a trustee, a party to the agreement, with plenary power to sell and convey; that this agreement required the trustee to distribute the proceeds among the respective grantees in proportion to the interests held by each, deducting from the share of each the amount due from him on the purchase price, and pay the same to the grantor, less the amount of a mortgage which he had agreed to pay; that the trustee never sold the land, but, November 1, 1892, conveyed to each of the beneficiaries his undivided interest; that an interest of $^{25}/_{40}$ was conveyed to the grantor, who recorded the deed thereof; that the grantor subsequently acquired an $^{8}/_{40}$ interest conveyed to others by the trustee at the same time, and January 30, 1893, conveyed his entire interest ($^{33}/_{40}$) to defendant. There was no evidence that any of the parties to the agreement objected to the conveyances by the trustee, or that defendant did till filing its answer in this action, November 12, 1894. *Held*, that a finding that all the beneficiaries to the trust consented to and acquiesced in the conveyances by the trustee was warranted.

2. A corporation is charged with the knowledge of its president, acting as attorney in fact of one making an assignment to it.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by W. E. Witter against the McCarthy Company to quiet title. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

McKeeby & Appel, for appellant. Wicks & McDonald, for respondent.

VANCLIEF, C. Action to quiet the alleged title of plaintiff to an undivided $^{2}/_{40}$ parts of a tract of land containing about 130 acres, situate in the county of Los Angeles. The defendant, for want of information or belief, denied plaintiff's alleged title, and asserted title adverse to that claimed by plaintiff. The court below, without the intervention of a jury, found the facts and law in favor of plaintiff, and rendered its judgment accordingly. The defendant appeals from the judgment, and from an order denying its motion for a new trial.

The facts relative to the question of title are substantially as follows: Prior to March 1, 1888, Edward McCarthy was sole owner of said tract of land, subject to a mortgage for $15,000, but prior to that day had contracted to sell to each of a number of persons undivided portions thereof, and had received from them portions of the purchase money. The plaintiff was one of such contractors, to whom, on February 15, 1888, Edward McCarthy had contracted to sell $^{2}/_{40}$ of said tract for the price of $6,000, of which $1,500 was paid at the date of the contract, and the remainder was to be paid, $1,125 in 3 months, $1,125 in 6 months, $1,125 in 9 months, and $1,125 in 12 months, from date of the contract. All parties interested desiring that the whole tract of 130 acres be subdivided and sold in lots to suit purchasers, and that the proceeds in money be distributed in proportion to the undivided interests of the parties, it was agreed that Edward McCarthy should convey the whole tract to J. I. Weed in trust to make such sales and conveyances and to distribute the proceeds thereof according to the agreement. This agreement was reduced to writing and executed by the three parties thereto, on March 1, 1888, to wit, Edward McCarthy, of the first part; W. E. Witter, G. P. Lyman, L. A. Thompson, and eight others (contractors for undivided interests), of the second part; and J. I. Weed, of the third part. The agreement confers upon the trustee plenary power "to grant, bargain, sell, and convey all or any portion of said land for such price and upon such terms as he shall deem best," and, as to his duties, contains the following: "It is further agreed that the trustee aforesaid shall receive and collect all moneys for sales of the land aforesaid, and pay all taxes, commissions, expenses of sale, of all kinds, and improvements authorized by the parties of the second part, and shall on or before the 1st day of July, A. D. 1888, declare a dividend in favor of the second parties of any and all moneys in his hands, in proportion to the interests of the respective parties therein, as shown by the contracts with Edward McCarthy aforesaid, and shall, out of said dividends, pay to Edward McCarthy the amounts due or to become due to him from second parties on said contracts, and the balance, if any there be, to the respective parties entitled thereto; and, in case the dividend shall not equal the installment due on said contract, second parties shall pay the balance of said installments at the times provided therein, and said trustee shall declare dividends, and apply the proceeds in the same manner every three months thereafter until all the installments on said contracts have been paid, and all of said property shall have been disposed of. It is further understood and agreed that whereas there is now a mortgage on said property to the amount of $15,000, with interest at 10% from March 1, 1888, of which Edward McCarthy has assumed the payment, that in case it becomes necessary or expedient to change or renew said mortgage the trustee shall, and he is thereby authorized to, execute such mortgage in his own name, and the amounts received by said trustee from said second parties, or in their behalf applicable to the installments due to Edward McCarthy, shall be applied to the liquidation of said mortgage, and shall be credited on the contracts of Edward McCarthy to second parties in the proportions to which they are respectively entitled thereto. It is further understood and agreed that in case of the failure or refusal of second parties, or any of them, to make the payments to Edward McCarthy provided for in said contracts, so as to thereby forfeit their rights to the interest in said land as provided in said contracts, the said trustee shall pay to Edward McCarthy all the proceeds of the sales of said lands to which the holder of said contract would otherwise be entitled to receive, and second parties agree to hold said trustee harmless in carrying out this provision." Contemporaneously with the execution of this tripartite agreement, Edward McCarthy conveyed the legal title of said tract of land to J. I. Weed by deed absolute upon its face, the trust being expressed only in said agreement. Weed never sold any part of said tract of land as contemplated by the trust agreement, but on November 1, 1892, four years and eight months after having accepted the trust, he conveyed to each of the beneficiaries an undivided part thereof equal to his beneficial interest in the whole. To plaintiff he thus conveyed $^{2}/_{40}$, that being the interest which plaintiff had contracted to purchase from Edward McCarthy as aforesaid, and for which he had fully paid according to the terms of his said contract with Edward McCarthy, and had also settled his proportion of the expenses of the trust to the satisfaction of the trustee. To Edward McCarthy the trustee conveyed on the same day (November 1, 1892) $^{25}/_{40}$ of the land. Afterwards Edward McCarthy acquired from other parties to the tripartite agreement $^{8}/_{40}$ which had been conveyed to them by the trustee on November 1, 1892, as aforesaid. On January 30, 1893, Edward McCarthy, Charles McCarthy, Emeline McCarthy, and Mrs. L. E. Hensler executed a deed purporting to convey to the defendant corporation the land in question and other property, this being the only evidence of defendant's legal title to the land. Yet defendant objected to this deed as being irrelevant, and claims nothing under it. It was relevant, however, as tending to prove that Edward McCarthy consented to and acquiesced in the aforesaid conveyances by the trustee to the beneficiaries, and for this purpose it was, presumably, introduced by plaintiff.

The only grounds upon which appellant claims a reversal of the judgment are that the conveyances of the land by the trustee to the beneficiaries on November 1, 1892, were void for the alleged reason that they were made without the consent of all the beneficiaries, and that the finding by the court that all the beneficiaries of the trust did consent to and acquiescence in those conveyances is not justified by the evidence. The finding of the court is that "said J. I. Weed, at the request of Edward McCarthy, grantor of defendant, and with the consent of the other parties in interest, conveyed the entire property to the respective parties in interest, and that such conveyances were accepted by the various parties, and were acquiesced in by the grantor of this defendant and all other parties to said agreement [tripartite agreement] set out in defendant's answer." The evidence tending to prove this finding as applied to Edward McCarthy, grantor of defendant, is (1) that he accepted and recorder a deed from Weed for $^{25}/_{40}$ of the land on the same day (November 1, 1892) that deeds were made to all the other beneficiaries; (2) that he subsequently purchased the interests conveyed by Weed on the same day to two other beneficiaries, amounting to $^{8}/_{40}$ of the land; (3) that thereafter, on January 30, 1893 (three months after the said conveyances by Weed), he conveyed all his interest in the land in question, then amounting to $^{33}/_{40}$, to the defendant corporation; and (4) there is no evidence or pretense that Edward McCarthy, or any one of the parties of the second part to the tripartite agreement, ever objected to any one of said conveyances by Weed of November 1, 1892, nor that the defendant corporation ever objected thereto before it filed its answer herein, on November 12, 1894,—over 2 years after said conveyances were executed, and 21 months after it had accepted a conveyance of $^{33}/_{40}$ of the land from Edward McCarthy, who claimed title under said Weed conveyances alone. I think this evidence, though merely circumstantial, is sufficient to justify the finding in question. Besides, it would not be consistent for the defendant to claim title to $^{33}/_{40}$ of the land under or through the Weed conveyances, and at the same time to deny the title of plaintiff and others who claim the other $^{7}/_{40}$, from the same source. But, as before remarked, defendant professes to claim nothing in this action under the conveyance from Edward McCarthy of January 30, 1893, and therefore claims no title at all unless it was acquired from some other source, or in some other manner. There is no evidence, however, of any other title, legal or equitable, in the defendant, except an instrument purporting to be an assignment by Charles McCarthy, Minnie A. Austin, and Mrs. L. E. Hensler, by their attorney in fact, James P. McCarthy, to the defendant, of all moneys and property to which they (assignors) "may be entitled from the proceeds of the sales of the land described" in the tripartite agreement, and in the deed from Edward McCarthy to J. I. Weed, "which property was deeded to said J. I. Weed in trust for certain purposes in said agreement mentioned." Yet even this assignment bears no date, and there is nothing in the record indicating when it was executed. Edward McCarthy is named in the body of the instrument as one of the assignors, but he does not appear to have signed it. Nor is there anything in the record indicating when the defendant was organized as a corporation. It is stipulated that, during all the transactions involved in this action, James P. McCarthy was the general attorney in fact for Edward McCarthy, Charles McCarthy, Mrs. L. E. Hensler, and Minnie A. Austin, and that he was president of the defendant corporation from its organization until the trial of this action. It is further stipulated that he expressly approved of the conveyances by Weed (of November 1, 1892) to plaintiffs Lyman and Thompson of the $^{7}/_{40}$ not conveyed to Edward McCarthy. Therefore at the time he executed said assignment for Charles McCarthy, Minnie A. Austin, and Mrs. Hensler, he had actual notice of the conveyances by Weed to plaintiffs Lyman and Thompson of $^{7}/_{40}$ of the land; and such notice to him was notice to said assignors for whom he acted as attorney in fact, and also notice to the defendant corporation (the assignee), of which he was then the president. It thus appears that at the time James P. McCarthy executed the assignment he was the agent of both parties thereto, and consequently both parties are chargeable with notice of all facts affecting or relating to the assignment then known to him, and, among them, the facts that, with his written approval, Weed had conveyed $^{7}/_{40}$ of the land to plaintiffs Lyman and Thompson who had paid the stipulated purchase money therefor to Edward McCarthy, defendant's grantor, of all his interest in the land, which could have been only $^{33}/_{40}$. Moreover, the assignment does not purport to be an assignment of any interest in the land, nor of any specific interest in the tripartite agreement. It is merely a quitclaim of all right to moneys which the assignors "may be entitled to" from sales of the land, both parties to the assignment then knowing that $^{7}/_{40}$ of the land had been conveyed to plaintiffs Lyman and Thompson, provided that the aforesaid conveyances by Weed were valid. Thus we are brought back to the questions first above stated and answered. It is unquestionable that the conveyances by Weed to the beneficiaries of the trust are valid if all the beneficiaries consented thereto at the time they were made, and thereafter acquiesced therein until the commencement of this action; and from the conclusion above arrived at, that the finding of such consent and acquiescence by the lower court is justified by the evidence, it necessarily follows that the judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

THOMPSON v. McCARTHY CO. (L. A. 69.)

(Supreme Court of California. Feb. 21, 1896.)

Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by L. A. Thompson against the McCarthy Company to quiet title. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

PER CURIAM. This cause being in all respects similar to that of Witter v. McCarthy Co. (L. A. 67, this day decided) 43 Pac. 969, having been tried upon the same evidence and at the same time, the judgment and order herein appealed from are affirmed, for the reasons stated in the opinion of the commissioners filed in the last-mentioned cause, numbered 67.

LYMAN v. McCARTHY CO. (L. A. 68.)

(Supreme Court of California. Feb. 21, 1896.)

Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by G. P. Lyman against the McCarthy Company to quiet title. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

PER CURIAM. This cause being in all respects similar to that of Witter v. McCarthy Co. (L. A. 67, this day decided) 43 Pac. 969, having been tried upon the same evidence and at the same time, the judgment and order herein appealed from are affirmed for the reasons stated in the opinion of the commissioners filed in the last-mentioned cause, numbered 67.

(111 Cal. 343)

HUMBOLDT SAVINGS & LOAN SOC. v. BURNHAM et al. (S. F. 190.)[1]

(Supreme Court of California. Feb. 24, 1896.)

MORTGAGE—DECEASED MORTGAGOR—FORECLOSURE—COMPLAINT—SUFFICIENCY—AMOUNT OF JUDGMENT—ACTION ON NOTE—COMPLAINT.

1. A complaint for foreclosure of a mortgage, alleging that plaintiff, within the proper time, presented its claim, duly verified, for the amount of the mortgage, against the estate of a deceased mortgagor, and that the same was duly approved, allowed, and filed, sufficiently alleges a presentation of the claim, as against a general demurrer, where the claim was not attached to nor set out in the complaint.

2. A complaint which alleged that a note counted on was given by Joel S. J. and Georgia C. J., in words and figures as therein set out, and set out a note signed "J. S. J." and "G. C. J.," sufficiently identified Joel S. J. and Georgia C. J. as signers of the note, respectively, as "J. S. J." and "G. C. J."

3. Taxes and insurance paid by a mortgagee under authority of the mortgage, and which are secured by it after his claim against the estate

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[1] Rehearing denied.

of the deceased mortgagor has been presented and allowed, are properly included in judgment of foreclosure without presentation of a claim therefor against the estate.

Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by the Humboldt Savings & Loan Society against Georgia C. Burnham and others. From a judgment for plaintiff, Georgia C. Burnham and another appeal. Affirmed.

J. D. Boyer, for appellants. A. H. Loughborough, for respondent.

VAN FLEET, J. Action to foreclose a mortgage. Defendants, other than Georgia C. Burnham and James D. Boyer, made default. The two latter demurred to the complaint. Their demurrer was overruled, and, upon failure to answer, judgment was entered against all the defendants, foreclosing the mortgage. From the judgment the two named defendants appeal upon the judgment roll, the only questions made being as to the sufficiency of the complaint.

1. The contention that the complaint does not state a cause of action, for want of a sufficient averment of presentation of the mortgage claim to the estate of Joel S. Josselyn, deceased, is ill founded. The particular objection is that the complaint does not allege, in terms, either that the claim contained a description of the mortgage, with a reference to the date, volume, and page of its record, or that it was accompanied with a copy thereof. The averment was that the plaintiff did, within the proper time, "present to said executrix its claim against the estate of Joel S. Josselyn, deceased, for the amount due and to become due on the said note and mortgage, and that the said claim was duly verified in all respects according to law, and was duly allowed and approved by said executrix and by the judge of said court, and that the same was duly filed on the 20th day of March, 1890, in the office of the clerk of said court, in the matter of the estate of said deceased." The claim was not set out, or attached to the complaint. We deem this a sufficient averment of the ultimate fact of presentation, as against a general demurrer; and the demurrer here was no less a general one because it undertook to specify the particulars wherein the complaint failed to state a cause of action. Whether the claim, as presented, was sufficient in form, or properly presented, was a matter of evidence, of which the general allegation made was sufficient to authorize proof. In Bank v. Charles, 86 Cal. 322, 24 Pac. 1019, relied on by appellant, the claim was set out in full in the complaint, and it appeared affirmatively therefrom that the presentation counted upon was insufficient; and the ruling there made that the demurrer should have been sustained was upon that ground, the court saying, "The complaint shows upon its face that the only presentation of the claim was as above stated, and makes the presentation a part of the complaint, as an exhibit." It was not a case, therefore, as it may be conceded is the case here, of a mere defective averment of the essential fact of presentation, but an averment from which it appeared that no proper presentation was ever had. The other cases relied upon by appellants we do not regard as affecting the question under consideration.

2. The further objection that the complaint is ambiguous and uncertain is equally untenable. This objection is based upon the fact that the complaint alleges the note counted upon to have been given by Joel S. Josselyn and Georgia C. Josselyn, while the note, which is set out in full, appears to have been signed "J. S. Josselyn" and "G. C. Josselyn;" and it is said that there is nothing to show that the last-named persons are the same two parties alleged to have executed the note, and that, for all that appears, they may be entirely different individuals. But it is alleged that "Joel S. Josselyn and said defendant Georgia C. Burnham, then the wife of the said Joel S. Josselyn, * * * then and there made, signed, and delivered to said plaintiff, the payee therein named, their certain promissory note in writing, which said promissory note is in words and figures following, to wit," and then follows the note. This was quite sufficient to identify the parties signing the note as Joel S. and Georgia C. Josselyn.

3. Nor was it improper to include in the decree the items paid out by plaintiff for taxes and insurance on the mortgaged property. These expenditures were covered and secured by the mortgage, and were paid under the authority therein given. Having been paid subsequent to the presentation of the claim, for the protection of the property, they were properly allowed, on foreclosure, without demand or presentation. Society v. Hutchinson, 68 Cal. 52, 8 Pac. 627. The judgment is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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111 Cal. 319

WEAVER v. CITY AND COUNTY OF SAN FRANCISCO. (No. 16,017.)

(Supreme Court of California. Feb. 21, 1896.)

MUNICIPAL CORPORATIONS—JUDGMENTS AGAINST—CITY AND COUNTY OF SAN FRANCISCO—INDEBTEDNESS PAYABLE FROM SURPLUS REVENUE—EXHAUSTION OF FUNDS.

1. Under the provisions of the constitution (article 11, § 18) and of the San Francisco city and county charter (sections 95–98), the board of supervisors are permitted to make expenditures, for purposes other than those enumerated, only from the surplus revenue of the year in which such indebtedness is incurred, and one who becomes a creditor for such purposes must take notice of the limitation, and of the fact that, should the revenues for the current year become exhausted, though by the payment of claims arising after his own, he has no means of obtaining payment.

2. The fact that the only fund from which a claim against a municipal corporation can be paid is exhausted constitutes no defense to an action thereon, but the proper form of judgment to be entered is one specifying the fund from which it is payable, in that, as in all cases of recovery for indebtedness incurred by a municipality, the constitution (article 11, § 18) having limited their liability therefor to the revenues for the fiscal year in which contracted.

Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by one Weaver against the city and county of San Francisco. Judgment for defendant, and plaintiff appeals. Reversed.

J. C. Bates, for appellant. H. T. Creswell, for respondent.

HARRISON, J. The plaintiff, in the months of November and December, 1892, performed certain labor in plumbing, gasfitting and tinning upon certain engine houses of the defendant, under an employment by the officers in charge of the fire department of the city, amounting in value to the sum of $4,517.17. Itemized demands therefor, duly verified, were presented to the officers of the defendant, and approved by the standing committee on the fire department of the board of supervisors, but the auditing committee of said board refused to allow the claims, and they were never audited or allowed. The present action was brought to recover judgment against the defendant for the amount of these demands. The complaint was filed May 9, 1893, and the answer upon which the case was tried was filed February 21, 1894. In its answer the defendant sets forth facts showing the sources and amount of the income and revenue of the city and county for the fiscal year ending June 30, 1893, and the different modes in which this income and revenue had been disposed of and expended; that not only had this entire revenue and income been exhausted, but that, for debts and liabilities incurred during that fiscal year, there had been allowed and audited by the proper officers of the city demands against the city amounting to upward of $200,000 in excess of the amount of this income, and that this deficiency was represented by allowed, audited, and registered demands for the payment of which no money had been provided; that, in addition to this deficiency, there were outstanding demands against the general fund amounting to the further sum of upward of $100,000, which had never been audited, and that the demands of the plaintiff were payable only out of this general fund, and had never been allowed, audited, or registered; that, at the time this action was commenced, viz. May 9, 1893, the audited and registered demands against the city, payable out of the general fund, together with the preferred claims for salaries during the remainder of the fiscal year, far exceeded in amount the income and revenue of the fiscal year then remaining in said general fund; and that, on said 9th day of May, 1893, there was not, and had not since been, any money in the treasury of the defendant, or in any of the funds thereof, which could be applied to the payment of the plaintiff's demands. The cause was tried by the court, who made findings in accordance with these averments of the answer, and rendered judgment in favor of the defendant. The plaintiff has appealed directly from the judgment upon the findings contained in the judgment roll.

The principles governing the decision of this case, as well as the provisions of law applicable thereto in support of the judgment of the superior court, have been so frequently pointed out by this court that it is only necessary to cite a few of the cases in which they are found: Gas Co. v. Brickwedel, 62 Cal. 641; Shaw v. Statler, 74 Cal. 258, 15 Pac. 833; Schwartz v. Wilson, 75 Cal. 502, 17 Pac. 449; Lewis v. Widber, 99 Cal. 412, 33 Pac. 1128; McGowan v. Ford, 107 Cal. 177, 40 Pac. 231; Smith v. Broderick, 107 Cal. 644, 40 Pac. 1033. In addition to the provisions in the constitution (article 11, § 18) referred to in the foregoing cases, the consolidation act, or charter of the city and county of San Francisco, contains provisions applicable to the present case. By section 71 of that act, the board of supervisors is directed, when making the levy of taxes for the fiscal year, to apportion and divide the taxes so levied and to be collected and applied to the several funds therein named, one of which is the general fund, and, at the close of each fiscal year, "the said board shall direct the treasurer to transfer all surplus moneys of all funds excepting the school fund, after liquidating or providing for all outstanding demands upon said funds, to the general fund." Section 76 declares: "The general fund consists of all moneys in the treasury not designated and set apart by law to a specified use, and of the overplus of any special fund remaining after the satisfaction of all demands upon it." A surplus fund is also provided for, which is defined, in section 76, to "consist of any moneys belonging to the general fund, remaining in the treasury after the satisfaction of all demands due and payable which are specified in the first fourteen subdivisions in section 95." This surplus fund is further defined in the fifteenth subdivision of section 95 to be the surplus of money that shall remain in the treasury "at the end of each fiscal year, and after every lawful demand on the treasury then due and payable, or to accrue for that year, shall have been actually paid, taken up and cancelled, and record thereof made in the proper books, or cash in the treasury have been set apart and reserved equal to the amount of said demands that may then be outstanding, or to accrue for that year." It is further provided, in this subdivision of section 95, that payments of demands on the treasury of said city and county may be made for "expenditures previously authorized by the board of supervisors in the lawful exercise of their powers for objects other than those specified in the preceding fourteen subdivisions of this section, out of this surplus fund as specified in sections ninety-seven and ninety-eight, but not otherwise." The claim of the plaintiff is not included within the preceding 14 subdivisions of this section. Section 97 declares that the powers of the board of supervisors enumerated in this act, so far as the exercise thereof may involve the expenditure of money otherwise than for the objects enumerated in the first 14 subdivisions of section 95, "shall be deemed to extend only to authorizing the appropriation and application of any surplus moneys remaining in the treasury during any one fiscal year, to the objects specified in such enumeration of powers, after the demands mentioned in the first fourteen subdivisions of section ninety-five, due and payable during such fiscal year, shall have been paid." And section 98 provides: "If any expenditures not authorized by this act be incurred, they can never be paid out of the treasury, nor shall they be deemed to constitute or lay the foundation of any claim, demand or liability, legal, equitable or otherwise, against the said city and county. If expenditures be incurred which are authorized by this act to be paid out of the surplus funds in the treasury, but not for the preferred objects specified in section ninety-six (those enumerated in the first fourteen subdivisions of section ninety-five), such expenditures can only be paid out of such surplus funds and revenues strictly appertaining to the fiscal year in which such expenditures have been ordered, or the contracts therefor entered into, and cannot be carried forward and paid out of any revenues accruing and receivable into the treasury for any subsequent year."

The court finds that the board of supervisors, at the time of levying the tax to provide for the expenses of the fiscal year ending June 30, 1893, estimated the expenses of the general election to be held November 8, 1892, to be $140,000, and provided that sum and no more for that purpose; but that claims and demands for the expenses of said election, amounting in the aggregate to the sum of $293,998.23, had been allowed and paid by the treasurer out of the general fund. This excess of the expenses of the election over the estimate therefor, and its payment out of the general fund, however much it may have depleted the fund out of which the plaintiff would have been entitled to receive payment for his labor, does not give him a right to receive such payment out of the income and revenues of the city for any other year, subsequent to that in which his claim accrued. Whether the expenses thus incurred were proper or not cannot be investigated in this action, since those by whom they were incurred, or to whom they were payable, are not parties hereto. The court finds that these claims and demands were allowed by the board of election commissioners "under the authority vested in it," and it must therefore be assumed that all of these expenses were necessary, and were properly incurred, and, consequently, that their payment was a legitimate disbursement of the revenues of the city. The expense of this election was one of the items which the board of supervisors was called upon to consider when determining the amount of tax to be levied for that fiscal year; and, if the estimate which they made of the amount which would be expended was inadequate, the payment of the expenses incurred was not thereby limited to the amount of the estimate, any more than would be the payment of any other expense which is payable out of the general fund, where the actual expense proved to be greater than was estimated as the basis of the tax to be levied. Whoever deals with a municipality does so with notice of the limitation of its powers, and with notice, also, that he can receive compensation for his labor or materials only from the revenues and income previously provided for the fiscal year during which his labor and materials are furnished, and with the knowledge, too, that all other persons dealing with the municipality have the same rights to compensation, and are subject to the same limitations, as he is. Even though, at the time of making his contract, there are funds in the treasury sufficient to meet the amount of his claim, he is charged with notice that these funds are liable to be paid out for municipal expenditures before his contract can mature into a claim against the city, and if others, whose claims have accrued subsequent to his, are able to intercept these funds, he is in the same condition as any creditor who has dealt with one whose assets are exhausted before he presents his claim. He acquires no claim in the nature of a lien upon these funds for the amount of his demand, nor is there any legal obligation upon the municipality, any more than upon any other debtor, to pay the claims against it in the order in which they are incurred, unless they are presented in that order, and in such condition and with such formalities as entitle the claimant to immediate payment. In dealing with the municipality, he must rely upon the integrity of its officers that they will not incur any liabilities during the year in excess of the income and revenues provided for that year, and, as a prudent man, he will ascertain, not only the amount of that income, but also the amount of the claims already existing, and of those that are likely to be incurred.

The court finds that, of the amount of the plaintiff's claim, $2,290.48 was furnished between the 22d of November and the 1st of December, 1892, and the sum of $2,226.69 between the 13th and 29th days of December. By the act of March 26, 1878 (St. 1878, p. 556), the amount which the board of supervisors may appropriate for the expenses of the fire department, which include the claim of the plaintiff, is $80,000 in each year. By section 1 of the act of February 25, 1878, p. 111, commonly known as the "One-Twelfth Act," it is made unlawful "to contract for, or render payable in the present or future, in any one month, any demand or demands against the treasury" in excess of one-twelfth of this amount. Section 2 declares: "All contracts, authorizations, allowances, payments and liabilities to pay, made or attempted to be made in violation of section one of this act, shall be absolutely void, and shall never be the foundation or basis of a claim against the treasury of said city and county." The court finds that, during the month of November, 1892, and prior to the 22d day thereof, the board of supervisors had allowed and ordered paid demands against said fund of $80,000, amounting to the sum of $10,645.49. It follows that the plaintiff has no right of action for the labor and materials furnished during the month of November. The court does not, however, find that any part of the appropriation applicable to the month of December had been allowed or ordered paid, and it must be assumed that at the time the plaintiff was employed to render the services in December, there was an unexpended portion of this appropriation with which to meet his claim. The contract between him and the city was therefore valid in its inception, and, upon its completion, he had a valid right of action against the city, which he was authorized to have established by the judgment of a court of record. The depletion of the treasury, or the application of the funds therein to other claims before the trial of the action, was not a satisfaction of the plaintiff's claim, nor did it constitute a defense to his action. He was still entitled to a judgment, with the direction therein that it should be satisfied only out of the income or revenue provided by the city for the fiscal year in which the liability in his favor was incurred. This, indeed, would be the appropriate form at all times in which to render a judgment against a municipality, whenever, in an action brought against it for any liability or indebtedness incurred by it, the court shall determine that judgment should be given against it. As the constitution limits the obligation of the municipality, upon any indebtedness or liability that it may incur, to the income and revenue provided by it for that year in which such indebtedness or liability is incurred, the means for satisfying a judgment which establishes that obligation is equally limited, and it is eminently suitable that the mode of satisfaction should be made a part of the judgment. See Smith v. Broderick, 107 Cal. 644, 40 Pac. 1033. Whether the income for that year has been exhausted or not is immaterial. The rights of the parties are measured by the terms of the constitution, and not by this fact. In the present case it appears, from the findings of the court, that the whole amount of the tax that was levied for the fiscal year ending June 30, 1893, has not been collected, and it may be that, in the future, there will be received into the treasury, from this tax, a sufficient amount of money from which the plaintiff's claim may be satisfied. At all events, he has the right to a judgment against the city for the amount of his claim, with the limitation that it shall be satisfied out of the income and revenue provided for the fiscal year ending June 30, 1893, after the payment of such other demands against such income as are properly payable in preference to his own.

The judgment is reversed, and the superior court is directed to enter a judgment in favor of the plaintiff, and against the defendant, for the sum of $2,226.69, and directing that the same be satisfied out of the income and revenues of the defendant provided for the fiscal year ending June 30, 1893, in accordance with the foregoing opinion.

We concur: GAROUTTE, J.; VAN FLEET, J.

111 Cal. 368

MARSH v. HANLEY et al., Supervisors. (L. A. 180.)

(Supreme Court of California. Feb. 25, 1896.)

CONSTITUTIONAL LAW—SPECIAL LEGISLATION—ELECTIONS.

St. 1895, p. 207, regulating the holding of primary elections, which is made applicable only to counties which cast a certain number of votes at the last election, which makes it applicable to only two counties, is unconstitutional as special legislation.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Suit by one Marsh against one Hanley and others, supervisors of Los Angeles county. There was a judgment for plaintiff, and defendants appeal. Affirmed.

J. A. Donnell, for appellants. M. W. Conkling, for respondent.

BEATTY, C. J. This is a suit by a taxpayer to enjoin the defendants from appropriating public funds of the county for the purchase of ballot boxes and the payment of other expenses involved in carrying out the provisions of the act of March 27, 1895, commonly known as the "Primary Election Law" (St. 1895, p. 207). The claim of the plaintiff is that the act is local and special, and therefore unconstitutional and void. This contention was sustained by the superior court of Los Angeles, and the injunction granted. Defendants appeal from the judgment.

There can be no question that the act is local and special, since, by its terms, it is to "apply to, take effect in and be in force only in counties of the first and second classes"; that is to say, in San Francisco and Los

Angeles. Section 26, p. 218. The constitution allows the classification of counties according to population for the purpose of regulating the compensation of county officers in proportion to their duties (article 11, § 5), and for that purpose a classification has been established under which San Francisco falls into the first class and Los Angeles falls into the second class. But the fact that these and the other counties of the state have been classified for a purpose which the constitution recognizes as a proper and necessary one does not relieve a law relating to other and distinct matters from the objection that it is local and special if by its terms it is limited in its application or operation to one or more classes of counties less than the whole. Dougherty v. Austin, 94 Cal. 620, 28 Pac. 834, and 29 Pac. 1092; Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Bloss v. Lewis (Cal.) 41 Pac. 1081; Turner v. Siskiyou Co. (Cal.) 42 Pac. 434; Darcy v. City of San Jose, 104 Cal. 642, 38 Pac. 500; Denman v. Broderick, 11 Cal. 48, 43 Pac. 516. This act, therefore, not being a regulation of the compensation of county officers, is local and special, notwithstanding it embraces two counties, each of which constitutes one of the classes defined by the county government act; and the only question to be determined is whether or not the subject of the act is one of those as to which special and local legislation is inhibited by the constitution. The act is intended to regulate primary elections, i. e. the election of delegates to nominating conventions, and not only in its general scope and nature, but by various specific provisions, is made an essential part of the general election law of the state. By section 21, for example, it is provided that no candidate can have his name printed upon any ballot as a candidate for public office at any general election in this state unless he shall have been nominated by a convention composed of delegates chosen as in the act provided, or nominated by a certain percentage of electors as in the Political Code prescribed. The entire act presents an elaborate scheme for the conduct of the primary elections by sworn officers whose certificates of election will constitute the credentials of the delegates to the various political conventions,—state, district, and local. Not only is it a general law, which should have a uniform operation (Const. art. 1, § 11), and not only is the case to which it applies one in which "a general law can be made applicable" (Const. art. 4, § 25, subd. 33), but from an inspection of its terms it clearly appears that it was designed originally to apply uniformly throughout the state. This is shown by various expressions scattered throughout its first 24 sections, in which the original scheme of the law is embodied. Section 25, which is in some respects incongruous with other portions of the act, seems to have been a later addition. It provides for the election in presidential years of delegates to a state convention to choose delegates to a national convention, and, by a proviso, is made obligatory only in counties which cast 9,000 votes and upward at the last preceding general election. But by section 26 this proviso is superseded by the provision limiting the application and operation of the act to counties of the first and second classes. But for these two sections we should have a law complete and full, capable of applying, and intended to apply, in every part of the state. It is not a matter for argument or speculation, therefore, whether this is a case in which a general law could be made applicable. This act, by its terms, shows that such is the case; and, if it did not, it is apparent that a law regulating the election of public officers by prescribing the exclusive means by which candidates of the great political parties can secure a place on the official ballot is necessarily a law of a general nature and capable of uniform operation. The act is therefore unconstitutional by reason of its conflict with section 11 of article 1, and subdivision 33 of section 25 of article 4, of the constitution above cited. It is also in conflict with the more specific provisions of subdivision 11 of section 25 of article 4, prohibiting local or special laws for conducting elections.

Counsel for appellants have made no answer to these objections to the validity of the act, and we know of none which can be made. An amicus curiæ makes an urgent appeal in behalf of the law on the ground that it is a good law, designed to prevent, and capable of preventing, evils of great and increasing magnitude, but he does not deny that section 26 makes it unconstitutional if it is allowed to stand. He suggests, however, that we should hold that section void (he would have to include section 25 also) and the act valid throughout the state. If we should do so, we would be imposing upon the whole state a law which it is clear the legislature intended to apply in only two counties, and which would not otherwise have passed. This we cannot do, as it would be nothing short of legislation.

If the act is as beneficient as is claimed, it is to be regretted that it cannot stand; but, as we have more than once been compelled to remind the defenders of special and local laws, we cannot have the advantage of such legislation when it happens to be good without changing a constitution which absolutely prohibits it upon the assumption that it is generally bad.

The judgment of the superior court is affirmed.

We concur: McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; TEMPLE, J.; and HENSHAW, J.

111 Cal. 398

ALBERT v. HOBLER. (No. 19,589.)

(Supreme Court of California. Feb. 28, 1896.)

State Lands—Right to Purchase—What Land is "Suitable for Cultivation"—Question of Fact.

1. Whether land is "suitable for cultivation" within Const. art. 17, § 3, allowing state lands suitable for cultivation to be granted to actual settlers only, is a question of fact.

2. The fact that land does not produce "ordinary agricultural crops in average quantities" does not render it unsuitable for cultivation, within Const. art. 17, § 3, impliedly allowing lands of such character to be granted to persons not actual settlers, but expressly providing that state lands "suitable for cultivation" can be granted only to actual settlers.

Commissioners' decision. Department 2. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by Charles C. Albert against Charles J. Hobler. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

J. A. Haunch, for appellant. E. T. Casper, and J. W. Wiley, for respondent.

HAYNES, C. This action is prosecuted to determine the conflicting claims of plaintiff and defendant as to their respective rights to purchase from the state of California certain school lands, viz. the N. E. ¼ of section 8, township 25 S., range 26 E., M. D. B. and M., and arises upon a contest initiated in the office of the surveyor-general of said state, and by him referred to the superior court of Kern county for trial. Findings and judgment went in favor of the plaintiff, and the defendant appeals from the judgment and from an order denying his motion for a new trial.

Both parties applied to purchase the land in question, and both applications were regular and sufficient in form; and the question as to which party is entitled to purchase it depends upon the character of the land. The defendant's application was first in point of time, and if the land "is not suitable for cultivation," as he alleged in his application, he was entitled to purchase without being an actual settler thereon; but, if said land "is suitable for cultivation," as plaintiff alleged in his application, he, having settled upon and occupied it, is entitled to purchase it. But two questions are discussed in appellant's brief: (1) That the evidence is insufficient to justify the finding that the land in question "is suitable for cultivation"; and (2) that the township plat put in evidence by the plaintiff did not prove that said land had been sectionized and selected by the state more than three months before his application to purchase, as alleged in the complaint.

1. Whether said land "is suitable for cultivation" is a question of fact. Dillon v. Saloude, 68 Cal. 271, 9 Pac. 162; Fulton v. Brannan, 88 Cal. 456, 26 Pac. 506. Several witnesses called by the plaintiff testified that it was, while witnesses called for defendant testified that it had been cultivated for seven successive years, and that it would not, by the ordinary processes of tillage, produce ordinary agricultural crops in average quantities. That the land in question is suitable for cultivation is therefore clearly proved, unless the production of ordinary agricultural crops in average quantities by the ordinary processes of tillage is the test by which it is to be determined. That is the test prescribed in section 3495 of the Political Code; but in Fulton v. Brannan, supra, after quoting sections 2 and 3 of article 17 of the constitution of this state, and declaring the general policy to be that lands should be held in small tracts, and constitute homes for its owners, it was said:

"No narrow construction of the only words in the section [article 17, § 3] open to construction—'suitable for cultivation'—should limit this policy. The effort should be rather to extend than to restrict, for the policy is plainly that the section should include all, so far as possible. The constitution classifies all lands as suitable or not suitable for cultivation. For the purposes of this section neither the legislature nor the courts can classify them otherwise, and it must follow that whether a particular tract belongs to the one class or the other must always be a question of fact." In Manley v. Cunningham, 72 Cal. 236, 13 Pac. 622, it was said: "The phrase, 'suitable for cultivation,' includes all lands ready for occupation, and which, by ordinary farming processes, are fit for agricultural purposes." But the precise question here made was decided in Jacobs v. Walker, 90 Cal. 43, 48, 27 Pac. 48. It was there said: "Nor did the fact that it would not, when cleared, produce ordinary agricultural crops in average quantities, render it so. To make an average, some lands must necessarily produce less than the average, while others produce more; and it would seem absurd to say that all lands producing less than the average must for that reason be held unsuitable for cultivation." In view of these decisions, it is not necessary to comment upon the inference which might be drawn from the actual cultivation of the land for seven consecutive years, and which included five seasons before and two seasons after defendant's application to purchase.

As to appellant's second point, it could only be material for the plaintiff to state in his application to purchase, or to allege in his complaint, or prove upon the trial, that the township in which the land in controversy is situated had been sectionized more than 60 days before his application was made, where there was an "adverse occupant" at the time of his application to purchase; and, as there was no adverse "occupant," the statement that the township had been sectionized and the plat filed more than 60 days before his application was wholly immaterial, and the allegation of that fact in his complaint, and proof thereof upon the trial, was unnecessary. However, that allegation in the complaint was expressly admitted in the answer. The evidence that plaintiff was entitled to purchase and that the defendant was not is satisfactory, and the general findings of the court, as well as the special findings, noticed by appellant, are therefore justified by the evidence; nor do we find any errors in rulings upon the trial of which appellant could complain. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

111 Cal. 351

BABCOCK v. CHASE et al. (S. F. 8.)

(Supreme Court of California. Feb. 25, 1896.)

CANCELLATION OF VOLUNTARY DEED—ACTION BY ASSIGNEE.

An assignee in insolvency has no standing to maintain an action to set aside an absolute deed, made without consideration, by the insolvent, at a time when he had no creditors, there being no allegations of fraud, nor any upon which to found an express or implied trust.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Henry C. Babcock, assignee in insolvency of William I. Wilson, against James P. Chase and another, to set aside certain deeds to real property. From the judgment rendered, plaintiff appeals. Affirmed.

Wells Whitmore, for appellant. Henry Miller, for respondents.

GAROUTTE, J. Plaintiff, as the assignee of one William I. Wilson, an insolvent debtor, brings this action to set aside two certain deeds of real property, and to have it adjudged that said real property is the property of said insolvent. As shown by the complaint, some five years prior to the adjudication that Wilson was an insolvent debtor, and at a time when he had no creditors, as far as the pleading indicates, he made and delivered a deed absolute in form to one Priscilla Burtch of the aforesaid real estate, this deed expressing a consideration therein of five dollars. It is further alleged that subsequently thereto said Priscilla Burtch, by a deed absolute on its face, and for an expressed consideration of five dollars, deeded all of said property to the defendants Martenstein and Chase. The complaint also alleges that both of these deeds were made without consideration, and that neither Priscilla Burtch nor her vendees, Chase and Martenstein, acquired any title, either equitable or legal, to the lands included therein; but that said deeds were given at the request of said insolvent, Wilson, and that said property might be held for said Wilson. This, in its substantials, is the complaint upon which relief is asked. Judgment went against the plaintiff, and this appeal is brought to this court.

Without considering other questions raised upon this record, we are prepared to say the case must fall by reason of a failure to state a cause of action. The assignee of the insolvent, in a case like the present one, stands in no better or different position than the insolvent debtor himself. He can do nothing as assignee that the insolvent could not do if plaintiff, and is entitled to no relief that the insolvent would not be entitled to if prosecuting this action individually and for himself alone. Francisco v. Aguirre, 94 Cal. 180, 29 Pac. 495. Upon the allegations of this complaint these deeds cannot be successfully attacked by the grantor, Wilson, or his assignee in insolvency. No express trust is charged, and there is nothing recited in the pleading that would authorize the introduction of evidence to establish a trust in parol. It was said in Jackson v. Cleveland, 15 Mich. 102: "A voluntary deed, which purports to be for the beneficial use of the grantee, and which was made deliberately and without mistake or contrivance, does not differ from any other deed binding on the grantor, and can only be attacked by those having superior equities, which the grantor had no right to cut off, as creditors and the like." There is no actual fraud charged. Neither is there any claim of constructive fraud arising from fiduciary relations existing between the parties. As directly in line, and fully supporting the principles of law which are absolutely fatal to plaintiff's alleged cause of action, we cite Barr v. O'Donnell, 76 Cal. 471, 18 Pac. 429, and Feeney v. Howard, 79 Cal. 525, 21 Pac. 984. No express trust is declared upon by the pleading, and neither is any implied trust indicated by its allegations. For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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5 Cal. Unrep. 285

McGEE et al. v. SAN FRANCISCO & N. P. RY. CO. (S. F. 231.)

(Supreme Court of California. Feb. 25, 1896.)

APPEAL—REVIEW—EVIDENCE.

A verdict based on conflicting evidence will not be disturbed.

Department 1. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

Action by Charles McGee and others, by their guardian, James W. Collins, and another against the San Francisco & North Pacific Railway Company, a corporation. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

Sidney V. Smith, for appellant. Shadburne & Herrin, for respondents.

PER CURIAM. This is an action for damages for personal injuries. The defendant appeals from the judgment and order denying its motion for a new trial, and by the record the sole question presents itself, was the evidence sufficient to support the verdict of the jury? The action is brought by the guardian of certain minor children. The father of these minors was a passenger upon a train belonging to defendant, and, it is claimed by defendant, acted in a disorderly and boisterous manner while traveling upon said train. Defendant's servant, a brakeman, attempted to quiet this passenger, and, it is now claimed, used unnecessary force and violence in so doing. As a result of the difficulty arising at that time, the passenger received injuries from which he died within a few days. There were many eyewitnesses at the scene of trouble, who testified at the trial as to all the circumstances, showing the cause and manner of the passenger's injury. Counsel for appellant, by his brief, admits that such testimony was hopelessly contradictory, but insists that the evidence of certain physicians who professionally waited upon the deceased after the injury was received and prior to his death, and who also conducted the autopsy upon the body, plainly shows that the deceased could not have been injured as testified to by the witnesses introduced at the trial upon the part of the plaintiffs. While the evidence of the physicians may be strong in support of defendant's theory as to the manner in which the injury was received, still we cannot hold it conclusive, for there was direct and positive evidence from the lips of eyewitnesses to the contrary. Thus a substantial and material conflict upon the evidence was created, and this material and substantial conflict was a matter which it was peculiarly and essentially within the province of the jury to solve and determine. For the foregoing reasons, the judgment and order are affirmed.

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111 Cal. 354

BOGGS et al. v. LAKEPORT AGRICULTURAL PARK ASS'N et al. (S. F. 286.)

(Supreme Court of California. Feb. 25, 1896.)

CORPORATION MORTGAGE—AUTHORITY TO EXECUTE—PAROL PROOF—SUFFICIENCY OF RESOLUTION—RATIFICATION—PLEADING.

1. Where it appeared that the directors of a corporation adopted a resolution authorizing the president "to make arrangements for paying off a debt by giving a mortgage or any other means," and that at a subsequent meeting the directors ratified the action of its officers in executing such mortgage, but no entry of either resolution was made in the record book of the corporation, though minutes of the proceedings were made on slips of paper which were afterwards lost, parol evidence is admissible, in an action against the corporation to foreclose the mortgage, to show the proceedings of the board authorizing and ratifying the execution of said mortgage, and it was not limited to showing merely the contents of the lost memoranda.

2. The resolution purporting to authorize the execution of said mortgage was sufficient in form; but, if not, the subsequent ratification was equivalent to precedent authority.

3. It was not necessary to specially plead such ratification.

Department 1. Appeal from superior court, Lake county; R. McGarvey, Judge.

Action by Boggs and others against the Lakeport Agricultural Park Association and others to foreclose a mortgage. From a judgment against defendants, and an order denying its motion for a new trial, defendant park association appeals. Appeal from the judgment dismissed. Order affirmed.

Hudson & Sayre, for appellant. F. E. Johnson and T. J. Sheridan, for respondents.

VAN FLEET, J. Appeal by the defendant Lakeport Agricultural Park Association from a judgment against it and an order denying its motion for a new trial in an action to foreclose a mortgage on real property. The appeal from the judgment was taken more than one year from its entry, and is therefore ineffectual, and must be dismissed.

Upon the appeal from the order but one point is made,—that the note and mortgage in suit were not made or authorized by the appellant corporation. The question really presented, however, is as to the propriety of the ruling of the court below upon the admissibility of the evidence offered to prove the authority of the officers of the corporation to execute the instruments in question; since, if properly admitted, it was amply sufficient to sustain the finding that the appellant both authorized and ratified their execution. Appellant was indebted to the party from whom it had purchased certain real estate for a portion of the purchase price thereof, which it was called upon to pay immediately to avoid suit to foreclose a mortgage given to secure the same. A meeting of the directors of the corporation was held to devise means to meet said obligation, and a resolution was thereat adopted providing "that the president make all necessary arrangements for paying off the debt by giving a mortgage, or any other means." In pursuance of this authority the president negotiated a loan of the necessary amount to satisfy the debt referred to, and as security for such loan the president and secretary executed the note and mortgage in suit to the plaintiffs. The mortgage was not under seal, the corporation having adopted none. At a subsequent meeting of the directors of the corporation the action of its officers in giving the note and mortgage was reported to the board, and thereupon a resolution was adopted fully ratifying their action in the premises. It does not clearly appear whether either of these meetings of the board of directors was regularly called, but it was shown that at both meetings all the members of the board were present. There was evidence tending to show that at each meeting a rough minute of the proceedings of the board was kept on slips of paper, but in neither instance, from some neglect or oversight, was any record of the action of the board made or entered in the regular minute or record book of the corporation, and the rough minutes could not be found, and were not produced at the trial. Upon this showing the court below permitted plaintiffs to show the proceedings of the board of directors by parol, and in this we think it committed no error. One of the objections was that, although no regular record was kept, the rough minutes of the meeting were not sufficiently accounted for to admit of the introduction of parol proof; and that, if admitted, it should have been confined to a showing of what was contained in those rough notes or minutes. We think the showing was quite sufficient to admit of parol proof, and that plaintiffs were properly permitted to show what in fact took place at the meetings, without reference to what may have been the contents of the lost memorandums. It is the duly-authenticated record in the books of the corporation which is the best evidence, and, in the absence of such, any competent secondary evidence may be admitted to show what the act of the board was. The rough notes of the meetings were as much secondary evidence as the testimony of the witnesses, and, if produced, would only have been admissible, like any other secondary fact, as tending to show what took place. "While the records of the corporation are usually regarded as the best evidence of the action of the board, yet, upon an issue whether a resolution was passed authorizing a given contract or conveyance, the fact may be proved by parol. Again, it will happen in some cases that the resolution may be passed, but not noted of record, in which case the fact may be proved by witnesses who can testify to it, as in other cases." 4 Thomp. Corp. § 1016. And see Bank v. Weaver (Cal.) 31 Pac. 160; Wat. Corp. § 295.

The objection that the resolution purporting to authorize the execution of the note and mortgage is not sufficient in form to justify the acts of the officers of the corporation under it is untenable; but, if otherwise, the subsequent ratification of the action of the president and secretary was equivalent to precedent authority. It was not necessary to specially plead such ratification. It was involved in the issue of whether the instruments were executed by the corporation.

The other grounds of objection do not require special notice. The appeal from the judgment is dismissed, and the order is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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5 Cal. Unrep. 286

FLADUNG v. DAWSON et al. (S. F. 289.)

(Supreme Court of California. Feb. 25, 1896.)

ACTION ON CONTRACT—PLEADING AND PROOF.

Where a complaint in an action to recover for work and materials alleges that they were furnished under a contract, which fact is not denied by defendant, the only issue made being as to the contract price, it is error to admit evidence of reasonable value.

Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by one Fladung against Dawson and others and J. G. Adams. From a judgment for plaintiff against him, defendant Adams appeals. Reversed.

Smith & Murasky, for appellant. C. S. Hemphill, for respondent.

HARRISON, J. The plaintiff brought this action to recover from the defendant Adams for certain labor and materials furnished by him, and to have the same declared a lien upon a certain building belonging to the defendant Dawson. The plaintiff, as a subcontractor, had furnished the materials and labor to Adams, who had contracted with Dawson for the construction of the building, and the materials and labor were furnished and used in such construction. At the trial it was shown that the building had been completed more than 30 days prior to the plaintiff's filing of his claim of lien, and he was denied a lien against the building, and judgment was rendered in favor of Dawson. The plaintiff, however, recovered judgment against Adams for the sum of $1,015, from which, and an order denying a new trial, Adams has appealed.

The finding of the court that no special contract was made and entered into between the plaintiff and the appellant as to the amount that the appellant should pay plaintiff for his work and material is not only not sustained by the evidence, but is in direct opposition to all the evidence on the subject. The real issue which was contested at the trial was the price that had been agreed upon between them for the work, and not that there was no contract with reference to the amount to be paid therefor. The plaintiff testified: "We met, and went into the saloon, and he told me that he would give me $3,335 to do the brickwork and the stonework and set the ironwork." "I gave Mr. Adams one written bid on this building, and I don't know now where it is. The amount was $3,535." And, in explanation of the averment in the complaint that the sum of $3,200 was agreed upon between them as the price of the work, he said: "It was at the suggestion of Mr. Adams that I charged $3,200 for the work that I did. He told me that I had to take off a little. My written bid was $3,535, and by an agreement with Mr. Adams it was changed to $3,200." There was no testimony in the case that the work was to be done for what it might be worth, or that the plaintiff agreed to do the work without any agreement as to its price. On the contrary, the appellant offered in evidence a written bid for doing the work, with the plaintiff's name signed thereto, which he testified was received by him from the plaintiff, and had been written by the plaintiff upon one of his business cards, and signed by him, wherein he offered to do the work for $2,226. The entire evidence on this point was that the price at which the work was to be done was fixed by the bid of the plaintiff, and the court should have determined the amount of this bid, even though the testimony of the parties thereto was diametrically opposed. See Leviston v. Ryan, 75 Cal. 293, 17 Pac. 239. Instead of so doing, the court admitted evidence, against the objection of the appellant, of the value of the labor and material furnished by the plaintiff, and found that this value was $3,160, of which the plaintiff had been paid a portion, and made this value the basis of its judgment. This finding was also outside of the issues made by the pleadings. The plaintiff had alleged in his complaint that he had entered into a contract with Adams to do certain work upon the building, "for which defendant Adams was to pay and agreed to pay to plaintiff the sum of $3,200." The appellant did not deny the agreement, except as to the amount, which he alleged was the sum of $2,226. The only issue before the court in this respect was, therefore, the amount which the appellant had agreed to pay for the work, and the court erred in admitting evidence of the value of the work done by the plaintiff, and in rendering its judgment in accordance with the value found upon this testimony. The judgment and order are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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111 Cal. 373

HEARNE v. DE YOUNG et al. (L. A. 59.)

(Supreme Court of California. Feb. 27, 1896.)

CHANGE OF VENUE—RESIDENCE OF PARTIES—BURDEN OF PROOF—WAIVER OF OBJECTIONS TO PLACE OF TRIAL—STIPULATIONS—CONCLUSIVENESS.

1. Where the action is one which is entitled to be tried in the county in which defendants or some of them reside, and the complaint fails to show their residence, a defendant who seeks a change of venue must show that neither he nor his codefendants reside in the county in which suit was brought.

2. A party may waive, expressly or by implication, the right to have a cause tried in a particular county.

3. Code Civ. Proc. § 283, providing that an attorney can only bind his client in an action by an agreement filed with the clerk or entered on the minutes of the court, and not otherwise, does not apply to an agreement which is admitted on the hearing.

4. A fact admitted on the hearing, and acted on by the court, cannot thereafter be denied.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by J. C. Hearne against M. H. De Young and another for libel. From an order denying a motion by defendant De Young for a change of venue, said defendant appeals. Affirmed.

Lloyd & Wood and W. J. Hunsaker, for appellant. Works & Works, E. W. Hendrick, and W. J. Murphy, for respondent.

SEARLS, C. This is an appeal from an order of the superior court of the county of San Diego denying a motion by defendant De Young to change the place of trial to the city and county of his residence, viz. the city and county of San Francisco. The action is brought in the county of San Diego, to recover from the defendants M. H. De Young and J. F. Blunt, and each of them, the sum of $100,000 as damages sustained by plaintiff, by reason of an alleged libel published by said defendants of and concerning plaintiff in the San Francisco Chronicle. The complaint avers that, during all the times therein mentioned, M. H. De Young was the proprietor, and the defendant Blunt was the San Diego correspondent, of a certain daily newspaper known as the "San Francisco Chronicle," which said newspaper had, and still has, a large circulation in the city of San Diego, state of California; that on the 27th day of August, 1894, the said defendants, and each of them, did maliciously and falsely print and publish in said San Francisco Chronicle, and did maliciously, willfully, and falsely cause to be printed, published, and circulated in said paper, in said county of San Diego, a certain false and defamatory article of and concerning the plaintiff, a copy of which article is made a part of the complaint. The complaint contains no allegations, other than as above, in reference to the place of publication of said newspaper, or of said article, or as to the relations existing between said defendants, or in reference to the residence of either of them. Defendant De Young alone moved in due time and form for a change of the place of trial, as aforesaid, showing that during all the times mentioned in the complaint he was, and still is, a resident of the city and county of San Francisco, and a nonresident of the county of San Diego; that he had a meritorious defense, etc. Defendant Blunt consented in writing that the place of trial be changed as prayed by his codefendant. It was admitted at the argument of the motion that defendant Blunt was, at the commencement of the action, a resident of the county of San Diego, Cal. The motion was denied, and defendant De Young alone appeals.

This action is one which, under section 395 of the Code of Civil Procedure, the plaintiff had a right to have tried in the county in which the defendants or some of them resided at the commencement of the action. If, therefore, J. F. Blunt, one of the defendants, at the time of the commencement of the action, was a resident of the county of San Diego, the court below was correct in refusing to change the place of trial, although M. H. De Young, his codefendant, was a resident of the city and county of San Francisco. The right to have a cause tried in a particular county is one which a party may waive either expressly or by implication. Pearkes v. Freer, 9 Cal. 642; Jones v. Frost, 28 Cal. 246; Cook v. Pendergast, 61 Cal. 72; Code Civ. Proc. § 396. If a complaint in an action which defendant has a right to have tried in the county of his residence fails to show the residence of the defendant, the onus probandi is cast upon such defendant to show the county of his residence, if he would secure a change of the venue. And, by parity of reasoning, if there are several defendants in a like case, he who would procure a change of the place of trial must show that none of them are residents of the county in which the action is brought. This the record failed to show.

Again, it was admitted at the hearing, as appears by the record, "that the defendant Blunt was at the commencement of the action a resident of the county of San Diego, in this state." Appellant contends that this admission is not binding, for the reason that it does not appear that the agreement was filed with the clerk or entered upon the minutes of the court, and is therefore not within the purview of section 283 of the Code of Civil Procedure.[1] Where the stipulation or admission of an attorney for and on behalf of his client, and being as yet executory, is denied, the only proof of its validity rests upon a compliance with the Code provision, and no other proof can be received. But where the stipulation, agreement, or admission is admitted, as in this case, there is no occasion to resort to other proof. For the purposes of the motion, the residence of defendant Blunt was an admitted fact, avoiding the necessity of other proof, and, having been acted upon by the court, cannot now be traversed. Smith v. Whittier, 95 Cal. 279, 30 Pac. 529; Himmelmann v. Sullivan, 40 Cal. 125; Hawes v. Clark, 84 Cal. 272, 24 Pac. 116; Patterson v. Ely, 19 Cal. 36; Reese v. Mahoney, 21 Cal. 306.

For these reasons, we are of opinion the court did not err in refusing to change the place of trial, and the order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(111 Cal. 378)

SINSHEIMER et al. v. WHITELY et al.

(No. 19,518.)[2]

(Supreme Court of California. Feb. 27, 1896.)

WAREHOUSEMEN—RECEIPTS—PLEDGE.

Where produce is left with a weigher, who stores it without charge, a receipt given by the weigher merely reciting that the produce had been weighed, and stating its weight, is not a "warehouse receipt," the transfer of which as security constitutes a delivery of the produce, rendering the pledge valid as against attaching creditors of the pledgor.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Replevin by B. Sinsheimer and others against Thomas Whitely and others. There was a judgment for plaintiffs, and defendants appeal. Reversed.

William Shipsey and F. A. Dorn, for appellants. Wilcoxon & Bouldin, for respondents.

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[1] Code Civ. Proc. § 283, provides that an attorney may bind his client in an action by his agreement, filed with the clerk or entered on the minutes of the court, "and not otherwise."

[2] Rehearing denied.

BRITT, C. Replevin for 217 sacks of beans. Defendant Whitely is constable of a certain township in San Luis Obispo county, and, as such, levied on the beans as the property of one Costa, in virtue of a writ of attachment to him issued out of the justice's court of said township, at the suit of one Lial against said Costa. At the time of the levy the beans were stored in a warehouse at Pismo, in said county, owned by the Jordan Bituminous Rock & Paving Company, a corporation, which is joined with the constable as a defendant in this action. In November, 1893, said Costa, who was then the owner of the beans, caused them to be weighed at said warehouse, and deposited therein; receiving from said paving company at that time five certain instruments, which plaintiffs style "warehouse receipts," and which defendants call "weighing tags." These were in the following form, varying as to the number of sacks specified: "Jordan Bit. Rock and Pav. Co.'s Scales. Pismo, Cal., 11-2, 1893. Weighed for F. J. Silva. Gross, 5,080. Tare, 1,570. 40 sks. beans. Net wt., 3,510. Marked, F. J. S. A. Klatt, Weigher." They were issued at Costa's request in the name of one F. J. Silva, with consent of the latter, but were delivered to Costa. Silva never had possession of them, and had no interest in the beans. A Mr. Stevens, agent of said company, and who had charge of the warehouse, testified at the trial: "The tags in evidence were issued by our company at Pismo, and are the only kind issued by our company; the only receipts given. They are given by the weigher. The tags, or whatever you call them, are given by the weigher at the scales when the beans were weighed and were placed in the warehouse;" also, that the company took the beans as a warehouseman, but had no charge against them; that it does not charge storage. On December 6, 1893, Costa delivered said instruments, though without indorsement, to plaintiffs, as security for a debt then owed by him to them. He also gave them a written order for the beans, addressed to "Agent Pismo Wharf Warehouse." December 11th, following, the constable seized the beans pursuant to said writ in Lial's suit against Costa. Lial obtained judgment in that action, and an execution issued thereon, under which the constable was about to sell the beans when plaintiffs, for the first time, notified him and also the paving company of their claim to the property in virtue of the transfer to them of said alleged warehouse receipts. Their demand for release of the property being refused, they brought this action.

A warehouse receipt has been defined to be a written contract between the owner of the goods and the warehouseman, the latter to store the goods, and the former to pay for that service. Hale v. Dock Co., 29 Wis. 488. Perhaps some of the terms of this contract may be implied. See forms of such receipts construed in Lowrie v. Salz, 75 Cal. 349, 17 Pac. 232, and Bishop v. Fulkerth, 68 Cal. 607, 10 Pac. 122. But surely there ought to be something on the face of the instrument to indicate that a contract of storage has been entered into. Our statute on the subject requires that much,—act in relation to warehouse receipts, etc. (St. 1877-78, p. 949, § 5). The language in the documents here, "Weighed for F. J. Silva forty sacks beans," no more signifies that the paving company received or held the beans as a warehouseman than that it bought or sold the same, or shipped them to a distant port. On their face, the papers plainly are not warehouse receipts. Cathcart v. Snow, 64 Iowa, 584, 21 N. W. 94; Robson v. Swart, 14 Minn. 371 (Gil. 287). But it is said that the tickets were the only vouchers issued by the defendant company, and hence must be treated as warehouse receipts. Rather, it seems to us, that circumstance tends to show that said company was not a "warehouseman" at all in the sense which the law attributes to that term,—an inference strongly corroborated by the fact that it makes no charge for storage. It is only persons who pursue the calling of warehousemen—that is, receive and store goods in a warehouse as a business for profit—that have power to issue a technical warehouse receipt, the transfer of which is a good delivery of the goods represented by it. Shepardson v. Cary, 29 Wis. 42; Bucher v. Com., 103 Pa. St. 534; Edw. Bailm. § 332. Since there was nothing equivalent to delivery of the beans in the transaction between Costa and plaintiffs, the rights of the attaching officer are not affected by the attempted transfer.

The court found that the constable made no valid levy of the writ; and some slight effort is made here to justify the finding. It seems to us a mere conclusion of law; but, admitting it to be a finding of ultimate fact, it is not sustained by the evidence. It appears from the constable's return and certain parol evidence, which was admissible in aid of the return (Brusie v. Gates, 80 Cal. 462, 22 Pac. 284), that he took actual possession of the beans in the warehouse, and placed said Stevens in charge thereof as keeper. There were some further proceedings by him to charge both Silva and the paving company as garnishees, but the sufficiency of these need not be looked to. His possession by his keeper was a compliance with the statute (Code Civ. Proc. § 542, subd. 3).

The judgment and order denying defendants' motion for new trial should be reversed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying defendants' motion for new trial are reversed.

111 Cal. 386

KIMBALL v. RICHARDSON-KIMBALL CO. (WILLIAM DEERING & CO., Intervener. No. 19,568).

(Supreme Court of California. Feb. 27, 1896.)

ATTACHMENT—INTERVENTION—LIEN—WHAT CONSTITUTES—PRIORITY—GARNISHMENT—APPEAL—OBJECTIONS WAIVED.

1. A subsequent attachment creditor has such interest in the matter in litigation in a prior attachment of the same property as entitles him to intervene, under Code Civ. Proc. § 387. Horn v. Water Co., 13 Cal. 62, distinguished.

2. Where, in an attachment, a person who has in his possession property or money of defendant is garnished, such garnishment constitutes an attachment lien on such property or money.

3. Where plaintiff in a bill of interpleader deposits the money or property in dispute with the clerk, without any order of the court permitting him to do so, such money and property are not in the custody of the law, so as to render unavailable a subsequent garnishment of plaintiff by the party entitled thereto.

4. Where an insolvent stockholder of an insolvent corporation is indebted on his subscription for stock to an amount in excess of a sum due him on a note of the corporation, an attachment lien procured by him in an action on his note against the corporation will be postponed in equity to a subsequent attachment lien of other creditors of the corporation.

5. Where a material fact found is merely defectively pleaded, objection that the finding is not supported by the pleadings is not available on appeal, in the absence of objection to the pleading by demurrer or objection to evidence.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action in attachment by George H. Kimball against the Richardson-Kimball Company, in which William Deering & Co., a corporation, intervened, and claimed a prior lien on the attached property. From a judgment in favor of the intervener, plaintiff appeals. Affirmed.

C. A. Miller, for appellant. Carver & Preston, for respondent.

SEARLS, C. The action was brought by the plaintiff upon a promissory note to recover from defendant $1,500 and interest. Plaintiff issued an attachment, which was levied upon certain property and moneys of defendant in the hands of the Los Angeles National Bank. Defendant made default, and no question was made as to plaintiff's right to a judgment against defendant. William Deering & Co. (a corporation) also brought an action against the same defendant (a corporation) to recover money due it from said defendant; issued a writ of attachment, which was subsequently levied upon the same property and money previously levied upon by plaintiff. William Deering & Co. took judgment against defendant for $1,372.69. After levying its attachment, William Deering & Co. intervened in this action, and set up facts claiming to show that the lien of plaintiff's attachment should be postponed and held subordinate to the lien of its subsequent attachment. The cause was tried by the court, written findings filed, and judgment rendered, adjudging the lien of intervener's attachment superior to that of the attachment lien of plaintiff, and adjudging the former to be first paid out of the attached property. Plaintiff appeals from the judgment, and the cause comes up without a bill of exceptions or statement, upon so much of the judgment roll as by the stipulation of the parties is deemed sufficient to illustrate the questions in dispute. The points made by appellant in favor of reversal are: (1) That the findings do not support the decree. (2) That finding 11 is not supported by the pleadings.

It would be more satisfactory to set out the findings in full, but their great length precludes our doing so, The following is believed to be a fair synopsis of them, and to lead to an understanding of the questions involved: (1) That William Deering & Co. is, and for more than five years past has been, a corporation organized under the laws of Illinois. (2) The Richardson-Kimball Company is, and since 1887 has been, a corporation under the laws of California. (3) The plaintiff, George H. Kimball, is, and has been, secretary, treasurer, and a stockholder of said Richardson-Kimball Company since 1887. (4) Intervener, William Deering & Co., has been since 1888 a creditor of the Richardson-Kimball Company (hereinafter called "defendant"); and on the 6th day of September, 1888, defendant had certain moneys of William Deering Company (hereinafter called "intervener") which it held for intervener's use, viz. $2,507.43, which it acknowledged in writing, but which it failed to turn over to intervener, and there is due intervener on account thereof $1,416.74. (5) That since 1889 defendant has been, and still is, insolvent, which was well known to plaintiff and defendant. (6) The attached property, money, etc., was on the 9th of May, 1891, in the hands of the Los Angeles National Bank, subject to its certain liens thereon, which was known to plaintiff and defendant. (7) On said May 9th, defendant made the note in suit to plaintiff, which was not made to defraud intervener or other creditors, but was for a consideration of $1,500, and was made without fraud or collusion. (8) On the 18th of August, 1891, plaintiff brought this action, and attached all the property and money of defendant in the hands of said bank. (9) On the 5th day of September, 1891, intervener brought suit against the defendant, and attached the same property. (10) The property so attached by plaintiff and intervener was, and now is, the only property and assets of the defendant. (11) Upon the incorporation of defendant, in 1887, plaintiff subscribed $22,400 to its capital stock, upon which he has not paid more than $2,400, and he still owes on account thereof $20,000. No calls or assessments have ever been made by defendant on account of the sum due and owing by plaintiff on account of his subscription to the capital stock. Since May 1, 1891, plaintiff has been at all times insolvent. (12) After intervener filed its complaint of intervention herein, viz. on the 3d day of November, 1891, the attachment in its suit against defendant was discharged by order of the court, and thereafter, and on the 7th day of November, 1891, intervener sued out a second writ of attachment in the same cause, which on the 9th and 11th days of November, 1891, was served upon the said Los Angeles National Bank, in the usual form, with notice, etc., attaching all the property, money, etc., of defendant in its hands. This attachment was also served in like manner upon T. H. Ward, as bailee of said bank, and the sheriff has since that time held the money and property so by him attached. Intervener obtained judgment in its action against defendant on the 16th day of January, 1892, for $1,372.69, and the property and money is held by the sheriff for the satisfaction thereof. On the 21st day of September, 1891, the Los Angeles National Bank commenced an action against F. A. Carter and others, including all the parties to this action, in a complaint of interpleader, requiring them to litigate their claims, etc., and at the same time deposited with T. H. Ward, the clerk of the superior court, all the property and money of defendant in its hands subject to the determination of the action of interpleader. Such deposit was made without order of the court, and without the knowledge or consent of defendant or intervener herein, and such action of interpleader is still pending and undetermined. On the 16th of January, 1892, intervener filed a supplemental complaint in intervention, setting out the order dissolving its attachment and the issuing and service of the writ of attachment of November 7, 1891, etc. This last fact is admitted in the record. It also appears that plaintiff interposed a general demurrer to intervener's complaint in intervention, which was overruled by the court.

The theory of appellant is that the findings do not support the decree for the reasons:

(a) That intervener, as an attachment creditor in another suit against defendant, has no such "interest in the matter in litigation" as entitles him, under section 387, Code Civ. Proc., to intervene. In support of this first contention, he cites Horn v. Water Co., 13 Cal. 62. The interveners in that case were general creditors of the defendant, without any lien, either general or specific, on the property involved in the action. In speaking to this point, the court said: "To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation. No such claim or lien is asserted in the petition of Rawle, and his right to intervene must, in consequence, fail." The court further held that certain other parties who were judgment creditors were proper parties. That case clearly intimates that a creditor having a lien upon the property there sought to be foreclosed under mortgages was entitled to intervene. That, under our Code, an attachment or execution creditor has a right to intervene, and upon a proper showing defeat the lien of a prior attaching creditor, we regard as too well settled to need further discussion. Davis v. Eppinger, 18 Cal. 378; Speyer v. Ihmels, 21 Cal. 280; Coghill v. Marks, 29 Cal. 673; Coffey v. Greenfield, 55 Cal. 382.

(b) It is further contended that, if a lien by direct attachment were sufficient to give intervener a standing in court, he claimed no such lien, but only to have a garnishment, which creates no lien on the property. Garnishment under our law is but another name for the service of a writ of attachment upon personal property in the possession of persons other than the defendant in the writ, and also to secure debts, credits, etc., in the hands of such third persons. By the service in the manner provided by statute, whether it be termed "garnishment" or "service of the attachment," while the possession is not necessarily disturbed, "a lien is obtained on defendant's title to the property in the hands of the garnishee." Wade, Attachm. § 338.

(c) It is further urged that intervener had no lien, for the reason that his attachment was dissolved, and, before the second writ of attachment issued, the bank had commenced a suit in interpleader, and had deposited the money and property with T. H. Ward, clerk of the superior court, and that the money, being in the custody of the law, was not subject to attachment. The first clause of section 386 of the Code of Civil Procedure provides that a defendant against whom an action is pending, upon a contract or for specific personal property, may at any time before answer, upon making the showing therein provided for, and upon notice to the parties, apply to the court for an order substituting the third party who makes claim to the property as a defendant in his place, and he may be discharged from liability to either party, "on his depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the court may direct; and the court may, in its discretion, make the order." The Los Angeles National Bank was not the defendant in any pending action, and hence was not within the purview of the first clause of section 386, supra, but instituted on its own account an action to compel the parties to interplead under the latter clause of the same section, with a view to being discharged from liability to any or all of the conflicting claimants. This clause makes no provision for an order permitting the plaintiff in the action of interpleader to pay into court or deliver the property claimed. We may suppose the court possesses the power to make the order permitting a party in a proper case to do so, but in the present case no such order was made or asked for, and, until it was obtained, the bank could not, on its own volition, relieve itself from responsibility, by voluntarily placing the property and money in the hands of the clerk; and, when so placed, it was in no proper sense in the custody of the law. Where property is lawfully taken, by virtue of legal process, it is in the custody of the law, and not otherwise. Gilman v. Williams, 7 Wis. 334. Money deposited by a defendant with the sheriff for the release of an attachment is in the custody of the law. Hathaway v. Brady, 26 Cal. 581. But this is because it is a symbol of, and stands in place of, the attached property. Other cases might be mentioned of like import. It is sufficient to say that the property in question was not in the custody of the law, and, whether in the hands of the bank or of Ward, it was subject to attachment. We are of opinion, therefore, that intervener acquired a valid lien by his second attachment.

(d) The only remaining question relates to the sufficiency of the finding to warrant the postponement of plaintiff's lien to that of intervener. The proceeding on the part of intervener is an equitable one to prevent the sole assets of the corporation, which is insolvent, from going to the plaintiff, who is also insolvent, who is a large owner of stock in the corporation, and whose liabilities to the corporation are in excess of $20,000. It may be true that plaintiff is not in a legal sense indebted to the corporation, for the reason that no assessment has been levied or call made on account of his subscription. It is, nevertheless, a liability which a court of equity, for the purpose of meeting the obligations of the corporation, could enforce, either by the direct levy of an assessment, or by requiring the directors of the corporation to do so. This course would be of no avail as against the insolvent plaintiff. It would be in the highest sense inequitable to permit one thus situated to avoid his liability by reason of his insolvency, and at the same time swallow up the entire assets of the concern, to the exclusion of creditors who have an equitable right to have the entire property and assets of the company appropriated to the satisfaction of their demands. Plaintiff's liability is an asset, which, but for his insolvency would go to swell the property of the corporation pro tanto. His share or interest in the corporation is his proportion, measured by his stock, in the residuum, after the payment of all demands due and owing by the company. "After actual insolvency, however, unpaid capital becomes a trust fund, to reach which creditors are not required first to reduce their claims to judgment." Spell. Corp. § 821, and cases there cited. Some of the cases go to the extent of holding that a stockholder of an insolvent corporation cannot offset an individual claim against the corporation in proceedings to enforce his liability for unpaid subscription for stock, but that he must pay in full and receive his pro rata share with other creditors on his demand. Id. § 818. However this may be in a proceeding to wind up the affairs of a corporation, we are of opinion that in an action like the present, where both the corporation and the stockholder are insolvent, and the latter is liable upon his subscription for stock of the company in an amount greatly in excess of all the claims in question, he cannot, upon any equitable principle, be permitted to enforce an individual claim against the corporation, to the exclusion of other creditors, and that his prior attachment lien should be postponed to that of subsequent attaching creditors where necessary to their payment, and in cases where, without such postponement, they must inevitably lose their demands, and the entire assets of the corporation go to satisfy the individual debt of the stockholder thus insolvent and thus liable on account of his subscription. Hatch v. Dana, 101 U. S. 205; Harmon v. Page, 62 Cal. 448. The fact that this is a proceeding of intervention is no reason why the equitable rights of the parties should not be adjusted on the same principle as the court would do in a direct action for that purpose, and the fact that intervener might have brought an action and obtained relief therein is no argument against his right here. Coffey v. Greenfield, 55 Cal. 382.

The order of the court, ex parte, allowing an intervention was proper. Spanagel v. Reay, 47 Cal. 608.

As the complaint in intervention is not set out in the record, we must presume the demurrer thereto was properly overruled.

The only other objection necessary to be noticed is that finding 11 is not supported by the pleadings. So much of the complaint in intervention as related directly to finding 11 is set out in the record, and is to the effect that defendant was not indebted to plaintiff in any amount, but that, on the contrary, plaintiff is, and since May, 1891, has been at all times, indebted to defendant in the sum of more than $2,500, and that he (the said plaintiff) has been at all times since May 1, 1891, and now is, insolvent. These allegations are contained in an amendment to intervener's complaint. No objection was made thereto by way of demurrer or to the introduction of evidence thereunder in the court below. We cannot see how appellant can successfully urge his objection here for the first time. There was an attempt to plead the substance of the finding, and plaintiff having gone to trial thereon, and evidence having been introduced without objection in support of the finding, it is too late to object here. Tynan v. Walker, 35 Cal. 645; Cave v. Crafts, 53 Cal. 141; Crowley v. Railroad

Co., 60 Cal. 630. It is a case of defective pleading, which may be waived, and not an entire omission to plead a material fact, which is fatal. Richards v. Insurance Co., 80 Cal. 505, 22 Pac. 939; Wilson v. White, 84 Cal. 239, 24 Pac. 114; Greiss v. Insurance Co., 98 Cal. 241, 33 Pac. 195; City and County of San Francisco v. Pennie, 93 Cal. 465, 29 Pac. 66; Lee v. Figg, 37 Cal. 328.

Upon the whole record as presented, we are of opinion the judgment appealed from should be affirmed, and so recommend.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

111 Cal. 381

PEOPLE v. WEBSTER. (Cr. 104.)

(Supreme Court of California. Feb. 27, 1896.)

ASSAULT WITH INTENT TO COMMIT RAPE—AGE OF CONSENT—PROVINCE OF JURY.

1. In a prosecution for assault with intent to commit rape, the intent with which the assault was committed is a question for the jury.

2. On the trial of a defendant for assault with intent to commit rape, it is error for the court to assume, in its rulings or instructions, that the prosecutrix was under the age of consent.

Department 1. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Warren Webster was convicted of an assault with intent to commit rape, and appeals. Reversed.

A. Ruef, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. Appellant was convicted of an assault with intent to commit rape. He appeals from the judgment and order denying his motion for a new trial.

1. It is first insisted that the evidence was insufficient to support the verdict; but we cannot agree with this contention. The question as to the specific intent with which appellant did the acts proven against him was a matter entirely for the jury to pass upon, under the evidence; and by that evidence the jury were fully justified in finding the intent as charged in the information.

2. The prosecutrix in this case took the stand, and testified that she was only 12 years of age, and then related the occurrences which took place between her and the appellant upon which this information is based. Upon cross-examination, she was asked if she did not consent to all that was done by appellant; and an objection was sustained to the question, upon the ground that her consent was immaterial, the trial court at the time stating: "I shall instruct the jury she cannot consent, and, that being so, it is of no legal consequence." When the time arrived to charge the jury as to the law of the case, the court made good its previous statement by giving that body this instruction: "By the statute of this state, rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances: '(1) Where the female is under the age of fourteen years.' Under the evidence, it is not necessary to mention the other circumstances here. * * * And this offense, if proved at all, comes within the section of the statute I have just read." In the case of People v. Verdegreen, 106 Cal. 212, 39 Pac. 607, this court held that a female under the age of 14 years cannot even consent to an assault with intent to commit rape, the identical offense here charged. The evidence in this case may well be said to be conflicting upon the fact as to whether or not this prosecutrix consented, although probably greatly preponderating to that effect. Hence, her age was a vital question in the case. It may be said to have been the fact upon which the whole case rested. Indeed, as we have seen, the trial judge so construed it. And we think it was clearly wrong upon his part to instruct the jury, in effect, that this girl was under 14 years of age. This is exactly what he said he would do, and is substantially what he did do. The court in so instructing passed upon a question of fact. The girl's age, as we have suggested, was a prominent fact in the case, and essentially one for the jury to pass upon. The court had no more right to tell the jury that, under the evidence, the girl was under 14 years of age, than it had to tell the jury that, under the evidence, the offense charged had been proven. The court appears to have assumed that, the prosecutrix having testified that she was but 12 years of age, and no contradictory evidence having been offered, the fact was conclusively established as a matter of law, and therefore it was justified in so telling the jury. But such principle is wholly unsound. If the girl had testified to a state of facts showing that the offense here charged had been committed, and no contradictory evidence thereof had been offered, certainly the court would have had no right to tell the jury appellant's guilt was established. Yet it could lawfully have done this if it was justified in instructing them as to the age of the prosecutrix. A jury in a criminal case is not bound to believe the uncontradicted statement of a witness as to a fact. This court in People v. Murray, 86 Cal. 34, 24 Pac. 802, said: "The jury were not bound to take the testimony of any witness as true. From the manner of the prosecuting witness, and the nature of his whole testimony, the jury might have disbelieved him if the defendant had not introduced any evidence at all. This whole matter was for the jury, and not for the court." Again, this court said in People v. Casey, 65 Cal. 261, 3 Pac. 874, that the trial court had no right even to tell the jury what the evidence

"shows." The province of the jury in passing upon the facts of a case is a broad one. It is practically unlimited. It is a constitutional right given to the jurors. It is a constitutional duty imposed upon them. They were not bound to take this witness' statement of her age as true. They had the right to disbelieve it, and were not beholden to any court for dereliction of duty in not believing it. It would be a matter between them and their consciences alone. It is for the jury to say when truth and when falsehood come from the mouth of the witness. The conduct of this witness when upon the stand may have shown her to have been lying. Her appearance may have shown her to have been of mature years. The inherent improbabilities of her testimony may have placed it beyond the pale of belief. Would such uncontradicted testimony be conclusive if the witness by her appearance was shown to be wrinkled and gray with age? These were matters for the jury to sift and weigh and measure, and matters with which the court had no right to deal, and, above all things, an examination upon which by the jury the court had no right to foreclose. The trial court, in assuming the testimony of the prosecutrix in this regard to have been true, committed an error which compels a reversal of the judgment and a new trial of the case. The court should have declared the law as laid down in the Verdegreen Case, and also have submitted to the jurors the question of fact as to whether or not the prosecutrix was under the age of 14 years at the time the assault is claimed to have been committed.

3. Counsel for appellant insists that the court committed an error in its instructions to the jury, wherein the jurors were told that, in order to convict, "you are not bound to be absolutely sure that the defendant is guilty." A new trial being necessary for the reasons already given, we will simply say the language here used is a departure from the common and usual instruction upon reasonable doubt. Such departures are always dangerous, and, being dangerous, resort should not be had to them. Mistrials often result thereby. There is no good reason for using untried and dangerous paths when safe and well-traveled roads are equally at hand.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; HARRISON, J.

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111 Cal. 409

DAVIS v. PHOENIX INS. CO. (L. A. 65.)

(Supreme Court of California. Feb. 28, 1896.)

INSURANCE — CONTRACT — INSURABLE INTEREST — AMOUNT OF INTEREST.

1. Where a policy of insurance is based on the condition that the assured is the owner in fee simple, but makes the application a part of the policy, and the insurer accepts a risk, though the application shows that the assured is not the owner in fee, the insurer cannot set up a want of such title to defeat an action on the policy.

2. One who is in the full possession of property under a contract on which he has in part paid the purchase price, and which on his volition and completion of the contract will entitle him to a conveyance of the legal title, has an insurable interest equal to the amount of payments he has made.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by J. D. Davis against the Phœnix Insurance Company on a policy of fire insurance. From a judgment in favor of plaintiff, defendant appeals. Modified.

E. J. Ensign and Rippey & Nutt, for appellant. F. P. Willard, for respondent.

SEARLS, C. This is an action to recover upon a policy insuring against loss by fire. Plaintiff had judgment for $1,200, from which judgment defendant appeals. The cause comes up on the judgment roll, and is not supported by a statement or bill of exceptions. It appears from the pleadings and findings that the defendant is, and was at all the times mentioned in the case, a duly organized and acting fire insurance corporation; that the plaintiff, on the 26th day of February, 1894, and at all the times mentioned in the complaint, was in the actual, peaceable, and undisturbed possession of 80 acres of land, known as the "W. W. Borden Farm," fully described in the pleadings, findings, and policy of insurance hereinafter mentioned, and was in like possession of a "one-story frame dwelling house situate thereon, and described in said policy, under and by virtue of a partially executed contract and agreement to purchase said land and premises, and a written option thereon (upon which had been paid the sum of one hundred [$100] dollars), made and delivered to him by W. W. Borden and Millie L. Borden, in whom was vested the fee and legal title thereto." On the 14th day of June, 1894, and within the time limited by his contract, plaintiff received a deed of conveyance of the premises, whereby the entire legal title thereto vested in him. Prior to June 14, 1894. the fee and legal title of the land and premises in question was in W. W. Borden and Minnie L. Borden. On the 26th day of February, 1894, plaintiff made an application to defendant for a policy of insurance upon said dwelling house for $800, and upon certain personal property therein for various sums aggregating $400, but which need not be further mentioned, as appellant admits the validity of the judgment to the extent of the $400 insurance on such personal property. In his application plaintiff "fully and explicitly informed defendant and set forth his interest in and title to said premises and property." The application "was written out by and delivered to A. H. Beach, the duly-authorized agent of defendant, and is referred to and made a part of the policy." On the 26th day of February, 1894, in consideration of a premium of $44.40, defendant made and delivered to plaintiff and the latter accepted its policy No. 11,116, which is made a part of the findings, whereby defendant agreed to indemnify plaintiff against loss or damage by fire upon receipt of the proofs of loss, etc., not exceeding the actual cash value thereof, in the sum of $800 on said dwelling house. On the 10th day of April, 1894, the dwelling house and all the personal property were wholly destroyed by fire. The actual cash value of the dwelling house exceeded the amount of insurance thereon, viz. $800. Due proof of loss was made, and the court finds that plaintiff has complied with and duly performed all the conditions required of him by said policy. The court found that plaintiff had, prior to the issue of the policy, paid to his grantors in all on account of the purchase of said premises $450, viz. $100 in cash paid on the option to purchase, and $350 by a sale of personal property to be applied on such purchase.

Upon the pleadings and findings of the court two questions arise: (1) Had the plaintiff an insurable interest in the dwelling house covered by the policy upon which he can recover? (2) If the first question is answered in the affirmative, what was the extent of that interest?

Section 2587 of the Civil Code is as follows: "A policy of insurance must specify: (1) The parties between whom the contract is made; (2) the rate of premium; (3) the property or life insured; (4) the interest of the insured in property insured, if he is not the absolute owner thereof; (5) the risk insured against; and (6) the period during which the insurance is to continue." The contention of appellant is that, as the policy, which is made a part of the findings, describes plaintiff as the absolute owner of the property, and contains a condition that, "if the assured shall not be the sole and unconditional owner in fee of said property, * * * this policy shall be null and void," and that, as the findings show that plaintiff only had an option to purchase the property, and was not vested with any title therein, there can be no recovery. Were this the entire showing of the record, we should concur in the views of the appellant; but when we review the whole record other factors appear, which affect the problem. Plaintiff, in his complaint, avers (to state it in brief) that in his application for a policy he fully and explicitly informed defendant of the nature of his title, etc., and delivered said application to defendant; that it is now in the possession of defendant, who is better informed as to its contents than plaintiff, and he therefore refers to it as though fully set forth, and makes it a part of his complaint as though it appeared therein. Plaintiff also makes the policy a part of his complaint. Turning to the policy, and we find that it recites that: "This indemnity contract is based upon the valuations and representations contained in the assured's application and diagram of even number herewith, which the assured has signed, and permitted to be submitted to the company, and which are hereby made a warranty, and a part hereof." The court finds in consonance with the allegations of the complaint. If, then, the application of plaintiff stated fully the nature of his title, and if that application is a part of the policy, it is a sufficient compliance with section 2587 of the Civil Code in specifying the interest of the insured in the property.

But suppose we are not to treat the application as a part of the policy,—and there are respectable authorities to the effect that it will not usually be so treated,—and still the fact remains that defendant was fully informed as to plaintiff's title, and with full knowledge that such title did not amount to an ownership of the property (for it so affirms in its answer) deliberately described plaintiff in its policy as the owner, and a proviso that, "if the assured shall not be the sole and unconditional owner in fee of said property, * * * this policy shall be null and void." Where, as in the present case, a policy of insurance is based upon the condition that the insured is the owner in fee simple, but containing a provision that the application of the insured is to be considered a part of the policy, such application clearly showing that the insured is not the owner in fee simple, the insurer, by thus accepting the risk, waives the condition in the policy as to the title, and cannot set up the want of such fee-simple title to defeat an action on the policy. Beach, Ins. § 409; Lamb v. Insurance Co., 70 Iowa, 238, 30 N. W. 497; Insurance Co. v. Ende, 65 Tex. 118; Insurance Co. v. Camp, 71 Tex. 503, 9 S. W. 473; Van Schoick v. Insurance Co., 68 N. Y. 434; Insurance Co. v. Hick, 125 Ill. 361, 17 N. E. 792; Smith v. Insurance Co., 91 Cal. 323, 27 Pac. 738. Either the insertion by the defendant of the statement in its policy that plaintiff was the owner of the property was a mistake on its part or a deliberate fraud upon the plaintiff. There is no imputation of fraud, and we shall not assume any such intention on the part of the defendant. Treated as a mistake of defendant, and the latter is not in a position to take advantage of it.

Holding, then, as we do, that there is nothing in the policy to prevent a recovery, provided it appears that plaintiff had an insurable interest, we address ourselves to that branch of the inquiry. It is said by law writers on the subject of insurance that "it is difficult to define accurately in what an insurable interest consists." Bid. Ins. § 156. It is admitted on all hands that it is not necessary that the insurer have a legal interest, but that an equitable interest is sufficient. The title, whether legal or equitable, may be defective, or even bad, provided the insurer has possession and use; even a valid equitable title is not requisite. It is held sufficient that the insured has a direct pecuniary interest in the preservation of the property, and that he will suffer a pecuniary loss as an immediate and proximate result of its destruction. Bid. Ins. supra; Merrett v. Insurance Co., 42 Iowa, 11; Herkimer v. Rice, 27 N. Y. 173; Riggs v. Insurance Co., 125 N. Y. 7, 25 N. E. 1058. In common parlance we speak of a house as being insured, but, strictly speaking, it is not the house, but the interest of the owner therein, that is insured; and whether that interest is founded upon a legal title, an equitable title, a lien, or such other lawful interest therein as will produce a direct and certain pecuniary loss to the insurer by its destruction, he has an insurable interest therein. Tyler v. Insurance Co., 12 Wend. 507. Actual possession by consent of the owner, with the beneficial use of the property, has been held an insurable interest. Horsch v. Insurance Co., 77 Wis. 4, 6, 7, 45 N. W. 945. In the present case the plaintiff was in the full possession and enjoyment of the property under a contract upon which he had in part paid the purchase price, and which upon his volition and completion of the contract would entitle him to a conveyance of the legal title. This enjoyment and expenditure gave him an insurable interest in the property.

2. What is the extent of plaintiff's insurable interest? Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. It is a contract of indemnity. "This principle underlies the contract, and it can never, without violence to its essence and spirit, be made by the assured a source of profit, its sole purpose being to guaranty against loss or damage." May, Ins. § 2. It is a contract with a party to secure him against apprehended loss on account of his interest in a particular subject-matter, and not at all incidental to or transferable with the subject-matter. Carpenter v. Insurance Co., 16 Pet. 495. It does not, in the absence of special contract, run with the title or possession of the subject-matter. Under such a contract reparation must be made to the insured for the loss which he has suffered through his interest in the subject-matter, and to the extent of that interest, not exceeding the limit fixed by the policy. If his interest extends to the whole of the subject-matter of the property, its value up to the sum named in the policy is the measure of his right to recover. If his interest falls short of the whole, his right is limited, not by the value of the property, but by the value of his interest. The very meaning of the term "indemnity" excludes all idea of profit to the insured. Plaintiff's insurable interest then is to be measured by the advances he had made upon his contract of purchase, viz. $450. Had he entered into an ordinary contract to purchase the property, binding himself to pay the whole purchase price, his position would have been very different. But his contract was an option, upon which he had paid $450, and which he was at liberty to abandon at any time. To the extent of his payments he had an insurable interest in the property; beyond that he was not bound. If he could insure for the full value of the property, and, in case of loss, recover such value, he could thereupon decline to purchase under his option, and thus speculate and make a profit on the transaction in violation of a fundamental law of insurance. To permit such a recovery would greatly tend to the destruction of like property under like circumstances, and open the door and tempt men to enter therein for fraudulent purposes. As the plaintiff, by his judgment, recovered $800 on account of the loss of the house, where his interest therein was shown by the findings to be but $450, the cause should be remanded, and the court below directed to amend the judgment by deducting therefrom the sum of $350, and, as thus amended, the judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the cause is remanded, and the court below directed to amend the judgment by deducting therefrom the sum of $350, and, as thus amended, the judgment appealed from is affirmed.

(112 Cal. 220)

REDFIELD v. OAKLAND CONSOL. ST. RY. CO. (S. F. 106.)[1]

(Supreme Court of California. Feb. 28, 1896.)

NEGLIGENCE — OPINION EVIDENCE — INJURY TO WIFE—DAMAGES—INSTRUCTIONS—RECORD.

1. A question asking a witness, in an action based on the contention that defendant was negligent in operating an electric car with but one person in charge, to state from his experience what the general custom was among electric roads, as to the number of men found necessary to manage a car under similar circumstances, does not call for the opinion of witness as an expert, but practically for the opinion of others as inferred from their conduct.

2. Where the question is whether an electric railway company was negligent in operating a car with but one man in charge, it being necessary for him to get off, at the top of a grade, to change the trolley to another wire, and all the circumstances are established by unconflicting evidence, opinion evidence is not admissible.

3. The overruling of an objection to an irrelevant and immaterial question will not be held prejudicial, it not appearing what answer was given

4. In an action by a husband for loss of his wife's services, there being evidence that before the injury she had cared for their children, refusal of an instruction that the jury could not consider the loss of service or of protection which plaintiff's children suffered by reason of the injury is not error; it being misleading, and instructions having been given clearly limiting recovery to damages suffered by plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Horace A. Redfield against the

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[1] Rehearing granted.

Oakland Consolidated Street-Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Chickering, Thomas & Gregory, R. M. Fitzgerald, and Carl H. Abbott, for appellant. Hall & Earl, for respondent.

HAYNES, C. Upon the trial of this cause, plaintiff had judgment, and the defendant appeals therefrom and from an order denying its motion for a new trial. The action was brought by plaintiff, the husband of Adeline B. Redfield, to recover for the loss of the service of his wife from May 6 to June 29, 1893, and for necessary medical and surgical attendance during said period, resulting from an injury to the wife alleged to have been caused by the negligence of the defendant. The jury returned a verdict for $1,700, and judgment was entered for that sum. The errors relied upon by appellant relate to the admission and exclusion of evidence, and the refusal of the court to give to the jury an instruction requested by the defendant. A brief statement of facts is necessary.

The plaintiff and his wife had two children. The wife and children visited Mountain View Cemetery on May 6, 1893, and took one of defendant's cars to return to the city of Oakland. The road upon which this car ran was a branch of defendant's main line, and the cars thereon were operated by one man, and had been for about a year, the electric motor being on the front platform, where there was also a brake. The platforms were separated from the body of the car by glass partitions extending across the car, as did also the seats, and the only way to pass from one end of the car to the other was by a step extending from one end to the other along the side of the car. For a considerable distance from the cemetery, the road consisted of a single track, and the grade was comparatively level; but, near the southerly end of the single track, there was an up grade, and at the top a switch, from which point there was a double track extending to the city. At or near the top of the grade, and before reaching the switch, the motorman shut off the power, the car having sufficient momentum to carry it past the switch, and jumped off the front platform, and got upon the rear platform, to change the trolley to the proper wire when passing the switch; and from that point there was a down grade for about half a mile to Booth street, where the track turned to the west. After adjusting the trolley at the switch, the motorman attempted to return to the front platform, but fell to the ground, and, when he got up, he was unable to catch the car, which ran with great speed down the grade to the turn at Booth street, at which point it left the track, and ran into a field, and Mrs. Redfield was thrown off, and received injuries from which she died on June 29, 1893.

Plaintiff's principal contention was that defendant was negligent in operating said car with but one man in charge. To rebut this charge of negligence, the defendant called one Leland, whose qualifications as an expert were not disputed, and put to him the following question: "If it appeared that the grade where the accident in question occurred was about a three per cent. grade, and upon that same line, can you state what experience has shown electric street-railway companies as to the number of men requisite in handling such a car in such a place and under such conditions?" The defendant also called Mr. Grim, who was familiar with the road and car in question, and had long experience in operating electric roads, and put the following question: "From that experience, are you now able to state to this jury what the general custom is among electric roads as to the number of men found requisite and necessary to manage such a car upon such a track as this, and under the conditions under which this car was operated?" Objections to these questions were sustained. These questions called for testimony as to the experience and custom of electric street-railway companies as to whether one man was sufficient to operate such cars upon such roads. If these witnesses were regarded as experts, and their individual opinions were required, the questions were too general, and did not embrace particulars which should have been stated; and so, if custom could be shown, it must appear that the cars used, the switch to be passed, and the grade of the road at the place where the motorman was required to leave his post to change the switch, were similar. But, aside from these criticisms upon the interrogatories, customs may originate in motives of economy, or the stress of pecuniary affairs, or in recklessness, and not from considerations based upon the proper discharge of their duty towards others using their cars. These witnesses could speak only from their observation of the fact that certain roads did operate certain cars with but one man in charge, and not as to the reason or motive for doing so. But, conceding that many roads did so because they believed one man sufficient, it would still be but the testimony of the witness that the several companies indulging in the custom were of the opinion that it was not negligent to do so. These questions did not call for the opinions of these witnesses as experts, but practically called for the opinions of others as inferred from their conduct; while, if those others were called and examined, they might admit that, while indulging in the custom, they knew it was dangerous. But it was not a case where opinions were admissible as evidence. All the circumstances from which the ultimate fact of negligence upon the one hand, or due care upon the other, must be found, were established by unconflicting evidence, and such ultimate fact was a matter to be inferred by the jury from the evidence. In Shafter v. Evans, 53 Cal. 32, it was said: "The ultimate fact of negligence in such a case is not one to be established by the mere opinions of witnesses called to testify. The evidence of experts is not admissible." In that case this court quoted from the opinion of Chief Justice Shaw in Glass Co. v. Lovell, 7 Cush. 321, as follows: "In applying circumstantial evidence which does not go directly to the fact in issue, but to facts from which the fact in issue is to be inferred, the jury have two distinct duties to perform: First, to ascertain the truth of the fact to which the evidence goes, and thence to infer the truth of the fact in issue. This inference depends upon experience. When this experience is of such a nature that it may be presumed to be within the common experience of all men of common education moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference." In Sappenfield v. Railroad Co., 91 Cal. 49, 59, 27 Pac. 590, a witness was asked: "From your experience in driving those cars and using those pins would you say that was a safe pin,—the straight pin?" The pin was used on a horse car. An objection that it was not a proper subject for expert testimony was overruled, and the ruling was held erroneous. The court said: "When the inquiry relates to a subject whose nature is not such as to require any peculiar habits or study in order to qualify one to understand it, or when all the facts upon which the opinion is founded can be ascertained and made intelligible to the court or jury, the opinion of the witness is not to be received in evidence. If the relation between the facts and their probable results can be determined without any special skill or training, the facts themselves must be given in evidence and the conclusions or inferences must be drawn by the jury. If the circumstances out of which the negligence is said to arise have been established by proof, or can be shown, the ultimate fact of negligence is an inference to be drawn by the jury, and is not to be established by the opinions of others." See, also, the cases there cited, and Kauffman v. Maier, 94 Cal. 280, par. 4, 29 Pac. 481. It is true this car had been operated by one man without accident for about a year prior to the injury to Mrs. Redfield; but as was said by Mr. Justice McFarland in Monaghan v. Mill Co., 81 Cal. 193, 22 Pac. 590, where a chain suspended from a hook fell upon the plaintiff: "It is argued that it had hung suspended there for some years without accident; but that circumstance is only a matter of wonderment, and is an instance of how good luck will sometimes protect carelessness for long periods." The case of Railway Co. v. Novak, 9 C. C. A. 629, 61 Fed. 573, cited by appellant, is distinguishable from this case. The case there was whether one brakeman was sufficient to check or control the speed of a train by means of hand brakes. That question could only be answered correctly by one who had experience; but it would hardly require more than ordinary intelligence and observation to determine whether a railroad company would be guilty of negligence to passengers upon its road if it should impose upon the engineer the performance of a duty which would compel him to leave his engine while the train was in motion. These experts were, however, permitted, without objection, to testify that, in their opinion, one man could operate the car in question, at the place in question, with a requisite degree of safety to the passengers; and it is not perceived that evidence as to the custom of electric roads would have added to the weight of this testimony, if it were competent.

One of defendant's witnesses was asked upon cross-examination the following: "Don't you know that there are more women visit that cemetery than men?" An objection thereto by the defendant that it was immaterial and irrelevant was overruled, and an exception taken. The witness answered, "Yes, sir." The objection should have been sustained. Not only is it immaterial whether more women than men ride upon the cars of the defendant upon that part of its road, but the question was not restricted to those who used defendant's cars in visiting the cemetery, but was so general as to include all modes or means of going there. It is not every error, in ruling upon questions of evidence, however, that will justify a reversal of the judgment. If it were otherwise, affirmances upon appeal would be comparatively rare. Section 475, Code Civ. Proc., provides that: "The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." The question involved was the alleged negligence of the defendant in operating its cars with only one man in charge. All the circumstances connected with the accident were shown by the evidence, and were such as to show conclusively that it was liable to occur at any time. Whether the passengers were all men or all women could not avoid or affect the necessity of the motorman leaving his post, and going to the other end of the car, to adjust the trolley in passing the switch. If the question had not been put to the witness, or if defendant's objection had been sustained, the result could not have been different. It is not argued that the amount of damages awarded was or could have been affected by the answer of the witness, nor that the damages are excessive; but the argument is that it could not legitimately affect the question of negligence. We are convinced that not only could it not legitimately affect the question of negligence, but that it did not affect it, and that defendant was not prejudiced by the error complained of.

Appellant also contends that the court erred in refusing to give the following instruction to the jury, as requested by the defendant: "In this action you are hereby instructed that you cannot consider the loss of service or of protection which the plaintiff's children suffered by reason of the injury to Mrs. Redfield." This contention is based upon the fact that the plaintiff testified that his wife was manager of his household, and did all the housework, cared for the children, made their clothing and hats, kept them clean, neat, and tidy, gave them piano lessons, and, to some extent, vocal lessons and lessons in drawing and painting, all which she was competent to do, attended to their moral training and habits, corrected them for their faults, taught them their prayers, and assisted them to some extent in their studies. It is true that no injury sustained by the children could be compensated or considered in this action; but as the duty of caring for and educating his children would devolve upon the plaintiff during her disability, and for which he was at all times responsible, it was competent for him to show, in estimating the value of the wife's services to him, the character of his household, the fact that he had children, and the character of her services to and for them; just as it would have been competent for the defendant to show that plaintiff kept servants who attended to all housekeeping affairs, a competent governess who attended to the training and care of the children, and a seamstress to do all the family sewing, and that the wife's position was merely ornamental. It is not contended that the evidence above stated was incompetent, or that it did not tend to show the value of the wife's services to the plaintiff, and therefore it cannot be assumed that the jury considered it for any other purpose. Besides, in regard to this element of the plaintiff's injury, the court instructed the jury that, if they found the wife had been injured through the negligence of the defendant, the plaintiff "is entitled to recover such damages, and such damages only, as he may have suffered, if any, through the loss of the services of his wife, if any, resulting from such injuries, as well as such reasonable costs and expenses, etc. * * * You are permitted to determine what pecuniary loss the plaintiff suffered by the illness of the deceased from the 6th day of May to the 29th day of June, and to find in that amount, and in no greater amount. * * * You are to find the actual pecuniary damage sustained by him, and no more." If there was anything in the evidence which might have misled the jury,—and I think there was not,—these instructions specifically confined their estimate of damages to such as the husband sustained, and rendered the instruction requested to be given wholly unnecessary. But the instruction as requested would have been misleading. The jury might readily have inferred from it that all the evidence relating to the wife's services to the children was not to be considered for any purpose. If the instruction had been that they could not consider any injury or damage suffered by the children resulting from the loss of service to them, but that such loss of service could only be considered so far as it affected the value of her services to the plaintiff, it would have been unobjectionable, though unnecessary in view of the instructions given.

No other questions are made by counsel for appellant. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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111 Cal. 401

EAMES v. HAVER. (L. A. 50.)[1]

(Supreme Court of California. Feb. 28, 1896.)

NEW TRIAL—REMITTITUR IN APPELLATE COURT—CONTRACT—TENDER OF PERFORMANCE.

1. A new trial should not be ordered for an error in an instruction as to the measure of damages, by the omission of a credit admitted by the pleadings, where the successful party offers to remit the amount of the credit from the recovery, though such offer is made for the first time in the appellate court.

2. Under a contract for the exchange of stocks on the demand of one party, his demand and offer to produce the stocks on his part—his ability to do so being shown—is a sufficient tender of performance, where the other party refuses the exchange and denies the contract.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by A. W. Eames against S. C. Haver. From an order granting a new trial, plaintiff appeals. Modified.

Frank A. Prescott, for appellant. C. C. Bennett, for respondent.

VANCLIEF, C. The complaint in this action may be stated substantially as follows: In May, 1893, the defendant purchased from plaintiff 20 acres of land with orange grove thereon, for which he was to pay $8,000 in cash, and assign and deliver to plaintiff 100 shares of the capital stock of a corporation named Bear Valley & Alessandro Development Company. As a part of the transaction, however, it was agreed that on demand of the plaintiff the defendant would exchange for said stock an equal number of shares of the stock of a corporation named Bear Valley Irrigation Company; the expense of such exchange, not exceeding 5 per cent. of the value of the last-mentioned stock, to be paid by plaintiff to defendant as brokerage. At the time the land was conveyed by plaintiff (May 6, 1893), defendant paid the $8,000, and also assigned and delivered to plaintiff 100 shares of the stock of the Bear Valley & Alessandro Development Company, which will hereinafter be called the "Development Company." Defendant's promise to exchange stock as aforesaid was a part of the consideration for the conveyance of the land by the plaintiff. Thereafter, within a reasonable time, on or about June 9, 1893, plaintiff demanded of defendant an exchange of stock according to the agreement; tendering to defendant said 100 shares of development company stock, and 5 per cent. on the value of 100 shares of the irrigation stock. But defendant refused to make the exchange, denying the alleged agreement to make such exchange. That at the time of said tender and demand 100 shares of the stock of the irrigation company were of the value of $10,000, and the stock of the development company was of no value whatever. That since said demand and refusal both the irrigation company and the development company have become insolvent, and the stock of neither has any market value. Plaintiff alleged that he was damaged by defendant's breach of the agreement to exchange stocks in a sum equal to the difference of value of said stocks, to wit, the sum of $7,910, at the time of said demand and refusal, and prays judgment for that sum. In his answer, defendant denies the alleged agreement to exchange stocks; denies the alleged tender and demand by plaintiff; also, denies that one hundred shares of the irrigation stock was of greater value than $4,000 at the time of the alleged demand and tender by plaintiff; and further denies that 100 shares of the stock of the development company was then "of less value than $4,000."

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[1] Rehearing denied.

The cause was tried by a jury, whose verdict was in favor of plaintiff, assessing the damages at $4,850, for which sum judgment was rendered against the defendant. Defendant moved for a new trial, which was granted by the following order: "The motion for new trial heretofore made in this case upon the part of defendant will be granted, upon the following grounds, to wit: The court erred in giving instructions Nos. 3, 4, and 6, at the request of the plaintiff, as each of said instructions ignored the 5 per cent. commission which defendant was entitled to under the testimony and plaintiff's own pleadings. (2) Upon the insufficiency of the evidence to justify the verdict, in this: that the weight of the evidence does not support the verdict as to the difference in value of the stock of the Bear Valley & Alessandro Development Company and the stock of the Bear Valley Irrigation Company."

1. The instructions "Nos. 3, 4, and 6," referred to in the order as being erroneous, related to the measure of damages, and were to the effect that, if the market value of the irrigation stock exceeded that of the development stock at the time of the demand of plaintiff for an exchange of stocks, the difference of such values would be the measure of the damages suffered by plaintiff, and that plaintiff was entitled to recover as damages a sum equal to such difference. It is admitted that a brokerage, not exceeding 5 per cent. of the value of the irrigation stock, should have been deducted from the excess of the value of that stock over that of the development stock, and therefore that the measure of damages, as stated in the instruction, is too large, by the amount of such brokerage. Appellant contends that this error can be corrected by a modification of the judgment, without any necessity for a new trial, and offers here, for the first time, to remit from the judgment a sum equal to 5 per cent. on the greatest possible value attributed to 100 shares of the irrigation stock by the complaint, or by any part of the evidence. In the complaint the value of 100 shares of the irrigation stock, at the time of plaintiff's demand for the exchange, is alleged to have been $10,000, and the answer of the defendant denies that it was then of any greater value than $4,000. The highest estimate of the value of that stock (100 shares) at any time, by defendant's witnesses, was $10,500, and appellant offers to remit from the judgment a sum equal to 5 per cent. of this valuation, which would be $525; and I think such remittance would fully compensate the respondent for all possible injury resulting from the alleged erroneous instructions, except his costs of this appeal. Considering all the circumstances, I think the offer of appellant to remit $525 from the judgment, which is equal to 5 per cent. of the value of the irrigation stock, is quite liberal, and that respondent should be required to accept it on the condition that appellant pay all costs of the appeal. Atherton v. Fowler, 46 Cal. 320; Bank v. Chester, 55 Cal. 49; Woods v. Merrill, 57 Cal. 435. See, also, Davis v. Pacific Co., 98 Cal. 18, 32 Pac. 708. Perhaps the condition that appellant pay all costs of the appeal would not be just, if he had offered to remit the $525 in the lower court before a new trial was ordered.

2. Nor do I think the second ground upon which the new trial was granted can be sustained, namely, insufficiency of the evidence to justify the verdict as to the difference in value of the stock of the development company, and that of the irrigation company. The court evidently overlooked the effect of the pleadings upon the value of the development stock. The complaint alleges that at the time the exchange of stocks was demanded 100 shares of the development stock was of no value. The answer denies that 100 shares of the development stock was then, or ever, of less value than $4,000. Thus, the defendant failed to deny the allegation of the complaint as to the value of the development stock, except to the extent of $4,000, and, by statutory implication, admits the truth of the allegation in the complaint, except to that extent. Besides, there is no evidence tending to prove that the market value of the development stock ever exceeded $40 per share. The defendant who was a broker dealing in stocks, and who testified at greater length than any other witness on either side, said nothing as to the market value of the development stock, except that he had never represented to plaintiff that it had any market value. The only other witnesses on the part of the defendant —Mr. Waters and Mr. Sterling—each testified that he did not know that the development stock ever had any market value, though Mr. Waters said he had heard of one private sale at $105 per share at some time between March and September, 1893, whereas plaintiff's demand for the exchange of stocks was on June 9, 1893. On the part of the plaintiff, Mr. Granger testified that he was a stockbroker, and knew the market value of the stocks in question in May and June, 1893, and that on and about the 9th day of June, 1893, the market value of the irrigation company stock ranged from $105 to $120 per share, and at the same time the development stock had no market value, "because there was no chance to sell any of it. * * * It could be bought for almost any price"; that it had been offered to him at 40 cents per share. There was no evidence tending to prove that either its market value or its intrinsic value was as much as $40 per share at any time. It follows that neither upon the pleadings nor by the evidence could it have been found or presumed that 100 shares of the development company stock was of greater real or market value than $4,000 at any time during May and June, 1893. As to the market value of 100 shares of the stock of the irrigation company at the time of plaintiff's demand for the exchange of stock, only two witnesses—Mr. Granger, for plaintiff, and Mr. Waters, for de-

fendant, both stockbrokers—testified. Mr. Granger testified that such value of 100 shares was $10,000 to $12,000, and Mr. Waters that it was $9,500 to $10,500. The difference between this lowest estimate ($9,500) and the highest estimate that could have been made of the value of 100 shares of the development stock ($4,000) is $5,500, which is $650 more than the verdict of the jury. So it is not improbable that the jury did deduct the brokerage commission from the difference in values of the stocks of the two corporations, notwithstanding the omission of the court to instruct them so to do; but, however this may have been, the proffered remission of $525 from the judgment, and payment of costs of appeal, by plaintiff, will surely compensate defendant for all detriment suffered by him in consequence of the alleged error in the instructions for which the new trial was granted.

3. It is contended, however, that the order granting a new trial was justified on another ground than those stated by the court, to wit, that the court erred in giving the twelfth instruction at request of plaintiff, as follows: "(12) The fact that the stock of plaintiff was pledged as security in the hands of others has no bearing upon the case, *and* if the jury find that the plaintiff was able and willing to furnish his part of the exchange, and offered to do so, and the defendant refused to make such exchange, then plaintiff was excused from making an absolute proffer of the actual stock." It appeared from the evidence that the identical 100 shares of development stock delivered to plaintiff had been pledged by him to secure a debt, with the understanding that it was to be exchanged for irrigation stock, as per agreement. Mr. Granger, who demanded the exchange as agent for plaintiff, testified that the pledgee was willing and anxious to have the exchange made, and offered to permit it to be made, and that when he demanded the exchange he knew he could get the pledged stock and deliver it to defendant, but that when he demanded the exchange, and offered to deliver the development stock, the defendant denied any agreement or obligation on his part to make the exchange, and positively refused to exchange, so that there was no occasion or necessity for producing and exhibiting to the view of the plaintiff the certificate of the development stock, and that defendant made no objection to his offer to deliver the stock on the ground that it was not actually produced at the time it was offered and the exchange demanded. In connection with the instruction in question, the court also instructed the jury that, if they found the facts testified to by Mr. Granger to be true, the conduct of the defendant waived or excused the actual production of the stock, and that the offer to produce it, with the ability to do so, was a sufficient tender. Under these circumstances, I think the instruction was not erroneous, to the prejudice of the defendant; and if the word "and," which I have underscored, in the third line of the instruction, be omitted, as I think it should be in the reading, all obscurity would thereby be removed, and, so read, the instruction is clearly correct. Hanson v. Slaven, 98 Cal. 383, 33 Pac. 266. I think the order granting a new trial should be reversed, on the conditions that within 10 days after the filing of the remittitur in the court below the appellant remit from the judgment the sum of $525, and pay all costs of this appeal; but, if these conditions are not performed by appellant, said order should stand affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from will be reversed, on the conditions that, within 10 days after the filing of the remittitur in the court below, the appellant remit from the judgment herein against the respondent the sum of $525, and pay all costs of this appeal; but, if these conditions are not fully performed by the appellant within the period above named, then said order shall stand affirmed.

(111 Cal. 366)

GETT v. SUPERVISORS OF SACRAMENTO COUNTY. (S. F. 381.)

(Supreme Court of California. Feb. 25, 1896.)

COUNTIES — CLASSIFICATION — PRIMARY ELECTION LAW.

The classification of counties referred to in the act of March 27, 1895 (St. 1895, p. 207), relating to primary elections, and which is made to apply only to counties of the first and second classes, is not that contained in section 4006 of the Political Code as originally enacted, but that made by the act of March 14, 1883 (St. 1883, p. 299), which revised the entire law on the subject of county government, and for the most part superseded the old law.

In bank. Proceeding by W. A. Gett for writ of mandate to the supervisors of Sacramento county. Denied.

D. E. Alexander and W. A. Gett, Jr., for petitioner. F. D. Ryan and J. Charles Jones, for respondent.

BEATTY, C. J. This is an original proceeding in which the petitioner asks a writ of mandate to the supervisors of Sacramento county, commanding them to perform the duties imposed upon election commissioners and boards of supervisors by the act of March 27, 1895 (St. 1895, p. 207), relating to primary elections. The act, by its express terms, is restricted to counties of the first and second classes (section 26, p. 218), and consequently has no application to Sacramento county or any other, except the city and county of San Francisco and the county of Los Angeles, unless the contention of petitioner can be sustained that the classes referred to in said section 26 are those defined in section 4006 of the Political Code as originally enacted, which reads as follows: "Sec. 4006. For purposes other than roads and highways the counties of this state are classified as follows: (1) Those containing twenty thousand inhabitants or over constitute the first class; (2) those containing eight thousand and under twenty thousand inhabitants constitute the second class; and, (3) those containing less than eight thousand inhabitants constitute the third class." This section was a part of title 2 of part 4 of the Political Code, relating to the government of counties as the same was regulated prior to the adoption of the present constitution. By the act of March 14, 1883, entitled "An act to establish a uniform system of county and township government" (St. 1883, p. 299), the whole law upon this subject was revised, and the old law in most respects superseded. This being so, it is extremely doubtful whether the classification established by section 4006, supra, is continued in force for any purpose whatever; but, conceding that it may be in force with respect to some matters regulated by statutes passed prior to the new classification contained in the act of 1883, we have no doubt that the reference in the primary election law is to the classes defined in the latest county government act, and not to the classes established by section 4006 of the Political Code. It follows, therefore, that neither this petitioner nor the respondents have any interest in the determination of the question which they have attempted to submit, i. e. the constitutionality of the act of March 27, 1895, and that it ought not to be decided upon such attempted submission. Writ denied, and proceeding dismissed.

We concur: McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; TEMPLE, J.; HENSHAW, J.

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5 Cal. Unrep. 288

SOUTHERN CAL. RY. CO. v. SOUTHERN PAC. R. CO. et al. (No. 19,553.)

(Supreme Court of California. Feb. 27, 1896.)

DEED—MUNICIPAL CORPORATIONS—ORDINANCE—INJUNCTION—EMINENT DOMAIN.

1. After a conveyance in fee of a strip of land known as a certain avenue, subject only to an easement in the public for road purposes, the grantor has no interest therein which he can convey to a subsequent grantee.

2. An ordinance granting a railroad company the right to enter upon and construct a track through a public street does not operate to justify wrongful acts of such company as trespassers prior to the passage of such ordinance.

3. Where defendant railroad corporation has been perpetually enjoined from entering upon and constructing its road over private lands, such injunction must be modified so far as it prohibits the exercise of rights subsequently acquired by defendant under right of eminent domain.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Action by the Southern California Railway Company, a corporation, against the Southern Pacific Railroad Company and the Pacific Improvement Company, corporations, and others, to restrain the construction or maintenance of a railroad track. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Harris & Gregg, for appellants. W. J. Hunsaker, for respondent.

SEARLS, C. This action is brought to restrain the defendants from constructing or maintaining a railroad track, and to compel them to remove all tracks and lines of track from a certain strip of land 100 feet in width, and commonly known as "Park Avenue," situate and being in the county of San Bernardino, and owned, possessed, and appropriated by the plaintiff for the purposes of a railroad; also, to recover from defendants $1,000 damages for injuries to said strip of land. The plaintiff had a decree in its favor, whereby it was adjudged that it was the owner of the land described in the complaint; that neither of the defendants had any right, title, or interest therein or thereto, and perpetually restraining them and each of them from entering upon said land and premises, and from constructing, maintaining, or operating any line or lines of railroad, etc., thereon, and requiring them to remove therefrom, within 10 days, all roads, tracks, ties, rails, switches, etc., and awarding plaintiff damages in the sum of one dollar, and denying to defendants the relief sought in their answer and cross complaint. Defendants appeal from the decree, and from an order denying their motion for a new trial.

A very few facts will serve to illustrate the only important questions involved in this case. Plaintiff and defendant the Southern Pacific Railroad Company are both railroad corporations, and the defendant the Pacific Improvement Company is a corporation, and, as a contractor, was performing for the other corporation defendant the grading, track-laying, etc., spoken of hereafter. The city of Redlands is a municipal corporation in the county of San Bernardino, and the strip of land described in the complaint, and known as "Park Avenue," is a public street in said city. In 1886 one W. F. Summers was the owner in fee of the tract of land described as "Lugonia Park," including Park avenue aforesaid. In December, 1886, Summers contracted to sell all the land described in the complaint to George L. Cook and A. L. Park within eight months. Cook and Clark, on the 28th day of November, 1887, conveyed the strip of land, 100 feet wide, known as "Park Avenue," to the Central Railway Company, reserving from the conveyance "the right to use all of the above land not used by the railroad track for a public road or drive." The Central Railway Company constructed a railroad longitudinally through the center of said Park avenue, and the present plaintiff, by consolidation, has succeeded to all the rights and property of the former owner. Summers consummated his agreement to convey to Cook and Park by a deed of conveyance. The railroad of plaintiff is an ordinary steam railroad, constructed and operated for the transportation of freight and carriage of passengers. Subsequent to the purchase of the fee in said avenue by the grantor of plaintiff, and subsequent to the construction of its railroad, the defendant railroad corporation projected and located a like railroad, for like purposes through and over said Park avenue.

The basis of defendants' claim to a right in Park avenue is: (1) A conveyance to the Southern Pacific Railroad Company by deed of September 18, 1891, by W. F. Summers, of a strip of land 30½ feet wide on the south side of said Park avenue, reserving all of the above-described land not occupied by the railroad track for a public road or drive. (2) An ordinance of the board of trustees of the city of Redlands passed March 2, 1892, authorizing the Southern Pacific Railroad Company to lay down, maintain, and use a railroad track upon and along the southerly 30½ feet of Park avenue. This action was commenced December 31, 1891, and on the 23d day of November, 1892, defendants, by a supplemental answer and supplemental cross complaint, set up the passage of the ordinance above mentioned. The allegations of the complaint and findings of the court are sufficient to warrant the judgment if defendants were not entitled to enter upon and interfere with the track, right of way, and property of plaintiff thereon. The deed to plaintiff's predecessor being prior in time to that to the railroad defendant, and conveying in fee the whole of Park avenue, subject only to an easement in the public for road purposes, the defendants acquired no right thereto by the subsequent conveyance; and hence, at the date of their intrusion upon the property and rights of plaintiff, defendants were trespassers.

Whatever rights were conferred upon defendants by the ordinance granting to the Southern Pacific Railroad Company the right to construct its road through Park avenue, it could not operate to justify or extenuate the wrongful acts of the defendants perpetrated many months prior to the passage of such ordinance. So, too, it is probable that defendants could not by and under such an ordinance so far justify their active interference with the plant of plaintiff, and thereby prevent the issuing of a perpetual injunction against them. We deem this question of little importance here, for these reasons: Subsequent to the rendition of the decree and perpetual injunction in this case, the Southern Pacific Railroad Company commenced an action against the plaintiff herein, under the right of eminent domain, to condemn a right of way for its railroad over the southerly side of this same Park avenue, and such proceedings were had therein that a right of way was condemned to the plaintiff therein for its said railroad through said avenue; and upon an appeal to this court the judgment of condemnation was affirmed, on the 31st day of January, 1896. See case No. 19,500, 43 Pac. 602. By virtue of the title acquired by the Southern Pacific Railroad Company in said condemnation proceedings, it will become the duty of the superior court in and for the county of San Bernardino, upon application, to so modify its perpetual injunction herein that it shall not apply to or prohibit the exercise of the rights obtained under the judgment in condemnation.

It follows that except as to the matter of one dollar damages awarded to plaintiff, and as to costs, this cause is and has become mainly a moot case, not calling for extended discussion. We think the evidence justified the findings and the latter support the decree. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foreging opinion, the judgment and order appealed from are affirmed.

SOUTHERN CAL. RY. CO. et al. v. SOUTHERN PAC. R. CO. et al. (No. 19,552.)

(Supreme Court of California. Feb. 27, 1896.)

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.
Action by the Southern California Railway Company and another against the Southern Pacific Railroad Company and the Pacific Improvement Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Harris & Gregg, for appellants. W. J. Hunsaker, for respondents.

PER CURIAM. This action is precisely the same as No. 19,553, between the same parties, this day decided (43 Pac. 1123), except that in this action, which was commenced after No. 19,553, one F. H. Pattee, who is shown to have become an abutting landowner on Park avenue after the other suit was brought, is made a party plaintiff. Defendants, in addition to a like answer and cross complaint as in the other case, pleaded the pendency of that action in abatement of this. The finding was against the defendants on this plea, and in all other respects the findings and judgment are the same in this cause as in that. For the reasons given in said cause No. 19,553, between all of the same parties except said Pattee, the judgment and order appealed from herein are affirmed.

111 Cal. 347

BUCKMAN v. LANDERS et al. (S. F. 240.)

(Supreme Court of California. Feb. 25, 1896.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—ACTIONS TO ENFORCE—EVIDENCE—DEFENSE.

1. Under St. 1889, p. 168 (Street Law, § 12), making the warrant, assessment, certificate and diagram, with affidavit of demand and nonpayment of a street assessment, prima facie evidence of plaintiff's right to recover in an action on the assessment, a finding of demand publicly made on the lot is warranted by the affidavit alone.

2. Error in omitting from a street assessment one of the lots fronting on the street cannot be urged as a defense in an action on the assessment, since the remedy was by appeal from the assessment.

3. Prima facie evidence afforded by the assessment itself warrants a finding that the contractor performed the work to the satisfaction of the superintendent of streets, notwithstanding the certificate of the city engineer to the contrary.

4. An extension granted for performance of a contract for street work need not be indorsed on the contract before the expiration of the time originally fixed therein for completion of the work.

Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by one Buckman against Landers and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Smith & Murasky, for appellants. Wm. H. Chapman and E. G. Knapp, for respondent.

HARRISON, J. Action upon a street assessment in San Francisco. The finding of the court that Army street, upon which the work in question was done, is a public street, is not specified in the statement as unsupported by the evidence, and the finding must therefore be accepted as correct.

Section 12 of the street law (St. 1889, p. 168) declares: "The warrant, assessment, certificate and diagram, with the affidavit of demand and non-payment, shall be held prima facie evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment and diagram are based, and like evidence of the right of the plaintiff to recover in the action." In the absence of any other evidence, the prima facie character of this evidence was sufficient to sustain the finding of the court that the agent of the plaintiff went upon the lot assessed, and, while there, publicly demanded payment of the assessment. Himmelmann v. Hoadley, 44 Cal. 213; Dyer v. Brogan, 57 Cal. 234. The testimony that no personal demand was made upon the defendants did not impair the statement in the affidavit that demand was made upon the lot.

An appeal from the assessment that had been originally made for the work by the superintendent of streets was sustained by the board of supervisors, and the assessment set aside; and the assessment upon which the present action is brought was thereafter made by the superintendent, in accordance with the directions of the board of supervisors. It is now contended by the appellants that this assessment is invalid, for the reason that certain lots which should bear a portion of the expense of the work are not included therein. The appellants herein could, however, have appealed from this assessment, and could have had the error, if it was such, corrected upon such appeal by the board of supervisors. People v. O'Neil, 51 Cal. 91. Their failure to so appeal deprives them of the right to assign such error in an action to enforce the assessment. The mere omission from the assessment of one of the lots fronting upon the street does not of itself render the assessment void upon its face. McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71; Dowling v. Conniff, 103 Cal. 75, 36 Pac. 1034; Warren v. Riddell, 106 Cal. 352, 39 Pac. 781. The assessment was prima facie evidence that the contractor had fulfilled his contract to the satisfaction of the superintendent of streets, and, in the absence of any other evidence, the court was authorized to find in accordance therewith. The prima facie character of this evidence was not overcome by the certificate of the engineer. Williams v. Society, 97 Cal. 122, 31 Pac. 908.

The record shows that the work was completed within the time fixed for its completion by the superintendent of streets and the subsequent extensions thereof authorized by the board of supervisors. It does not appear at what time the superintendent indorsed these extensions upon the contract, and the prima facie character of the documentary evidence introduced includes the "regularity and correctness" of his acts. It was not requisite that he should indorse an extension upon the contract before the expiration of the time originally fixed therein. McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885; Ede v. Knight, 93 Cal. 159, 28 Pac. 860. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

CALIFORNIA REPORTER

44 PACIFIC REPORTER

111 Cal. 531

NATIONAL CARRIAGE MANUF'G CO. v. STORY & ISHAM COMMERCIAL CO. et al. (L. A. 72.)

(Supreme Court of California. March 11, 1896.)

CORPORATIONS—ASSIGNMENT OF STOCK AFTER INSOLVENCY—INDIVIDUAL LIABILITY.

1. A stockholder of a corporation to whom had been assigned all of its assets in consideration of her agreement to pay its debts, and who knows that the corporation is insolvent, cannot relieve herself of a personal liability for the corporate indebtedness by assigning her stock to an insolvent person for that purpose.

2. A judgment in favor of the assignee for a subsequent conversion by the corporation of the stock assigned does not operate as an estoppel to relieve the assignor of her liability.

3. A stockholder may show that the corporate indebtedness which is sought to be enforced against her was incurred through fraud and collusion with the directors, if such is the fact.

Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the National Carriage Manufacturing Company against the Story & Isham Commercial Company, and Adella B. Story. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Haines & Ward and Works & Works, for appellant. McDonald & McDonald, for respondents.

TEMPLE, J. This is an action brought to recover from respondent Adella B. Story the unpaid subscription upon stock held by her in the corporate defendant, or so much of such subscription as is necessary to pay the judgment of plaintiff against said corporation. Respondent became the owner of 2,498 shares of such stock on the 16th day of January, 1888, by transfer from H. L. Story. The shares were of the par value of $100, and only $10 per share had been paid thereon. The complaint shows that plaintiff recovered a judgment against the corporate defendant on the 28th day of February, 1894, for $1,464.52, and it is averred that respondent continued to be the owner of said stock, and that there was due on the same the sum of $224,820. Plaintiff asks that respondent be compelled to pay into court upon her subscription a sum sufficient to pay its judgment and costs. Respondent, in her answer, denied most of the material allegations of the complaint, and particularly that since the 26th day of February, 1891, she had owned or held any of the stock of the corporate defendant. For a second defense she avers an assignment of her stock on the date last named to one Walter E. Williams, and that said Williams presented the certificate and the transfer to the officers of the defendant corporation, and demanded a transfer thereof to him on the books of said corporation; that the corporation refused to allow such transfer to be made, but retained the certificate of stock, and refused to return the same to said Williams, thus converting the same to its own use; and that on the 28th day of February, 1891, said Williams commenced an action against said corporation for the recovery of the value of said stock, and such proceedings were thereafter had that on the 26th day of May, 1891, said Williams recovered a judgment against said corporation for the sum of $12,210, as the value of said stock, which judgment has never been appealed from or set aside or modified. For a third defense she denies that at the time plaintiff commenced its said action against said corporation on which it recovered the above-mentioned judgment, the corporation was indebted to plaintiff in any sum whatever. She then avers that "during all the time aforesaid this defendant was the only solvent stockholder of said Story & Isham Commercial Company." Further, that the corporation was wholly insolvent, which fact was well known to plaintiff; and that the board of directors of the defendant corporation, for the purpose of injuring and defrauding defendant, knowingly and willfully permitted plaintiff to take and recover said judgment.

At the trial it was stipulated that plaintiff had recovered the judgment as averred, and that execution had been issued and returned nulla bona before this suit was commenced; also that respondent had, as alleged in her answer, assigned her stock to Williams, and that Williams had presented the certificate and demanded a transfer as alleged, and had recovered the judgment for conversion against the corporation as charged in her answer. Plaintiff in said stipulation reserved the right to attack the bona fides of the assignment.

Williams, the supposed assignee of Mrs. Story, testified at the trial. He stated that Mr. Bates, who it is admitted was the agent of appellant, called upon him, and wanted to know if he would accept the gift of the stock. He stated that the corporation was indebted in the amount of $90,000, and that Mrs. Story had agreed to pay something like $60,000, and, in order to stop any increase of liability, "she wanted to dispose of that stock to some one who was not in a condition that would render them liable for,—not liable, but whose financial standing was such that there would be no element of strength or credit to the concern. And at that time I was insolvent. I had just taken out insolvency proceedings, and the fact that I was insolvent made it so that my being a stockholder would prevent the company from getting any further credit, and she would be out of it; and me being friendly to her, I accepted the gift of the stock in that way." Under instructions, and at the request of Mrs. Story's attorneys, he took the stock to the office of the company, and demanded a transfer on the books. He then went to her attorneys, and notified them of what he had done. He had nothing to do with the bringing of the suit in his name for the conversion of the stock. He did not employ attorneys or pay costs. He had no hand in it except to testify. After the judgment had been recovered, he assigned it to Mrs.

Story. He had no agreement or conversation about the assignment. They presented the paper, and he signed it without reading it, just because he was asked to. There was no agreement that he should hold the stock for Mrs. Story. He did not think he could be compelled to assign the judgment to her. He then testified as follows: "Q. In this whole transaction, did you understand that you were acting in your own interest in the matter, or that you were acting purely as a matter of friendship for Mrs. Story? A. I was acting as a matter of friendship for Mrs. Story. Q. You took the assignment of this stock because Mr. Bates requested you to accommodate her? A. Yes, sir. Q. And held it in the same way? A. Yes, sir. Q. And when somebody came to ask you to transfer the judgment to her you transferred it in the same way? A. Yes, sir. Q. Purely as an act of friendship throughout? A. Yes, sir. Q. Now, when you speak about understanding you were the absolute owner of the stock, you simply mean you understood you were the legal owner of it? A. Yes, sir. Q. But that morally you felt like you should account to Mrs. Story for anything, if anything grew out of it? A. Yes, sir. Q. And you held it with that understanding? A. In my own mind. There was no agreement to that effect. I was at liberty to have done with it just what I pleased."

At the trial it was admitted at the request of Mrs. Story's attorneys that certain witnesses would testify, and were considered as having testified, that before the gift of the stock to Williams Mrs. Story had assumed and agreed to pay all the debts of the corporation, and the company had executed to her an instrument which she construed as conveying to her all the assets of the corporation, but that difference had arisen between herself and the officers of the corporation, and she believed that they would use every means in their power to injure her financially, and that, to secure immunity as a stockholder from any indebtedness that might be created by the company in litigation with her or otherwise, she desired to make such transfer of the stock to Williams, and that after the transfer to Williams she paid on the indebtedness of the corporation between ninety and one hundred and fifteen thousand dollars. It will be seen, therefore, that both the assignor and assignee knew at the time of the transfer of the stock by Mrs. Story that the corporation was utterly insolvent, and that all its assets had been assigned to Mrs. Story herself, in consideration of her agreement to pay its debts. Further, it expressly appears that Mrs. Story understood that she was not transferring any property, but was merely getting rid of a liability, and she so represented to Williams at the time, and Williams accepted it as a favor to Mrs. Story, not for the purpose of acquiring any property himself; and in the whole matter was actuated not with the motive of gain, but out of pure friendship to Mrs. Story. Accordingly, he acted in the matter all through under the advice of her attorneys. She caused suit to be commenced in his name against the corporation for conversion, without consulting him, and when judgment had been obtained she presented to him an assignment thereof to herself without first consulting him about it, and he executed it without reading, just because she wished it.

It was also said by the witness that there was no understanding that he should hold for Mrs. Story, or would reconvey to her. But what was there to hold? All the assets had been assigned to Mrs. Story, and both knew that they were insufficient to pay the debts. The corporation could not have been a "going concern," and, since all its property rights had passed from it, there was no possibility of a surplus or of possible value in the stock. In transferring the stock Mrs. Story transferred nothing, and did not think she passed anything of value to Williams. It was as though the payor of a promissory note could assign his liability to pay. Still this apparent anomaly, this right to transfer a liability from one point of view, usually attaches to the interest of shareholders in a corporation. It has been said to be a special partnership, in which the shareholders conduct business and own property in a fictitious name, and in which there is no delectus personæ, and, therefore, in which the partners may sell, and by so doing be relieved from all liability save such as the statute or the charter may provide shall continue. And this includes the liability for unpaid subscription for stock. So long as the corporation is solvent, there is ordinarily no restriction upon the right to transfer, but the American doctrine is that, after the corporation has become insolvent, and the stockholder knows this, and especially if the corporation has ceased to do business, a shareholder cannot transfer his stock to an insolvent or to an irresponsible person, so as to relieve himself from liability. And I do not find from the cases that it is necessary to find, in addition to the above facts, that there was an actual intent to defraud. Such a transaction would necessarily have that effect, and the stockholder, having had the chance of gain, cannot, when the enterprise has proven unprofitable, escape the liability. It would be a fraud upon his fellow shareholders as well as upon the creditors, for it would deprive them of the right to enforce contribution. Upon this point the decisions and the text writers in this country are as one. Morawetz (Priv. Corp. § 858) states the law as above, and cites numerous authorities. This author also states that the transfer must be a sale for a valuable consideration,—what the English cases call an "out-and-out sale." Cook, in his work on Stock and Stockholders (sections 263–265), says: "In the United States a transfer of shares in a failing concern, made by a transferror with the intention and for the purpose of escaping liability as a stockholder to a person who, for any cause, is incapable of responding in respect to such liability, is void, both as to creditors of the company and as to other shareholders; and that, too, although, as between the transferror and transferee, the transaction may have been absolute, and no secret trust involved." This author states, however, that it would be otherwise if the transferror did not know of the insolvency of the corporation, and the transfer was bona fide. In such case the transferror would be released, although the corporation proved to be insolvent. This author also cites many cases. See, also, Beach, Priv. Corp. § 127; Spell. Priv. Corp. § 817; Thomp. Liab. Stockh. § 210 et seq. The last author states the substance of the cases in this country and in England at considerable length. This author concludes that the American rule results from the trust-fund doctrine, and says courts of equity will not allow this portion of the fund to be frittered away by transfer to an insolvent for the purpose of escaping liability. He says, also, the intent, which is material, is the intent to escape liability. In this case that intent is avowed as the motive of the transfer by both the parties to it. Defendant claims, however, that there was an intent to escape the payment of liabilities then existing, yet in this case she is endeavoring thereby to escape such liability. If the judgment was procured against the corporation by plaintiff through collusion or fraud, she could have proved that as a defense in this case. She made no attempt to prove anything of the kind. It would make no difference that the judgment was for damages. The question is not whether there was an intent to defraud plaintiff. The transfer was not in good faith if made after insolvency, simply with a view of escaping liability, and when there was no real sale of the stock. Such a transfer is colorable only. The judgment of conversion is not an estoppel. A corporation after insolvency cannot by converting the stock of its shareholders relieve them of liability upon their stock, and it matters not what the motive may be which induced the act of conversion. There is no conflict in the evidence. It does not support the findings, and therefore the order and judgment are reversed and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.

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111 Cal. 416

DEACON v. BLODGET. (L. A. 28.)

(Supreme Court of California. March 2, 1896.)

CONTRACTS—CONSTRUCTION—CONDITION PRECEDENT.

Defendant gave plaintiff a written contract whereby he agreed to pay him $835 not later than one year from date. The contract further provided that the money should be paid sooner if realized from the sale of certain lands which were placed in the hands of plaintiff, and on the sale of which he was to receive a certain commission, and required plaintiff to use diligent effort to sell the land for the best price. *Held*, that the stipulation requiring plaintiff to use diligent effort to sell the land was not a condition precedent to defendant's duty to pay the money at the expiration of the year, in case the land was not sold.

Commissioners' decision. Department 2. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by George H. Deacon against H. A. Blodget. There was a judgment for plaintiff, and defendant appeals. Affirmed.

T. W. Lockhart and C. E. Arnold, for appellant. J. W. Wiley and C. C. Cowgill, for respondent.

BRITT, C. Plaintiff recovered judgment for the sum of $835 and legal interest thereon from November 23, 1893, found by the court to be due to him from defendant upon the following written instrument: "I hereby promise to pay George H. Deacon, not later than one year after date, the sum of eight hundred and thirty-five dollars. Said sum to be sooner paid if realized from the sale of the southwest quarter of the southeast quarter of section six, township thirty-one S., range twenty-nine east, which said tract of land I hereby place in the hands of said Deacon exclusively for the said term of one year, for sale at a minimum price of forty-five dollars per acre. Said Deacon to receive a commission on said sale of five per cent. Said Deacon to use diligent effort to obtain the best price possible in excess of said price of forty-five dollars per acre. H. A. Blodget. Nov. 23, 1892." The complaint (filed March 21, 1894) set out a copy of said instrument, and alleged its execution by defendant, and that no part of said sum of $835 has been paid, but contained no averment that plaintiff had sold or endeavored to sell the land therein described. Defendant contends that the pleading was insufficient; that the contract imposed on plaintiff the obligation to use diligent effort to sell the land before the expiration of one year, at $45 per acre or more; and that he should have alleged such effort in the complaint. This is so if such endeavor on the part of plaintiff is a condition precedent to the duty of defendant to pay said sum of $835; but we think it clearly is not such a condition. Stipulations in a contract are not construed as conditions precedent, unless that construction is made necessary by the terms of the contract. Railroad Co. v. Butler, 50 Cal. 577. The instrument sued on contains two engagements on the part of defendant,—one to pay plaintiff the sum of $835 not later than one year from date; the other authorizing plaintiff to sell the land described,—and the only connection or dependence between them is that the accomplishment of a sale in virtue of the latter would entitle the plaintiff to earlier performance of the former. Plaintiff's obligation to use diligence relates entirely to the second contract, and not to the first.

Defendant filed a cross complaint in which he averred that the instrument sued on does not truly represent the contract which the parties intended to express therein; that he (the defendant) prepared such instrument, and by mistake omitted therefrom a provision that said sum of $835 should be paid only out of the proceeds of sale of the land described, and that such sale must be made within the period of one year, which was the real agreement of the parties, as plaintiff well knew when the written contract was executed. The circumstances of the alleged mistake were set out with particularity, and defendant prayed thereon a reformation of the instrument. From the evidence at the trial, the court found, in effect, that defendant was justly indebted to plaintiff to the amount of $835 at and prior to the time of the execution of said written contract; that his obligation to pay the same was not contingent upon the sale of said tract of land by plaintiff; and that said instrument does express the agreement of the parties. Defendant assails the findings, but his argument is hardly more than that they are contrary to the weight of the evidence. There was certainly direct conflict in the material parts of this, and quite sufficient appears to sustain the findings. One or two other points are made, but they are unimportant. We find no error in the record available to appellant. The judgment and order should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

111 Cal. 428

BARNHART v. EDWARDS et al. (Sac. 150.)

(Supreme Court of California. March 6, 1896.)

MORTGAGES — FORECLOSURE — DECREE — APPEAL — PARTIES — SERVICE OF NOTICE ON ADVERSE PARTY.

1. In an action against the administrator of a deceased mortgagor to foreclose the mortgage after the rejection of a claim against the estate for the amount thereof, a grantee of the mortgaged property was made a defendant, and judgment was rendered for plaintiff for about one-fourth the amount presented in his claim against the estate. *Held*, that on appeal from such judgment by defendant grantee the administrator was an adverse party (Code Civ. Proc. § 940), on whom notice of appeal must be served.

2. In an action against the administrator of a deceased mortgagor and a grantee of the mortgaged premises to foreclose the mortgage, judgment was rendered for plaintiff, and defendants joined in a notice of intention to move for a new trial on the same grounds. An appeal from the order denying a new trial was perfected by defendant grantee only, and the record failed to show that the interests of such defendants were adverse to each other on the motion for new trial, and also failed to show that any statement of the case was prepared or settled on behalf of the administrator. *Held*, that the administrator was not a necessary party to the appeal.

Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by one Barnhart against Edwards and Davis to foreclose a mortgage. From a judgment for plaintiff, and an order denying a new trial, defendant Davis appeals. Respondent moves to dismiss the appeal from such order for want of service of notice of appeal on defendant Edwards. Appeal from judgment dismissed, and motion to dismiss appeal from order denied.

P. J. Hazen and Nicol & Orr, for appellant. Jas. A. Louttit, Minor & Ashley, and Paul Morf, for respondent.

HARRISON, J. A motion is made to dismiss the appeal herein upon the ground that the notice of appeal was not served upon a codefendant of the appellant. The motion is resisted by the appellant upon the ground that his codefendant is not an adverse party, within the meaning of section 940, Code Civ. Proc. The action was brought for the foreclosure of a mortgage given to the plaintiff by one E. C. Vancil in the form of an absolute deed, but by way of security for the payment of certain claims and advances by the plaintiff. Prior to the commencement of the action, Vancil died, and the defendant Edwards was appointed administrator of his estate. The plaintiff presented to the administrator a claim against the estate for the amount of money then due and unpaid for which the security had been given, which was rejected by the administrator, and thereupon the present action was brought to establish the amount of the claim, and for a sale of the mortgaged lands. Subsequent to the execution of the mortgage, Vancil conveyed the mortgaged premises to the appellant, and for that reason he was made a party defendant. Issue was made upon the various allegations of the complaint, and the court found in favor of the plaintiff, and rendered its judgment directing a sale of the mortgaged property to satisfy the plaintiff's claim against the estate of Vancil, and providing that, if there should be any deficiency, it should be paid out of the estate in due course of administration. Both of the defendants gave notice of an intention to move for a new trial, but the statement of the case on which it was to be heard, and the assignment of errors therein, appear to have been prepared by the appellant alone, and the minute entry of the order thereon states that the motion of the "defendant" herein for a new trial was this day denied. The appeal from the judgment and from the order is by the defendant Davis alone. No service of the notice of appeal was made upon the administrator of Vancil's estate.

By the judgment appealed from the amount of the plaintiff's claim against the estate of Vancil has been determined to be $7,668. The amount for which the plaintiff presented his claim against the estate, and which he claims in his complaint, is $30,477. If the present judgment should be reversed, and upon another trial the plaintiff should establish the full amount of his claim, the estate of Vancil might be injuriously affected. If the mortgaged premises should sell for enough to satisfy the present judgment, the estate would not be called upon to pay any money to the plaintiff; whereas, if by another judgment the amount of the plaintiff's claim should be increased, the estate, by reason of its obligation to pay the deficiency of such judgment after the sale of the property, would be injuriously affected to whatever extent such deficiency might be increased by the increased amount found due to the plaintiff. It is evident, therefore, that the administrator of the estate should be notified of the appeal before this court would have any jurisdiction to determine whether the judgment should be reversed. Insurance Co. v. Fisher, 106 Cal. 224, 39 Pac. 758.

As both of the defendants joined in the notice of intention to move for a new trial, stating therein the same grounds for their motion, it does not appear from the record that their interests upon that motion were adverse to each other. The record, however, fails to show that any statement of the case was prepared or settled on behalf of the administrator, and, as the order denying a new trial is by its terms limited to the motion therefor on behalf of the "defendant," we must assume that it was the defendant by whom the statement of the case found in the transcript was prepared, and that the motion on behalf of the administrator is still undetermined. Upon an appeal from an order denying a new trial, only the parties to the motion upon which the order was made are necessary parties to the appeal (In re Ryer's Estate [Cal.] 42 Pac. 1082), and, as only the plaintiff and the appellant are parties to the order appealed from herein, there was no occasion for the appellant to serve his codefendant with the notice of appeal from that order. The appeal from the judgment is dismissed, and the motion to dismiss the appeal from the order denying a new trial is denied

We concur: GAROUTTE, J.; VAN FLEET, J.

(111 Cal. 457)

PATERSON v. SCHMIDT. (S. F. 108.) [1]

(Supreme Court of California. March 6, 1896.)

EXECUTOR—TIME FOR FILING CLAIMS—DETERMINING VALUE OF ESTATE.

Under Code Civ. Proc. §§ 1490, 1491, requiring an executor or administrator at once on his appointment to publish a notice to creditors to file their claims within a designated time thereafter, which shall be ten months when the value of the estate exceeds $10,000, and four months where it is of less value, the rights of creditors as to the time within which they may file claims is governed by the value of the estate, and not by the determination of it by the executor; and, in the absence of a decree finding its value, it may be determined in an action by a creditor against the executor, and, if found to exceed $10,000, the plaintiff is within the time if his claim was filed within ten months of the publication of the notice, regardless of the time stated in the notice.

Department 1. Appeal from superior court, Alameda county; W. E. Green, Judge.

Action by Edward M. Paterson against Albert Schmidt, as executor of the will of F. A. Moore, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

C. C. Marsh and Stephen G. Nye, for appellant. Chas. F. Craddock, for respondent.

GAROUTTE, J. Schmidt, as executor of the last will and testament of Francis A. Moore, deceased, published a notice to creditors, requiring them to present their claims against the estate within four months after the first publication. Some time thereafter an inventory and appraisement was returned, showing the value of the estate to be $6,485.95. Two months after the time for presenting claims, as prescribed in the notice to creditors, had expired, this plaintiff presented a claim to the executor against the estate for services, which claim was rejected, upon the ground (presumably) that it was not presented in time. Action was brought upon this rejected claim, and at the trial it was shown by oral evidence that the estate of the deceased at the time of the first publication of notice to creditors was of a value in excess of $10,000, and the court made a finding of fact to that effect. The court also held that the creditors had ten months within which to present their claims against the estate, and that this claim was presented in time, and rendered judgment for plaintiff.

Section 1490 of the Code of Civil Procedure provides that every executor or administrator must, immediately after his appointment, cause to be published a notice to creditors; and section 1491, following, provides that the time expressed in the notice must be ten months after its first publication when the estate exceeds in value the sum of $10,000, and four months when it does not. Section 1443 of the same Code provides that every executor or administrator must make and return to the court, within three months after his appointment, a true inventory and appraisement, etc. From the fact that the notice to creditors must be published immediately after the executor or administrator is appointed, and that the executor or administrator after his appointment has three months within which to return the inventory and appraisement, it is plainly observable that the law does not contemplate that the executor or administrator shall obtain information from the appraisement for the purpose of fixing the time specified in the notice in which creditors may present their claims. It would seem, therefore, that the executor or administrator must for himself, and at his own risk, investigate and determine the value of the estate for the purpose of determining the time in which creditors may appear and present their claims; and a wrong determination of that fact by him may often result in serious consequences, for his decision of the fact is in no sense judicial, and therefore not binding and conclusive upon creditors. The law, in effect, says that, when the estate is of greater value than $10,000 the creditors are entitled to ten months' notice. It does not say that, when the executor or administrator determines its value to be greater than $10,000, the notice shall be for ten months; but it is the fact, and not the executor's or administrator's determination of the fact, that is controlling. The law gives the creditors certain rights as to the time within which they may present their claims, and no executor or administrator, by giving a four-months notice, where he should have given a ten-months notice, can in any way deprive creditors of those rights.

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[1] Rehearing denied.

In this case the trial court found the estate to be of greater value than $10,000, and further found that the claim was presented within ten months after the first publication of notice to creditors. Under that state of facts, the executor should have allowed the claim as a valid and binding claim against the estate. If there had been a decree of due publication of notice to creditors, entered by the probate court prior to the presentation of this claim to the executor, possibly such decree would have been a bar to any investigation in this case by the superior court as to the value of the estate when the first publication was made; for such matter may have been concluded by the decree declaring a sufficient publication. In this case the record discloses no such decree, and there never was at any time in the probate court a judicial determination, either directly or indirectly, as to the value of the estate, or the sufficiency of the notice to creditors; but that question is not here involved.

For the foregoing reasons, the judgment is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

(111 Cal. xvi)

BUTEAU v. SCHMIDT. (S. F. 107.)[1]

(Supreme Court of California. March 6, 1896.)

Department 1. Appeal from superior court, Alameda county; W. E. Green, Judge.

Action by Samuel H. Buteau against Albert Schmidt, executor of F. A. Moore. There was a judgment for plaintiff, and defendant appeals. Affirmed.

PER CURIAM. This case is in all respects similar to Paterson v. Schmidt (S. F. 108, this day decided) 44 Pac. 161, and upon the authority of that case the judgment is affirmed.

(111 Cal. 419)

ATKINSON v. LORBEER. (L. A. 90.)

(Supreme Court of California. March 4, 1896.)

ELECTION—CANVASS OF VOTES—STATUTORY PROVISIONS—COMPLIANCE.

Pol. Code, § 1252, provides that the canvass of votes cast at an election must be public, in the presence of bystanders. The action of the election board in removing from the polling place all but two bystanders, and keeping the doors locked for one-half hour, did not invalidate the votes cast, where the fact that no fraud was committed during that time was shown.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Election contest between Thomas B. Atkinson and John W. Lorbeer to determine the right of the respective parties to the office of marshal of the city of Pomona. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Edwin A. Meserve and C. E. Sumner, for appellant. Tanner & Fleming and A. W. Hutton, for respondent.

McFARLAND, J. This is an election contest brought under sections 1111–1127, Code Civ. Proc., and presents the right to the office of marshal of the city of Pomona. Judgment was in favor of defendant, Lorbeer, who had been declared elected by the board of trustees. Plaintiff, Atkinson, appeals from the judgment upon the judgment roll, which includes findings. There is no statement or bill of exceptions. The question presented is whether or not the entire vote of the Second ward of said city at the election involved here should be rejected. At that ward respondent received a majority of 51 votes; and, if the entire vote at that ward be rejected, the appellant would have a majority in the city. The court below refused to reject the vote of said ward.

It is contended by appellant that the entire vote of the Second ward should be rejected on account of "malconduct on the part of the board of judges" of the election, under subdivision 1 of section 1111; and the main facts relied on to support this contention are, briefly, these: Immediately upon the closing of the polls, the board of election removed all the bystanders except two from the room which constituted the polling place, and for one-half hour kept the door of said room locked, and kept the public, except said two bystanders, out of said room; and during said half hour one of the judges of said election was absent. During that half hour some of the members of the board took the ballots from the ballot box, and counted them, and, finding that there was one more ballot in the box than there were voters as shown by the poll lists, destroyed one of said ballots. The board also, while the room was in that condition, sealed up in envelopes all the unused ballots, and did other things necessary to a preparation for tallying, but did not proceed to the tallying of the votes. At the expiration of the half hour the door was opened, and other bystanders went in, the absent judge returned, and the tallying commenced. At the trial three of the members of the board who were in the room during said half hour were examined as witnesses, and testified as to what was done during that time; and the court found that everything was done in good faith, and that no fraud was committed.

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[1] Rehearing denied.

Election contests arising out of irregularities of election officers frequently present to courts the alternative of either setting aside in the case in hand the honest and clear expression of the will of the majority of the voters, or of so construing the election laws as to open the door to future frauds, which it is the purpose of those laws to prevent. Of course, neither the voters nor those voted for have any control over election officers; and to set aside the vote of a precinct, when there was clearly no fraud, or any mistake affecting the result, for mere irregularities occasioned by the ignorance or carelessness of election boards, would in many cases be a patent injustice. Moreover, a construction requiring an exceedingly strict compliance with all statutory provisions might tempt to irregularities contrived for the very purpose of vitiating the vote at a certain polling place, and, as was said in Whipley v. McKune, 12 Cal. 361, "might lead to more fraud than it would prevent." On the other hand, statutory provisions which are clearly mandatory must be substantially complied with; and even directory provisions cannot be so grossly departed from as to make it impossible or extremely difficult to determine whether fraud had been committed or anything done which would affect the result. The provision of the statute which appellant contends was violated by the acts of the board as above stated is in section 1252 of the Political Code, and is as follows: "As soon as the polls are finally closed the judges must immediately proceed to canvass the votes given at such election. The canvass must be public, in the presence of bystanders." This provision, according to the current of authorities, is merely directory. Provisions concerning the time and place of holding the election, and officers holding the same, the legal qualifications of voters, and other matters of that character, are of substance and mandatory. "As a general rule, however, the regulations prescribed by law for conducting an election are directory merely, and will not be literally enforced where their nonobservance has occasioned no injury." Notes to section 1253, Deering's Pol. Code, and cases there cited; 1 Dill. Mun. Corp. § 197, and notes; Brightly, Elect. Cas. p. 448 et seq.; Whipley v. McKune, 12 Cal. 352; Sprague v. Norway, 31 Cal. 174; Keller v. Chapman, 34 Cal. 640. Section 1252 is not one of the new features of that part of the present election laws which is called the "Australian System," and which is in many respects mandatory. It has always been a part of the election laws, and so, also, has the provision of section 1112 of the Code of Civil Procedure, which is as follows: "No irregularity or improper conduct in the proceedings of the judges, or any of them, is such malconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected when he had not received the highest number of legal votes." See Whipley v. McKune, supra. But provisions which come under the category of "directory" may be so grossly violated as to give rise to a suspicion of fraud or unfairness, and the circumstances may be such that a court will not enter upon the task of inquiry whether or not this suspicion can be removed, because, in the nature of things, no evidence upon the point could be satisfactory. Tebbe v. Smith (Cal.) 41 Pac. 454. When, however, it may be easily shown that the departure from a strict compliance with directory provisions was not accompanied with fraud or any act affecting the result, and such showing is made, then the vote will not be rejected. Russell v. McDowell, 83 Cal. 70, 23 Pac. 183. In the latter case the subject is somewhat fully discussed in the opinion of the court delivered by Chief Justice Beatty. There the alleged misconduct was the failure of the election officers to comply with sections 1225, 1226, Pol. Code, which provide that the name and registry number of the voter, and in cities also the number of the street where he lives, etc., must be called out in an audible tone of voice by the officer receiving the vote, and the residence must be recorded by the poll clerk. The court, having stated the general rule as to directory provisions, say also that the neglect of such provisions designed to prevent fraud "is ground for rejecting the entire vote of a precinct if there is no means of purging the poll." And the court, in speaking of the omission of the officers in that case, further say: "It casts suspicion upon their integrity, and is sufficient, prima facie, to make out a case of fraud. No doubt, such omission is susceptible of explanation, and we are very willing to believe that the officers of these precincts erred through ignorance of the law, and were not actually guilty of fraudulent intent. But as the case is presented we cannot indulge that presumption. The officers were not called as witnesses, as they should have been, to prove that they acted as they did through ignorance, and not through fraudulent intent; and, in the absence of any rebutting proof on this point, we feel constrained to hold that the contestant made out a case of malconduct on the part of the election board." The rule to be deduced from these views is that, where the failure of an election board to comply with a directory provision is of such a character that it can be readily shown by competent proof that no fraud was committed and no harm done by such failure, and such proof is made, then the vote will not be rejected. And such was the character of the alleged misconduct in the case at bar. The provision of section 1252, Pol. Code, was not entirely ignored, for there were some bystanders present during the short time when others were excluded. The election officers no doubt thought, innocently, though erroneously, that it was proper to clear the room of all except two bystanders while they were making preparations for tallying. But the fact that no fraud was committed and no wrong done during the half hour was susceptible of easy proof, and such proof was made to the satisfaction of the trial court. The officers of the election were called as witnesses, "as they should have been" (Russell v. McDowell, supra); and upon their testimony, uncontradicted, the court made its finding. We think, therefore, that the refusal to reject the vote of the Second ward was correct. There is nothing in this conclusion inconsistent with Tebbe v. Smith, supra. The part of the opinion in that case invoked related to the conduct of the election officers of Lake precinct. In the first place, taking the ballot box away from the polling place during the day, leaving the ballots and all other materials at the polling room, was such a gross violation of the statute, and presented such opportunities for fraud, that a court might well decline to inquire whether actual fraud had been committed. But, in the second place, the decision was not based solely upon the removal of the ballot box, nor was it expressly said that such misconduct would itself warrant the rejection of the vote. That fact was mentioned in connection with the other and exceedingly important fact that the polls were not opened until 10 o'clock; and the cases cited in the opinion—Knowles v. Yates, 31 Cal. 82, and People v. Seale, 52 Cal. 72—were cases where the polls were not opened at the proper place, or at the proper time. When the polls are not opened until several hours after the time fixed by law, it is practically impossible to show satisfactorily that no voter was prevented from casting his vote. Moreover, provisions as to time and place of holding the election are mandatory. There are no other points made by appellant which are not covered by the above views. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

111 Cal. 425

WHITE v. CLARKE. (S. F. 224.)

(Supreme Court of California. March 5, 1896.)

Agreed Case—Requisites of—Affidavit.

1. Under Code Civ. Proc. § 1138, providing that parties to a question which might be the subject of a civil action may agree upon a case, and submit the same to any court, which would have jurisdiction of such action, an agreed case which shows that the right of action of one party depends on his right to enter certain lands under the homestead laws of the United States presents a question which cannot be the subject of an action in the state courts, and cannot be entertained.

2. An affidavit to an agreed case which states that the "statement" is a real controversy, and that the "contention" is in good faith, does not comply with Code Civ. Proc. § 1138, which requires it to state that the controversy is real, and the proceedings in good faith.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Proceeding on an agreed case between James White and J. F. Clarke. White appeals. Dismissed.

M. J. McGrath, for appellant. David Barry, for respondent.

HARRISON, J. This proceeding purports to have been instituted in the superior court of the city and county of San Francisco, under section 1138, Code Civ. Proc., for the purpose of obtaining a judgment of the court upon an agreed case. The document upon which the judgment was sought is prefaced by the statement: "The plaintiff and the defendant agree to submit this controversy without action, and present the following facts;" and, after setting forth certain facts, concludes: "Wherefore the plaintiff, as well as the defendant, agrees to submit this controversy, without action, upon the foregoing statement. Judgment of the court is respectfully prayed." It is stated in the "agreed case" that the defendant has acquired title to certain lands in San Francisco which are not within the boundaries of the patent issued to the city by the United States under a patent issued by the governor of the state, January 24, 1881, and, as impairing the effect of this fact and the sufficiency of the title thus acquired, is the statement: "That on January 12, 1895, the plaintiff being qualified to claim a homestead under section 2289, Rev. St. U. S., duly claimed said land as a homestead," together with a statement in the form of an argument on behalf of the plaintiff, in which are given various reasons why the patent issued to the defendant is invalid, many of which are based upon the existence of facts which are not set forth in the agreed case. The document also contains a stipulation that, if the patent is valid, the title of the defendant shall be sustained, whereas, if it is void, the plaintiff's claim to "enter the land as a homestead" is "proper." Following the foregoing "agreed case" are certain stipulations of other facts signed by persons purporting to be attorneys for the respective parties to the controversy; and at the end thereof is the following affidavit:

"Now comes James White, the plaintiff, and J. F. Clarke, the defendant, who, being duly sworn, deposes and says that the above and the foregoing statement of the case containing the facts above stated is a real controversy, and the contention is in good faith to determine the rights of the parties. James White. J. F. Clarke.

"Subscribed and sworn to before me, this 12th day of January, 1895. G. W. F. Cook, Justice of the Peace," etc.

The transcript does not contain any copy of the judgment, and only from certain recitals can it be ascertained whether any judgment has been given or entered. The only recital of the character of the judgment is the following statement, injected into the body of the agreed case, immediately preceding the aforesaid affidavit: "On June 21, 1895, judgment was given for defendant, and the same was duly entered August 8, 1895." But this was evidently no part of the original submission, as it relates to dates subsequent to the date of the affidavit.

From the foregoing statement it is apparent that the proceeding in the superior court was not of a character to entitle it to be entertained. Section 1138, Code Civ. Proc., provides: "Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have had jurisdiction if an action had been brought; but it must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties." The document, purporting to be an agreed case, fails to show any question in difference between the parties which might be the subject of a civil action. It does not show that either of the parties is in the possession of the land described therein, or is seeking to gain or to withhold from the other the right of possession; nor is any fact stated tending to show that the plaintiff has any right to question the title claimed by the defendant. The statement that the plaintiff "duly claimed said land as a homestead" falls far short of conferring upon him any interest in the land, or right to question the defendant's title; and whether the plaintiff would have the right to enter the land as a homestead under section 2289 of the United States Revised Statutes if the patent under which the defendant claims title is void cannot be the subject of a civil action in the courts of this state. The affidavit annexed to the agreed case is also insufficient to authorize the court to entertain the proceeding. Instead of showing that the controversy is real, its language is that the "statement of the case" is a "real controversy"; and, instead of stating that the proceedings are in good faith, it states that the "contention" is in good faith. The judgment is reversed, and the cause is remanded to the superior court, with directions to that court to enter an order dismissing the proceeding.

We concur: VAN FLEET, J.; GAROUTTE, J.

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111 Cal. 432

In re GRABER'S ESTATE. (S. F. 138.)

(Supreme Court of California. March 6, 1896.)

EXECUTORS—REVOCATION OF LETTERS—DISCRETION OF COURT.

Code Civ. Proc. § 1450, providing that the probate "court may upon notice" revoke letters testamentary of administration if an executor or administrator fails to file an inventory within three months, as required by section 1443, or within such further time, not exceeding two months, as the court shall, for reasonable cause, allow, is directory merely, and the question of revocation is within the discretion of the court on the facts in each case.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Petition by a legatee against executors for revocation of letters testamentary of defendants. From an order denying the petition, the petitioner appeals. Affirmed.

Ben. B. Haskell, for appellant. Andrews & Frank, for respondents.

GAROUTTE, J. This appeal is prosecuted from an order denying the petition and motion of appellant, a legatee, to revoke the letters testamentary of the respondents for failure to file an inventory within the time prescribed by law. The sections of the Code bearing upon this question are as follows:

"Sec. 1443. Every executor or administrator must make and return to the court, within three months after his appointment, a true inventory and appraisement of all the estate of the decedent," etc.

"Sec. 1450. If an executor or administrator neglects or refuses to return the inventory within the time prescribed, or within such further time, not exceeding two months, which the court or judge shall for reasonable cause allow, the court may, upon notice, revoke the letters testamentary or of administration," etc.

It is now claimed by appellant that, if the executor or administrator does not file his inventory and appraisement within the time allowed by the statute, his letters must be revoked when that fact is brought to the attention of the court, and that the court has no judicial discretion in the matter. We do not think such to be the construction placed upon the statute by the profession; neither do we think it justified by the language used. While section 1450 is a most salutary one, yet all the purposes which could possibly have actuated the legislative mind in enacting it may be fully served by holding its provisions directory, rather than mandatory. To revoke or forfeit letters testamentary or of administration, ipso facto, by a statute, is most rigorous treatment, and we would not be inclined to so construe the law, unless the intention of the lawmaking power to that effect was plainly manifest. Here no such intention is apparent; but upon the contrary, by the language itself, a discretion is vested in the lower court. The statute says the court may, upon notice, revoke the letters testamentary or of administration. The fact that such revocation can only take place after notice is a clear indication that the executor or administrator is to be given an opportunity to come before the court and show cause why his letters should not be revoked. Whether the cause shown be good or bad is a matter largely within the discretion of the trial court; and, when that court has investigated the question and adjudicated upon it, it will only be where a gross abuse of discretion has occurred that this court will interfere. We see no such abuse of discretion in this case, and the order appealed from is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

(111 Cal. 453)

PEOPLE v. KNUTTE. (Cr. 63.)

(Supreme Court of California. March 6, 1896.)

CRIMINAL LAW—ORDER GRANTING NEW TRIAL—REVIEW.

An order granting a new trial for insufficiency of the evidence to sustain a conviction will not be reviewed except for manifest abuse of discretion, though the evidence was wholly that of the prosecution, and sufficient if believed to prove all the material facts.

Department 1. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Christian Knutte was convicted of obtaining money and property by false pretenses, and from an order setting aside the verdict, and granting a new trial, the state appeals. Affirmed.

Atty. Gen. Fitzgerald, for the People. F. A. Hornblower, for respondent.

VAN FLEET, J. Respondent was tried for the offense of obtaining money and property by false pretenses. At the conclusion of the evidence in chief for the prosecution, the court advised the jury to acquit, for the reason that, in the judgment of the court, the case had not been established; and the case was then submitted to the jury upon the instructions of the court, without evidence on behalf of defendant or argument of counsel. The jury, notwithstanding the advice of the court, found the defendant guilty, and thereupon the court, of its own motion, made an order setting aside the verdict, and granting the defendant a new trial. From this order the people prosecute this appeal, the sole point made being that the action of the court was an abuse of its discretion.

The case is argued here by both parties upon the assumption that the new trial was granted upon the ground that the evidence was deemed insufficient to sustain the verdict; and, while no specific ground is stated in the order of the court, it may be safely taken, from the court's action in advising the jury to acquit, that this assumption of counsel is correct. It has been so repeatedly held here as to become axiomatic that where a new trial is granted upon this ground, or where it is one of various grounds upon which the trial court may have based the order, its action will not be disturbed, except in a case showing a manifest and unmistakable abuse of discretion. This discretion is, of course, not arbitrary, but, like any other judicial function, is to be exercised under the sanction of the judicial oath; and, the strong presumption being always that it was so exercised, it will require in any case a very clear showing to the contrary to overcome such presumption, and enable us to say that the power of the court in that respect was abused. While it is the exclusive province of the jury to find the facts, it is, nevertheless, one of the most important requirements of the trial judge to see to it that this function of the jury is intelligently and justly exercised. In this respect, while he cannot competently interfere with or control the jury in passing upon the evidence, he, nevertheless, exercises a very salutary supervisory power over their verdict. In the exercise of that power, he should always satisfy himself that the evidence as a whole is sufficient to sustain the verdict found; and if, in his sound judgment, it does not, he should unhesitatingly say so, and set the verdict aside. People v. Lum Yit, 83 Cal. 130, 23 Pac. 228. It can, of course, make no difference, in the exercise of this power by the court, that the evidence in the case was wholly that of the prosecution, and stands, in the sense at least that it is not controverted by evidence on behalf of defendant, without conflict. The same duty rests upon the judge in such a case as where the evidence is conflicting, to satisfy himself that guilt has been established; and, notwithstanding the evidence may be all one way, he is not required to believe it. "A court may reject the most positive testimony though the witness be not discredited by direct testimony impeaching him or contradicting his statement. The inherent improbability of a statement may deny it all claims to belief." Blankman v. Vallejo, 15 Cal. 638, 645. The judge has the witnesses before him, and, as suggested in People v. Lum Yit, supra, "an equal opportunity with the jury to observe the manner of the witnesses, the character of their testimony, and to judge of their credibility, and to discover their motives. He, too, ought to be satisfied that the evidence as a whole was sufficient to sustain the verdict. If he was not, it was not only the proper exercise of a legal discretion, but his duty, to grant a new trial. People v. Baker [39 Cal. 686], supra; People v. Ashnauer, 47 Cal. 98; People v. Hotz, 73 Cal. 241, 14 Pac. 856." Nor does it affect the question that the evidence in the case may have a legal tendency to prove all the material facts. Guilt is to be established beyond a reasonable doubt; and, while there may be some evidence to support each fact, this does not signify that it is necessarily such as to satisfy the conscience of the judge that a case is made which warrants conviction. Applying these principles to the record before us, we cannot say that the learned judge of the court below improperly exercised his discretion in the premises. In this view it is neither pertinent nor proper for us to review or comment upon the evidence, since another trial must be had. Nor, for the same reason, is it proper at this time to indicate our views upon the point urged by defendant, that the evidence is insufficient in law to warrant a conviction. That point should not be anticipated, since upon another trial the evidence may be so essentially different that it may not arise. The order is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(111 Cal. 484)

BEATON et al. v. REID et al. (S. F. 281.)[1]

(Supreme Court of California. March 10, 1896.)

HOMESTEAD—SALE ON JUDGMENT OF JUSTICE.

Under Civ. Code, §§ 1240, 1241, providing that the homestead shall be exempt from forced sale except on judgments recovered before the declaration of homestead is filed, and which constitute liens upon the premises, a homestead is not subject to forced sale under an execution issued on a justice's judgment which has not been recorded, so as to create a lien on the land, though the declaration of homestead was not filed until after the levy of the execution.

Department 1. Appeal from superior court, San Mateo county; George N. Buck, Judge.

Action by one Beaton and others against one Reid and others. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

Chas. W. Reed, for appellants. J. C. Bates, for respondents.

VAN FLEET, J. Execution based upon a judgment recovered by the appellant Reid in the justice's court of the city and county of San Francisco against the respondent Elizabeth Beaton, and which had been docketed in the superior court judgment docket of said city and county, was issued by the clerk thereof to the sheriff of San Mateo county, and by the latter levied upon the premises in dispute, situate in the latter county, on October 18, 1894, and notice of sale under said execution given. Subsequent to said levy, but before the sale, on October 26, 1894, the judgment debtor declared a homestead on the premises in due and proper form, and subsequently thereto brought this action to enjoin the sale. The sole question presented is whether the levy of the execution and the lien created thereby prevented the premises from being impressed with the character of a homestead to an extent to defeat such sale,—it being conceded that the judgment itself did not constitute a lien thereon. The instances and extent in which and to which a homestead is liable to be subjected to the demands of creditors of the homestead claimant are clearly and explicitly provided in the Civil Code: "The homestead is exempt from execution or forced sale, except as in this title provided." Section 1240. "The homestead is subject to execution or forced sale in satisfaction of judgments obtained: (1) Before the declaration of homestead was filed for record, and which constitute liens upon the premises." Section 1241. These provisions would seem to exclude by their terms the right to enforce the judgment in question against the homestead, unless the levy of the execution had the effect, as contended by appellant, to constitute the judgment, which was not otherwise such, a lien upon the premises. But it had not such effect. The lien of the execution is not that of the judgment; the execution neither creates a judgment lien nor extends a judgment lien once created. Bagley v. Ward, 37 Cal. 122; Rogers v. Druffel, 46 Cal. 654; Eby v. Foster, 61 Cal. 282. There is but one mode of constituting a justice's judgment a lien upon the lands of the judgment debtor, and that is the filing of an abstract thereof in the office of the recorder of the county in which the land is situated. Code Civ. Proc. § 900. But it is claimed that the levy of the execution vested appellant with a right to its satisfaction out of the land which was not subject to be defeated by a subsequently-acquired homestead therein. We see no distinction in principle, as to the mere effect in this regard, between an execution lien and the lien of an attachment. They both subserve a like purpose,—the one to hold the property until judgment, and the other until the sale; and it has been repeatedly held that an attachment lien is defeated by the intervention of a homestead right subsequently acquired. Wilson v. Madison, 58 Cal. 1; McCracken v. Harris, 54 Cal. 81; Sullivan v. Hendrickson, Id. 258. These cases proceed upon the principle that the statute providing for and protecting the homestead right is to be construed strongly in favor of its protection; that the statute has provided the instances in which the homestead may be taken on forced sale, and the right to so take it will be strictly limited to those instances. And this would seem to accord with the purpose and intention of the legislature, as it winds up the title of the Code upon the subject by declaring that "in no case shall it be held liable for the debts of the owner, except as provided in this title." Section 1265. In Sullivan v. Hendrickson, supra, after a review of the authorities, it is said: "The constitution seems to empower the legislature to authorize a declaration of homestead to be made at any time before sale." And this, we think, is what the legislature has done. The subject of homesteads is one wholly committed by the constitution to the legislature, with simply the general mandate that the latter shall protect it by law from forced sale. Const. art. 17. The extent of the right, therefore, and the mode of its protection, with the limitation of the rights of creditors therein, are purely matters of legislative prescription, and something with which we have nothing to do but construe and apply. As aptly suggested in Fitzell v. Leaky, 72 Cal. 477, 483, 14 Pac. 198: "With the policy of the law, or the abstract morality of a particular transaction, we have nothing to do.

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[1] Rehearing denied.

The doctrine bearing upon conveyances made to hinder, delay, or defraud creditors has no application to the creation of a homestead. If any doubt remained as to the intention of the legislature, it ought to be set at rest by the language of sections 1240 and 1241 of the Civil Code, which, after declaring generally that the homestead is exempt, enumerates as an exception that it is subject to sale in satisfaction of judgments obtained before the declaration of homestead was filed, 'and which constitute liens upon the premises.'" From these considerations we are satisfied that the levy of the execution in question did not have the effect to prevent the premises from being impressed with the homestead character at any time before the sale; and that, the lien of the execution not being one of those specified in the Civil Code for which the homestead can be taken, the judgment of the court below enjoining the sale and the execution of a deed thereunder was right, and should be affirmed. It is so ordered.

We concur: HARRISON, J.; GAROUTTE, J.

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111 Cal. 482

CITY STORE v. COFER. (S. F. 116.)

(Supreme Court of California. March 10, 1896.)

HOMESTEAD AND EXEMPTIONS—FILING OF DECLARATION—SUBSEQUENT DIVORCE.

A married woman's declaration of homestead, filed on lands on which she resided, and which were her separate property, is not so affected by subsequent divorce proceedings, in which no reference is made to the homestead property, as to render it liable to the payment of a debt not within the exceptions recited in Civ. Code, § 1265, exempting a homestead so declared from forced sale for any liability of the owner.

Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by the City Store (a corporation) against Susan Cofer, to subject a declared homestead to the satisfaction of a judgment debt. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

John H. Yoell and D. L. Thornton, for appellant. J. A. Fairchild, for respondent.

GAROUTTE, J. Defendant was a married woman residing upon certain real estate, her separate property. She filed a declaration of homestead thereon for the joint benefit of herself and husband. The homestead declaration contained all the statements and recitals demanded by the statute. Subsequently she obtained a decree of divorce from her husband. Neither by the pleadings in that action, nor by the decree of the court, was the matter of the homestead property adverted to. After the filing of the declaration, and prior to the divorce decree, plaintiff obtained a money judgment against defendant. Subsequent to the decree of divorce, plaintiff attempted to enforce its judgment by a levy and sale of the homestead property. It became the purchaser at such sale, and, basing its claims upon the title thus obtained, brings this action for possession of the realty.

Plaintiff's judgment was one which could not be enforced by a seizure and sale of the homestead property, and consequently no title was vested in the purchaser at such sale. Section 1265 of the Civil Code provides: "From and after the time the declaration is filed for record, the premises therein described constitute a homestead. * * * But in no case shall it be held liable for the debts of the owner, only except as provided in this title." The judgment held by plaintiff was not one of the debts provided for by that title of the Code, and necessarily the homestead was entirely exempt from its effect and operation. The case, in principle, appears to be similar to Roth v. Insley, 86 Cal. 134, 24 Pac. 853, where this court said: "Under the plain language of the statute just quoted, it would appear that, when the homestead was once declared, it remained as such, always exempt from forced sale as against any liability of the owner, only except as provided in the provisions of the title of which it was a part. And, as the debt here was not one for which, under that title, the property was liable, it must follow that the attempt to sell the property was forbidden by law, and a sale could vest no title in the purchaser." For the foregoing reasons the judgment is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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111 Cal. 471

HIBERNIA SAVINGS & LOAN SOC. v. WACKENREUDER et al.

(S. F. 180.)

(Supreme Court of California. March 10, 1896.)

CONSTRUCTION OF CONTRACT.

Defendant, who had borrowed money from plaintiff at 8 per cent. per annum, compounded monthly, applied for a renewal of the loan at 6 per cent.; and, in rejecting such application, plaintiff notified defendant that the existing loan would be "allowed to run at 6 per cent." *Held*, that such notification modified the original contract as to the rate of interest only, leaving in force the clause pertaining to the compounding of interest.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by the Hibernia Savings & Loan Society against Henry Wackenreuder and another to foreclose a mortgage. From a judgment for plaintiff, and from an order denying a motion for new trial, defendants appeal. Affirmed.

T. Z. Blakeman, for appellants. A. Tobin and Thos. F. Barry, for respondent.

GAROUTTE, J. This appeal is from the judgment, and from an order denying appellants' motion for a new trial, in an action for the foreclosure of a mortgage. The main point involved relates to the manner in which interest should be computed upon the principal of the note. It was computed by the court, in fixing the amount of the judgment, at 6 per cent. per annum, compounded monthly, and it is now claimed by appellants that only simple interest should have been allowed. The construction of the contract between the parties determines the question involved. The contract as to the original loan called for interest at the rate of 8 per cent., compounded monthly. Proceedings of foreclosure were begun upon such contract, whereupon the mortgagor made a written proposition to plaintiff, whereby he proposed "to pay enough on the existing mortgage to reduce it to $8,000, and to then give a mortgage for the sum of $8,000, to bear interest at the rate of 6 per cent. per annum." Plaintiff answered the mortgagor's proposition by the following resolution of its board of directors: "Application No. 11, V. Wackenreuder, for a renewal of his loan of June 29, 1881, at 6 per cent. Renewal declined, but present loan allowed to run at 6 per cent., and the attorney requested to grant a stay of 60 days." It will be observed that the foregoing proposition of the mortgagor was rejected, and it would seem, for that reason, that the case now stands exactly as though no such proposition had ever been made to the bank; but, after the rejection of that proposition, the bank, of its own motion, and without consideration, notified the mortgagor that it had reduced the rate of interest upon the loan to 6 per cent., and such reduction, being greatly to the benefit of the mortgagor, in the absence of anything to the contrary, we must assume was accepted by him. We think the only fair construction to be placed upon the bank's agreement or proposition to reduce the interest to 6 per cent. is the one placed upon it by the trial court. Before this time the note was drawing interest at the rate of 8 per cent., compounded monthly. The statement of the bank to the mortgagor only proposed to modify a single term of the note, and that was the annual rate of interest. No modification of the clause of the note pertaining to the compounding of the interest was mentioned in the bank's proposition, and we are bound to conclude that no modification as to that clause was contemplated, and that the original contract in that regard remained in statu quo. Some months intervened between the time when the judgment was ordered and the time when the findings of fact and conclusions of law were filed. Complaint is now made that interest for this period of time is computed in the judgment at the rate of 7 per cent. per annum. Appellants have not been hurt by such computation, even conceding the soundness of their contention; for, if the computation be wrong, then respondent is entitled to 6 per cent. interest, compounded monthly, in accordance with the terms of the note, and, so compounded, the present judgment would be increased rather than diminished. For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

111 Cal. 435

MATTHEWS v. CHABOYA. (S. F. 63.)

(Supreme Court of California. March 6, 1896.)

FRAUDULENT CONVEYANCES — KNOWLEDGE OF INSOLVENCY—PREFERENCES.

1. Under Insolvent Act, § 55, rendering invalid transfers by a debtor made within a month of the filing of a creditors' petition in insolvency, and in contemplation of insolvency, and with intent to give a preference to the transferee, provided the transferee had reasonable cause to believe that the debtor was insolvent, and that the transfer was made with a view of violating the insolvent act, a transfer so made is invalid, as fraudulent in law, without regard to the existence of actual fraud on the part of the transferee.

2. That a transfer was made within a month of the filing of the petition of insolvency, and out of the usual and ordinary course of business, does not show conclusively that it was fraudulent.

3. The failure of a creditor, taking the mercantile business of his debtor in payment of his claim, to investigate the financial status of the debtor, does not necessarily render the transfer fraudulent as to other creditors.

Department 1. Appeal from superior court, Monterey county.

Action by John L. Mathews, assignee of H. J. Hall, an insolvent debtor, against Fannie M. Chaboya. There was a judgment for defendant, and plaintiff appeals. Reversed.

Alexander & Dougherty, for appellant. S. F. Geil and J. J. Wyatt, for respondent.

GAROUTTE, J. This is an action brought by the assignee of an insolvent debtor to set aside a transfer of certain personal property, to wit, a merchandise business, made within one month prior to the filing of a creditor's petition in insolvency. The appeal is by the assignee from the judgment and order denying his motion for a new trial. The defendant was a creditor of the insolvent debtor, and took a transfer of the business in satisfaction of her debt. It is now claimed that that transfer was violative of section 55 of the insolvent act. In order that plaintiff may set aside this transfer, and recover the property transferred, under the provisions of the aforesaid section, he must establish four independent facts, to wit: (1) That the transfer was made within one month of the filing of the creditor's petition in insolvency, and with a view to give a preference to defendant; (2) that the transferror was insolvent, or in contemplation of insolvency, at the date of the transfer; (3) that the transferee, the defendant, at the time, had reasonable cause to believe that the transferror was insolvent; (4) that the transferee had reasonable cause to believe that the transfer was made with a view of violating or evading one or more provisions of the insolvent act.

It is first claimed that the evidence is insufficient to support the verdict. A creditor's petition for insolvency was filed within 30 days subsequent to the transfer, and it is beyond question that the transfer was made out of the ordinary and usual course of business. Tapscott v. Lyon, 103 Cal. 297, 37 Pac. 225. The transfer having been made out of the ordinary course of business, that fact was prima facie evidence that it was fraudulent. See last clause of the aforesaid section. And, when coupled with the additional fact that it was made within one month of the filing of the petition in insolvency, a prima facie case for a recovery is made. For this rule of evidence, declared by the section, not only refers to the intent or view with which the acts are done, but assuredly covers the question of the belief of the transferee as to the debtor's insolvency. That a transfer so made gives the transferee reasonable cause to believe the debtor insolvent was held in Ohleyer v. Bunce, 65 Cal. 544, 4 Pac. 549; Godfrey v. Miller, 80 Cal. 420, 22 Pac. 290; Chevalier v. Commins (Cal.) 39 Pac. 929. See, also, Tuttle v. Truax, 1 N. B. R. 601, Fed. Cas. No. 14,277; In re Dean, 2 N. B. R. 89, Fed. Cas. No. 3,700; North v. House, 6 N. B. R. 365, Fed. Cas. No. 10,310. Of course, this prima facie evidence of fraud is simply prima facie, and may be rebutted by any competent evidence. In this case, the defendant took the stand and testified to facts which, if believed by the jury, were sufficient to create a substantial conflict in the evidence as to the practice of any fraud upon the provisions of the insolvent act. The jury evidently believed her statements, and found a verdict accordingly; and we are not disposed to disturb its action upon this ground. As to cases of conflicting evidence in this regard, see Bernheim v. Christal, 76 Cal. 567, 18 Pac. 683; Haas v. Whitter, 97 Cal. 412, 32 Pac. 449; Grunsky v. Parlin (Cal.) 42 Pac. 575. It is further insisted that it was the duty of the defendant, before purchasing, to make an investigation as to the financial status of the insolvent. Cases sometimes arise where a party is put upon inquiry to this point, but the rule is not at all universal, and the true doctrine would appear to be, has the transferee, in view of all the surrounding circumstances, reasonable cause to believe that the debtor is insolvent at the date of the transfer?

Appellant complains of various instructions of the court given to the jury. The court told the jury: "The mere fact that, at the time the defendant purchased the stock of goods mentioned in the complaint from H. J. Hall, the said H. J. Hall was in fact insolvent, and unable to pay his debts, and that a petition in insolvency was filed against him within 30 days from the date of said sale, is not sufficient, alone, to entitle the plaintiff to a judgment. But he must also show, by a preponderance of the evidence, that said Fannie M. Chaboya knew, or had reasonable cause to believe, that said H. J. Hall was insolvent, and she bought said stock of goods for the purpose of defrauding the other creditors of their debts." Aside from the last clause of this instruction, we see nothing objectionable here. Certainly all the facts therein enumerated must be proven. The court does not tell the jury what must be the particular character of evidence necessary to establish them, but that they must be established by some competent evidence cannot be questioned. As we have seen, proof that the transfer was made out of the ordinary course is, prima facie, sufficient to establish its fraudulent character. As a concluding portion of the instruction, the court told the jury that, in order to find for plaintiff, it must appear that the defendant bought the stock of goods for the purpose of defrauding the other creditors of their debts. We think this language is too strong and too broad, and prejudicial to plaintiff. In a case like the present one, there is no element of actual fraud necessarily involved. The defendant may have acted with entire honesty and good faith, as far as she was concerned, and still the transfer be void. Promptness and energy exercised by her in securing her claim may be said to be commendable, rather than fraudulent. It is a legal fraud, rather than fraud in fact, that renders the transfer void. It is fraud upon the insolvent law, rather than actual fraud practiced upon the creditors. It was not necessary for the jury to find, as a fact, that the defendant bought the stock for the purpose of defrauding other creditors, before they were justified in declaring the transfer void by their verdict, and we hold the instruction to be erroneous.

The court further instructed the jury as follows: "If you find, from the evidence, that, at the time the defendant purchased the goods mentioned in the complaint from H. J. Hall, she did not know that said H. J. Hall was insolvent, or have reason to know the same, but, on the contrary, that she was in entire ignorance that said Hall owed more than he could pay, then in that event her act was not fraudulent, and you must find for the defendant." We think it may be fairly said that this instruction omitted the question as to whether or not the transfer was in the ordinary course of business, and such fact was a necessary element in order that the instruction should express a perfect exposition of the law bearing upon the question. The court further told the jury "that if, after considering all the evidence in this case, you find that the conduct of the defendant, Mrs. Chaboya, can be reconciled with fairness and honesty on her part, then you must find a verdict for the defendant." As we have had occasion to remark, this instruction is too broad, and not sound as a principle of law. Honesty and fairness, as those words are ordinarily and commonly used, are not necessarily involved in this character of litigation, and the instruction, by the most liberal view that may be taken of it, at least tended to mislead the minds of the jury. If the provisions of section 55 of the insolvent act are violated, the transfer is void; and this is true, regardless of any question of honesty, fairness, good faith, or actual fraud.

We find no other matters in the record demanding our attention. For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; VAN FLEET, J.

(111 Cal. 473)

CHARNOCK et al. v. HIGUERRA et al.

(L. A. 76.)[1]

(Supreme Court of California. March 10, 1896.)

RIPARIAN RIGHTS — IRRIGATION — RIGHT TO PUMP WATER FROM STREAM.

1. A riparian owner may pump water from a stream for irrigation purposes, provided he takes no more than his proportionate share, the method of diversion being immaterial.

2. The amount of water which a riparian owner may take for irrigation purposes is not limited to that necessary for land to which the water may be led in ditches by the force of gravity, but extends to the taking, by pumps or otherwise, of water necessary to irrigate lands above the level of the stream.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by John J. Charnock and others against Francisco Higuerra and others for an injunction. Judgment for defendants, and plaintiffs appeal. Affirmed.

E. E. Howard, for appellants. R. Dunnigan, for respondents.

VAN FLEET, J. This is an action brought by several riparian proprietors against certain persons above them on the stream, to restrain them from diverting any of the waters of the stream. The complaint alleges that the plaintiffs are riparian proprietors, and as such entitled to all the waters of the stream; that the defendants are not entitled to use any of the water for any purpose; and that they, by means of certain machinery, artificially and wrongfully raise and divert from the stream a large amount of the waters thereof, for the purpose of irrigating certain lands not of right irrigable from the stream, and which do not so lie as to be irrigated by the waters of said stream "diverted therefrom by any natural means" on said lands. The facts found by the court are, in substance, that both plaintiffs and defendants are riparian proprietors on the stream, the lands of defendants being above those of plaintiffs, and that neither plaintiffs nor defendants have any right to the waters of the stream, except as such riparian owners; that all of the lands of the plaintiffs, and 30 acres of the lands of the defendants, are so situated that the water of the stream can be diverted and conducted thereon solely by natural gravity from dams in the stream, situated within the limits of said lands, respectively, without backing the water upon the lands of the owners next above them, and that no other part of the lands of the defendants can be irrigated in that manner; that the defendants have erected pumping machinery and pumps on their land, and, by means thereof, pump water from the stream onto land belonging to them, bordering on the stream and within its watershed, but which lie too high to be irrigated solely by natural gravity from dams situated within the limits of their lands without backing the water upon the lands of others above them; that all of the lands of both parties are dry, and of little value without irrigation, but are of great value and very productive when irrigated; that defendants have not used, and do not threaten or propose to use, more than their just proportion of the water of the stream. On these findings, judgment was entered in favor of defendants, with leave to any of the parties at any time to "maintain another action to determine the exact proportion of the water of said creek which the respective owners may use." A portion of these findings is attacked as unsupported by the evidence, but we think that the evidence fully justifies them in the particular in which they are so attacked. The only question, then, is whether the findings support the judgment.

1. It is contended by appellants that a riparian proprietor has not, for the purpose of irrigation, the right to raise water by means of pumps. No authorities are cited in support of this contention, and counsel states his inability to find any. So far as we can understand, this argument is based on the meaning of the word "irrigate," which counsel contends is "to convey water by ditches," and on the alleged universal custom in the past to employ only such means in irrigation. As to the meaning of the word "irrigation," counsel cites some doubtful passages from civil law writers; but it is evident that this court, in holding, as it has repeatedly held, that riparian proprietors have the right to use a reasonable proportion of the water of the stream to irrigate their lands, used the term in no such restricted sense. The Latin word from which it is derived means, primarily, to convey water to or upon any thing, and, more generally, to wet or moisten anything; and the ordinary definition in our language is to water lands, whether by channels, by flooding, or simply by sprinkling. The mere method of obtaining the water with which to irrigate has nothing to do with the process of irrigation, or the meaning of the word. There was no proof in this case of any such custom as is claimed by appellants; and, if we can take judicial notice of such a matter at all, we are unable to say that pumping has never been used for such purpose. It may be that, owing to the comparatively greater expense of that method,

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[1] Rehearing denied.

it has been little used in the past; but, if improvements in machinery have made or shall make that method practicable, we see no reason why riparians proprietors may not, like others, take advantage of such improvements. In fact it has always been considered that the reasonableness or lawfulness of any given diversion of water is in no wise affected by the mere mode of diversion. Thus, in Elliot v. Railroad Co., 10 Cush. 191 (cited with approval in Lux v. Haggin, 69 Cal. 402, 404, 10 Pac. 674), Chief Justice Shaw said, "One man may take water from a perennial stream of moderate size, by means of buckets or a pump,—for the mode is not material,—to water his garden." And in such a case, he says, "the water would be used for irrigation" and such "might be regarded as a reasonable use." So this court has repeatedly held that a prior appropriator of water may change, at pleasure, the place or mode of his diversion, so long as others are not injured by such change. And in Earl of Norbury v. Kitchin, 7 Law T. (N. S.) 685, it was held that a riparian proprietor, so long as he took no more than his reasonable share of the water, might take water from the stream by pumping machinery, elevate it into a reservoir, and thence convey it by pipes to other land, not riparian, and there use it; the court holding that neither the mode of diversion nor the use to which the water was actually applied was material,—the only question being whether or not the defendant had taken more than his reasonable share.

2. But appellants claim, as we understand them, that, whether the particular mode is material or not, the mode by which the land of a riparian proprietor can possibly be irrigated is a material factor in ascertaining what portion of the water he may divert for irrigation. They contend that a riparian proprietor cannot be allowed to use any portion of the water of the stream to irrigate land which, though bordering on the stream, lies so far above it that water cannot be conducted thereon solely by natural gravitation from the stream, without the use of any appliances other than ditches originally on such land and dams situated thereon, and which will not back the water on the lands of other persons. In other words, the reasonable proportion of water which any riparian proprietor may withdraw for irrigation is made to depend, primarily, upon the area of his land which can be irrigated in that particular manner. In the first place, that question does not properly arise in this case. The complaint was framed on the theory that the defendants were not riparian proprietors at all, and had no right to divert any water. No issue was tendered as to what amount or proportion of the water of the stream could lawfully be used by the defendants, if they had the right to use any portion. It was denied that they had any rights to the stream, and the complaint furnished no data from which any rights of the parties, as tenants in common of the water, could be determined. Nevertheless, as the question seems to have been treated as an issue, evidence being introduced on the subject, apparently without objection, and as the court below did, to a certain extent, consider it, it calls for consideration at our hands. No authorities whatever are cited by appellants in support of this contention, nor can we find that any such doctrine has ever been even suggested by any court or writer. Appellants do cite some cases to the point that riparian diversion must be "on the bank of the proprietor," but the judgments in those cases do not sustain that doctrine, and we are not prepared to say that any such rule exists. It is, however, not necessary to decide that question, for its determination would shed no light on the subject now under consideration. The only question now is whether the mere altitude of this land can deprive the riparian owner of the right to irrigate it. No rules have ever been laid down by this court for determining the relative and proportional rights of riparian proprietors to the use of water for irrigation, nor has any case come before us in which we could properly determine what are the rules on that subject. But, whatever difficulties may arise in matters of detail, that problem must find its solution in an application of the principles upon which the right to use water for that purpose at all is based. That right, as recognized in the decisions of this court, is founded upon the proposition that in an arid country the use of water for irrigation is of such vital consequence that, of necessity, it must be considered as embraced within the spirit of the category of rights accorded by the common law to riparian proprietors. The common-law rule, as interpreted in this country, is that the right to the waters of the stream, with certain exceptions, not material here, belongs to the riparian proprietors in common and equally, and may be exercised by each as the necessities of the situation may require, only so as not to infringe upon the equal rights of the others. As irrigation is here a necessity of the situation, resulting from climatic conditions, the right to use a just and equal portion of the water for that purpose has been held to be an essential part of the riparian ownership.

Such being the foundation of the right, it is evident that the restriction contended for by appellants is inconsistent with the rule itself. The right to use the water for this purpose results from the need of water upon the land. Assuming this need, in any given case, to exist equally as to all the riparian land, the respective rights of the proprietors to divert water for this purpose must be in proportion to their respective ownerships upon the stream. No other method would conform to the rule of equity. If every riparian proprietor on a given stream owned the same quantity of land, with the same frontage on the stream, and with the same susceptibility to and need of irrigation, each would be entitled to precisely the same quantity of water for that purpose. We do not now decide how far a variation in any one of those factors would affect the question, nor whether all of them are necessarily to be considered in any case. But it must necessarily be true, from the very nature of the right, that in no case can one proprietor be deprived of this just and equal proportion merely because his land, by reason of its altitude or level above the stream, cannot be irrigated by the same method employed on some other land. That the rule contended for by appellants would be utterly inconsistent with the very foundations of the riparian doctrine in this country will readily be seen by observing its results in particular instances. According to appellants' theory, none of the waters of the Colorado river, in the greater part of its course, can ever be used by the riparian owners for irrigation, for none of them can erect a dam high enough to divert any water by gravity on his own land without backing the water upon his neighbor. The same is true of many important streams in the mountainous districts of this state, now extensively used for irrigation. Yet nowhere is irrigation more needed than in such localities. Coming next to the level plains, we find streams with so little fall that diversion by a dam on the very tract of land to be irrigated is only possible on tracts having very considerable frontage on the stream. Suppose six adjoining proprietors on such a stream, neither of whom can divert the water on his own land in the manner required by appellants. According to appellants' contention, they could not, even by agreement among themselves, divert the water on the land of one, and carry it to the land of another, of their number, or pump it onto the land of any of them. They must permit all the water to flow down to the more fortunate proprietor below, whose acres are thousands to their hundreds. And yet, if one of the six should buy the lands of the others, he would then be entitled to divert the water. Such are some of the consequences, suggesting themselves to the mind, of the rule we are asked to declare, and they show clearly that the mode of diversion of the water is a false quantity in the discussion. Whatever be the just proportion of water to which any riparian proprietor is entitled, that proportion cannot be diminished by the fact that, in order to utilize it, he must raise it from the bed of the stream by pumps or other similar appliances. Every diversion of water from a stream is artificial,—a disturbance of the natural order of things. A dam or a ditch is as much an artificial mechanism as a pump,—it may, indeed, be much more so; and the one alters the natural conditions in the same sense that the other does. The right to take the water at all is a right to change the ordinary course of nature; and the methods employed, so long as their use does not infringe the like and equal rights of others, are immaterial. We do not wish to be understood as now deciding how, in any given case, the respective proportions of the different owners upon a stream are to be determined. Whether they are to be ascertained according to the extent of ownership or frontage along the stream, or according to the area of land bordering on the stream, or the amount of land needing or susceptible of irrigation, or the character of the soil, or according to several or all of these circumstances, or other circumstances that may exist, has never been decided, nor has there been, so far as we know, any opportunity for deciding it. We merely hold that the mere mode of diverting the water from the stream, so long as that mode does not deprive others of their equal rights, is not a factor to be considered. We will add, in view of any further effort that the parties may make to obtain a judicial determination of their respective rights in this stream, that a final and satisfactory adjustment can never be had without the presence of every person having any right in the stream, and that all the facts which can possibly bear on the question should be laid before the court. In the present case, as we have suggested, no sufficient data are furnished by the pleadings or evidence for a determination of that question, and the learned judge of the court below would have been justified in no other disposition of the case as presented than the one made. The judgment and order are therefore affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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111 Cal. 514

STORKE v. STORKE. (S. F. 398.)

(Supreme Court of California. March 11, 1896.)

APPEAL—VACATION OF JUDGMENT.

A party cannot, after causing a judgment to be vacated, have the same judgment reviewed on appeal.

Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by C. A. Storke against Yda Addis Storke for a divorce. Subsequent to an order vacating a decree in favor of plaintiff, on defendant's petition, defendant appeals from the decree so vacated, which appeal plaintiff moves to dismiss. Dismissed.

Grant Jackson, Thos. McNulta, S. E. Crow, and Roger Johnson, for appellant. B. F. Thomas, A. A. Ogelsby, and T. M. Osmont, for respondent.

PER CURIAM. This action was brought by the plaintiff, in the superior court for the county of Santa Barbara, for a divorce between him and the defendant, and the case was tried and findings therein filed January 14, 1895. Judgment was thereupon entered

January 18, 1895, dissolving the marriage theretofore existing between them, and directing that the plaintiff pay to the defendant the sum of $250 alimony and $200 counsel fees. The money part of the judgment was paid by the plaintiff and received by the defendant, and on the 6th of November, 1895, the defendant filed a petition to vacate and set aside the judgment thus entered, and, the plaintiff having answered the said petition, the matter was heard by the court, and an order made by it, and entered in its minutes January 7, 1896, "that said findings, decision, and decree, and judgment in favor of plaintiff, and against the defendant, Yda Addis Storke, filed and entered on the 14th day of January, 1895, and the said decree and judgment in favor of plaintiff, C. A. Storke, and against defendant, Yda Addis Storke, filed and entered January 18, 1895, decreeing a divorce between said plaintiff and said defendant, be, and each of them are hereby, vacated and set aside." January 16, 1896, the defendant appealed to this court from that portion of the aforesaid judgment of January 18, 1895, decreeing a divorce between her and the defendant. The respondent now moves to dismiss the appeal, upon the ground that, at the time the appeal was taken, the superior court had made the aforesaid order vacating the said judgment, and that there was no existing judgment from which an appeal could be taken.

The motion must be granted. The defendant cannot, after having had the judgment set aside upon her own motion, treat the same judgment as valid for the purpose of having it reviewed upon an appeal. She does not question the sufficiency of the order vacating the judgment, if, indeed, it would be competent for her to dispute an order made upon her own motion; and her attorneys have filed an affidavit upon this motion, in which they state that "they are of opinion that said order is just, and was properly made," but that this appeal is taken out of abundant caution, so that, if the order vacating the judgment should be reversed, she may still have an opportunity to secure a reversal of the judgment in this court. Upon this motion we cannot, however, consider whether the court erred in making the order setting aside the judgment, any more than we could in a case where the court has granted a new trial, and thereby vacated a judgment previously entered. The record upon this motion contains findings by the court of many facts and circumstances which induced it to make the order, but they are immaterial for the purpose of determining the effect to be given to the order. Only the order itself can be considered on this motion. It is within the jurisdiction of the superior court to vacate a judgment entered by it by other proceedings than a motion for a new trial. If it has committed error in thus vacating the judgment, it can be corrected on a direct appeal; but, on a collateral attack, the order will be deemed to have been properly made. The appeal is dismissed.

(111 Cal. 516)

DUNCANSON v. WALTON et al. (S. F. 67.)[1]

(Supreme Court of California. March 11, 1896.)

SALE OF LAND—BREACH OF CONTRACT—RECOVERY OF MONEY PAID.

Plaintiff, having bought land under an agreement that he should make monthly payments, the money to be paid to both the vendors, and to be payable at the office of M., can, as for breach of contract, recover money already paid, on notice from one of the vendors to make no further payments till further notice, and from the other to pay the money to him alone, and on refusal of M. to receive money tendered to him, no further notice having been given before action was brought by plaintiff, seven months thereafter.

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by one Duncanson against one Walton and another. Judgment for plaintiff. Defendants appeal. Affirmed.

Blake, Williams & Harrison and Benjamin Romaine, for appellants. R. M. Fitzgerald and Carl H. Abbott, for respondent.

PER CURIAM. The plaintiff and his assignors entered into separate agreements with the defendants for the purchase of certain lots of land, by which they were to pay a certain portion of the purchase price at the dates of the agreements, and other installments thereafter monthly, until the whole price should be paid, at which time the defendants were to execute a conveyance of the lands. After several monthly payments had been made, differences appear to have arisen between the defendants in regard to the land, and notices were sent to the plaintiff and to his assignors by the defendant Walton, directing them not to make any more payments on the agreement until further notice; and from the defendant Shelper, not to make payments to any one but to him. In the agreements it had been provided that the money should be paid at the office of McGarvie & Co., in San Francisco, and notices were also sent by McGarvie & Co. not to pay any more money until further notice. McGarvie & Co. also refused to receive the money when it was tendered to them. Thereupon the present action was brought to recover the amount of the payments that had been made by the plaintiff and his assignors. The court rendered judgment in favor of the plaintiff, and the defendants have appealed. upon the ground that the findings are not sustained by the evidence. The complaint is in the form of an action for money had and received, and the findings are to the same effect.

The evidence before the court was ample to justify it in finding that the defendants had violated their agreement, and had sufficiently indicated to the purchasers that they would no longer be bound by its terms. The provision in the agreements that the purchasers should pay the monthly installments to the defendants implied a corresponding agreement on the part of the defendants that they would receive these payments when they should be tendered; and the further provision that the money should be payable at the office of McGarvie & Co. carried with it an agreement on the part of the defendants that the payments might be made to McGarvie & Co. The subsequent direction to the purchasers not to make any more payments until further notice, and the refusal of McGarvie & Co. to receive the money when it was tendered, were evidence from which the court was authorized to find that the defendants had refused any longer to be bound by the agreements, and, as a consequence, that the purchasers were entitled to a return of the money already paid. The direction not to make any more payments until further notice was given in September, 1892, and the present action was not commenced until May, 1893; and it was not shown that any further notice had been given, or that the defendants had made any qualification of the directions given in September. The provision in the agreement that the money should be paid to both of the defendants would authorize a payment to either, and the notice by the defendant Shelper to the purchasers that they should pay the money to him alone was in repudiation of this provision, as well as of that which made it payable at the office of McGarvie & Co. The proposition of the appellants that it does not appear that these notices were sent to the plaintiff and to one of his assignors is without merit. The plaintiff produced the notices to himself and to his assignors at the trial, and the genuineness of the signatures was admitted by the defendants. The judgment is affirmed.

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[1] Rehearing denied.

111 Cal. 539

KNOX v. RAINBOW et al. (No. 19,561.)

(Supreme Court of California. March 11, 1896.)

CERTIORARI—LIQUOR LICENSE—ORDER OF COUNTY SUPERVISORS.

1. An order of the board of county supervisors, denying an application for a license to sell liquor, cannot be reviewed on certiorari.

2. Such order has no mandatory force, and does not estop the applicant from again soliciting a license.

In bank. Appeal from superior court, San Diego county.

Certiorari by A. L. Knox against J. P. Rainbow, J. Jasper, A. G. Nason, John Judson, and W. Wetzell, board of supervisors of San Diego county, to annul an order denying an application for a license. From a judgment in favor of plaintiff, defendants appeal. Reversed.

M. L. Ward, for appellants. Copeland & Goodbody, for respondent,

TEMPLE, J. This is an appeal from a judgment rendered by the superior court annulling, on certiorari, the action of the board of supervisors of San Diego county denying an application for a license to sell liquor, at retail, in El Cajon township, in said county.

The parties have mistaken their remedy. If an official or a board refuses to perform a duty specially enjoined by law, it is absurd to declare such refusal void. Setting aside the order will not affect the fact, if it be a fact, that the board has refused to do its duty. An order was not necessary to show such refusal. If it had refused to make any order in the premises, or to consider the application, the effect would be the same. If the board had any discretion in the matter, and it was not a duty imperatively imposed by law, then their abuse, if it was abuse, cannot be so reviewed. Their action in such case would be clearly within their jurisdiction. It is not necessary to consider the question as to whether such action was judicial.

But, waiving all other questions, of what advantage can it be to plaintiff to have the order vacated? There is no mandatory force in such an order. The effect of it, if it had any, would be to place the matter before the board as though no action had been taken. But there is no estoppel in such an order. It does not prevent the applicant from again soliciting a license. It is not therefore an injury to him. The judgment is reversed, and the cause remanded, with directions to the superior court to dismiss the proceedings.

We concur: GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.; McFARLAND, J.; HENSHAW, J.

111 Cal. 519

HIBERNIA SAVINGS & LOAN SOC. v. LEWIS et al. (S. F. 309.)

(Supreme Court of California. March 11, 1896.)

APPEAL — WAIVER OF SERVICE OF NOTICE —PARTIES.

1. An appellate court does not acquire jurisdiction of a party who has waived service of the notice of appeal, unless, in addition, he has given notice of appearance, either in person or by attorney, as required by Code Civ. Proc. § 1014.

2. In foreclosure, after judgment and sale, the purchaser and the party against whom a writ of assistance was ordered are the only necessary parties to an appeal from that order.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action in foreclosure by the Hibernia Savings & Loan Society against Anna A. Lewis, J. D. Boyer, and others. From orders denying a motion to vacate the judgment, and granting a writ of assistance against him, defendant Boyer appeals. Plaintiff moves to dismiss both appeals. Appeal from the order refusing to vacate the judgment dismissed. The motion to dismiss the appeal from the order granting a writ of assistance is denied.

J. D. Boyer, in pro. per. Tobin & Tobin, for respondent.

HARRISON, J. This action was brought for the foreclosure of a mortgage executed to the plaintiff by the defendant Lewis. The Santa Cruz Rock Pavement Company was made a defendant under an allegation that it claimed some interest in the mortgaged lands, and filed an answer setting forth its claim of lien. Judgment was rendered in favor of the plaintiff for the amount of its claim, and also in favor of the pavement company, and directing a sale of the mortgaged premises, and the application of the proceeds to the payment of the plaintiff's claim, and the surplus, if any there be, to the payment of the claim of the pavement company. Thereafter J. D. Boyer, claiming to have succeeded to the interest of the mortgagors in the land by conveyance from them subsequent to the commencement of the foreclosure suit, served upon the attorneys for the plaintiff, and for the pavement company, a notice of motion to vacate the judgment. It does not appear whether the mortgagors, or either of them, were served with this notice, or were before the court upon the hearing of the motion. This motion was denied, and from this order Boyer has appealed. The notice of appeal is directed to the attorneys for the plaintiff alone, and was neither directed to nor served upon the pavement company or its attorneys. Prior to giving notice of the aforesaid motion, the mortgaged premises were sold to the plaintiff by virtue of the judgment; and, after the issuance of the sheriff's deed upon said sale, the plaintiff, upon affidavit that the lands were withheld by Boyer, and upon notice to him, applied for a writ of assistance, which was ordered by the court to be issued. From this order, Boyer has also appealed, and has served his notice of appeal upon the plaintiff alone. The plaintiff now moves to dismiss each of the appeals, upon the ground that no notice of the appeal was served upon the pavement company. Subsequent to giving notice of this motion a document was filed in this court, signed by the attorneys for the pavement company, waiving service of the notice of the appeals by the defendant Boyer.

1. The pavement company was an "adverse party" upon the appeal from the order refusing to vacate the judgment, and without its presence this court would have no jurisdiction to reverse that order, and thus impair the rights which the judgment conferred upon it. The principle upon which an appeal is dismissed for failure to serve the adverse party with a copy of the notice of appeal is that, without his presence, the appellate court has no jurisdiction to render a judgment affecting his interests in the matter appealed from. If his interests will not be affected by a reversal or modification of the judgment, the want of such service will not deprive this court of jurisdiction; and, as it is only necessary that such adverse party be before the appellate court in such a manner that he will be bound by its judgment, it is immaterial whether his presence is by a voluntary appearance, or whether he has been brought here by a hostile notice from the appellant. A respondent who is properly before the court, and who claims that another party to the action is an adverse party, who should also be before the court, cannot object to the manner by which the court obtains jurisdiction of such party, whether it be by his voluntary appearance, or upon the service of a notice of the appeal. The pavement company has not, however, appeared in this court, or authorized an appearance here for it. The document waiving the service of the notice of appeal is ineffective, unless followed by some other act equivalent to an appearance, by which it would be bound by the judgment of the court. As the notice of appeal herein is directed to the plaintiff alone, its service upon the pavement company would not have the effect to bring that defendant before the court (Williams v. Bergin, 108 Cal. 166, 41 Pac. 287); and the waiver of such service would be equally ineffective (Investment Co. v. Merrill, 108 Cal. 490, 41 Pac. 487). The notice of appeal, by which the adverse party is brought under the jurisdiction of this court, corresponds to the summons by which he is brought before the superior court, although the service thereof, instead of being personal, may be made upon his attorney. The notice itself, like the issuance of a summons, may be waived. A voluntary appearance will be equivalent to a personal service of the notice, but the mere waiver of the service is insufficient. There must, in addition, be given a notice of appearance, either in person or by an attorney. Code Civ. Proc. § 1014.

2. Upon the appeal from the order granting a writ of assistance, the pavement company is not an adverse party. By the sale of the mortgaged premises and the execution of the sheriff's deed thereunder, the pavement company has ceased to have any interest in the judgment directing the sale of the land, or in the land which is sold. Only the purchaser at that sale, and the party against whom the writ of assistance was ordered, are necessary parties to the appeal from that order.

The appeal from the order refusing to vacate the judgment is dismissed. The motion to dismiss the appeal from the order granting a writ of assistance is denied.

We concur: GAROUTTE, J.; VAN FLEET, J.

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5 Cal. Unrep. 292

PEOPLE'S DITCH CO. v. '76 LAND & WATER CO. et al. (Sac. 41.)

(Supreme Court of California. March 10, 1896.)

PARTIES—CORPORATIONS—POWER TO SUE—EVIDENCE.

1. Under Code Civ. Proc. §§ 379, 389, providing that one having an interest in the con-

troversy, or whose presence is necessary to a final determination of it, may be brought into an action as defendant, the court may order one who purchased rights in the property in controversy after issue joined on the original complaint to be made defendant by an amended complaint.

2. A de facto corporation may sue and assert its corporate character as against the world, except in a direct proceeding by the attorney general to test its right to its franchise.

3. Where there is a sharp and substantial conflict of evidence, the findings of the trial court will not be disturbed.

Department 1. Appeal from superior court, Tulare county.

Action by the People's Ditch Company against the '76 Land & Water Company and the Alta Irrigation District to enjoin a diversion of water. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

W. S. Goodfellow and C. W. Cross, for appellants. Bradley & Farnsworth and Alfred Daggett, for respondent.

PER CURIAM. Appeal from the judgment and from an order denying a new trial in an action by the respondent, as a prior appropriator, to enjoin the defendants from diverting water from Kings river so as to interfere with respondent's appropriation; judgment being in favor of respondent, enjoining such diversion.

1. The demurrer of the defendant Alta Irrigation District to the amended or supplemental complaint making it a defendant, upon the ground that it was improperly joined as a defendant in the action, was properly overruled. That defendant having, subsequently to issue joined on the original complaint, taken a conveyance from the '76 Land & Water Company of all the latter's rights to divert the waters of Kings river, together with its canal and ditches by means of which such diversion was made, and under which conveyance the vendee claimed the right to make diversion of the waters of said river to the like extent claimed by its vendor, it clearly became a necessary party to a complete determination of the controversy; and, that fact being brought to the attention of the court, it was properly ordered that the vendee be brought in as a defendant. Code Civ. Proc. §§ 379, 389; Robinson v. Gleason, 53 Cal. 38.

2. Assuming that the defendants' objection to the introduction in evidence of plaintiff's articles of incorporation, for their want of strict conformity to the requirements of the Civil Code, should have been sustained, the error in admitting the paper is without prejudice. The complaint alleged that the plaintiff was at the commencement of the action, and since the year 1872 has been, a corporation duly incorporated under the law, and since said date has been acting in good faith as such corporation, and there was evidence sufficient to support the finding of the court as to the de facto character of the corporation. This being so, it became immaterial whether plaintiff was in fact a corporation de jure or not, since its de facto character entitled it to maintain the action, and assert its corporate character as against all the world, except the state in a direct proceeding by the attorney general to test its right to such franchise. Code Civ. Proc. § 358; People v. La Rue, 67 Cal. 530, 8 Pac. 84.

3. The point most seriously contended for is that the evidence does not support the findings in certain material respects; and, by reason of such contention, we have carefully reviewed the evidence contained in a somewhat voluminous record. As a result of such examination, we are constrained to hold that the contention cannot be sustained. While, in one or two particulars, we are inclined to think the evidence preponderates somewhat in favor of the view of the facts as contended for by defendants, we are nevertheless satisfied that in these respects, as in all others, there is a sharp and substantial conflict, which fact precludes us from disturbing the findings of the trial judge. The judgment and order are affirmed.

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111 Cal. 488

PETALUMA SAV. BANK v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 334.)

(Supreme Court of California. March 10, 1896.)

RECEIVER IN DIVORCE CASE—EFFECT—ENFORCEMENT OF LIENS—ABUSE OF DISCRETION —MANDAMUS.

1. Civ. Code, § 140, provides that the court may require the husband in a divorce case to give reasonable security for alimony, and may enforce the same by the appointment of a receiver. *Held*, that a receiver appointed in such case takes the property of the husband, subject to all prior liens, and that the holders of such liens may take such proceedings elsewhere as the law exacts for preserving and enforcing the liens, according to their priority, without regard to the mere volition of the court or judge making the appointment.

2. Where, in such case, a receiver is appointed, the discretion of the court appointing him to refuse to grant leave, if such leave be necessary, to holders and claimants of prior liens and incumbrances to enforce them in other courts, is not an absolute, but is a regulated, discretion, which cannot be abused.

3. Where the superior court appoints a receiver, and the husband's property consists of lands situated in other counties, it is an abuse of discretion for such court to refuse holders of liens on such lands leave to sue or to enforce such liens in other courts, on the ground that the lien of the judgment rendered by it in favor of the wife is prior to such other incumbrances.

4. Where, in a divorce case, the court appoints a receiver to take charge of the husband's property, as authorized by Civ. Code, § 140, for the purpose of enforcing payments to the wife as decreed by such court, and it afterwards improperly refuses the holder of liens on the husband's lands lying in other counties leave to enforce them in other courts, mandamus will lie to compel such court to make the order granting leave.

5. It was no answer to a petition for a writ of mandamus to compel such court to make the order granting such leave that petitioner's judgments were obtained by fraud, and an action had been commenced to set them aside; that the wife, at the time of the filing of her cross complaint in the divorce suit, filed notice of lis pendens, and afterwards recorded the order or

interlocutory decree in her favor in all the counties in which the husband's lands are situated.

6. Nor was it an answer that the wife had a superior lien.

In bank.

Original proceedings by the Petaluma Savings Bank to obtain a writ of mandamus to compel the superior court of the city and county of San Francisco, and J. C. B. Hebbard, judge thereof, to make an order permitting it to enforce its judgments by sale of certain lands situated in other counties claimed to be in the possession of a receiver appointed by such court in a divorce case. Writ denied.

Edward Lynch, for petitioner. Henry E. Highton, Wm. T. Baggett, and Dunne & McPike, for respondents.

BEATTY, C. J. This is an original proceeding by mandamus based upon the following facts: Since the year 1887 there has been pending in the superior court of San Francisco an action for divorce, entitled "George E. White v. Frankie White," in which a judgment was entered on May 15, 1889, granting a divorce to the defendant upon grounds stated in her cross complaint. By said judgment she was awarded the community property and $200 per month, further judgment being deferred until the coming in of the report of a referee appointed to take account of the community property and the separate property of the plaintiff. August 29, 1893, the referee reported that there was no community property, but that the plaintiff, George E. White, had separate property, consisting mainly of land situated in this state, of the value of $206,000 over and above his liabilities, estimated at $138,000. June 29, 1894, this report was confirmed. On June 18, 1894, an order was entered in said action appointing a receiver therein. The receiver first appointed failed to qualify, but, on June 27, 1894, Wilson T. Smith—a subsequent appointee—assumed the office and entered upon the discharge of his duties. He has since claimed to be in possession as receiver of all the real property of said George E. White. On February 9, 1895, another judgment was entered in said action of White v. White in favor of the defendant, Frankie White, for the sum of $100,000, and by said judgment the receiver was continued in office and required to enforce the same by taking possession of all the separate property of said George E. White, including said real estate, and by managing and disposing of said property. All the personal property of said George E. White had been sold under executions prior to June 15, 1894, and his only property subject to execution was and is said real estate. The first or interlocutory judgment of May 15, 1889, was not declared to be a lien upon any property, and did not require said George E. White to give any security for the payments thereby decreed, but provided that, in the event the community property should "be insufficient out of the reasonable income and profits thereof" (sic) the defendant might apply for further judgment awarding to her a suitable maintenance out of the separate property of plaintiff, to be secured by transfer of such property, or a sufficient portion thereof, to a trustee, or in some other suitable manner. On April 3, 1895, the plaintiff herein, the Petaluma Savings Bank, filed in the superior court of San Francisco, and in said action of White v. White, an affidavit, setting forth, in addition to a number of formal allegations, the facts that on May 22 and May 23, 1894, judgments had been duly rendered and entered by the superior court of Mendocino county in favor of said bank, and against said George E. White, in several actions, for an amount aggregating about $45,000, and which remained unsatisfied to an amount exceeding $37,000; that said judgments were, immediately after rendition, enrolled and docketed in the clerk's office; that on and prior to May 26, 1894, transcripts of said dockets were duly recorded in the counties of Trinity, Humboldt, Kern, and Tulare, wherein all of the lands of said George E. White were situated; that said judgments were still in force; that said receiver, Smith, was not in the actual possession of any of said lands, but was claiming to be in possession, and endeavoring to take possession of the same; that said bank intended to apply to the superior court of Mendocino county for an order directing the sheriffs of Mendocino, Trinity, and Humboldt counties to sell said lands in the manner provided by law, but not desiring to bring about any conflict of jurisdiction between the superior courts of San Francisco and Mendocino, or their respective officers, and not desiring to do any act which might be construed as a contempt of the San Francisco court, it had suggested these facts, and, disclaiming any intention to submit itself, or the merits of its several judgments, to the jurisdiction, process, or orders of the said court in the action of White v. White, it thereupon prayed the superior court of San Francisco, and J. C. B. Hebbard, the judge presiding in the department to which the said case of White v. White had been assigned, to make an order therein, directing its receiver not to interfere with the officers of the superior court of Mendocino county in the lawful execution of said judgments in favor of said bank. Upon the filing of this affidavit a rule to show cause why such order should not be made was duly served on Frankie White and the receiver, Smith, but upon the hearing the court refused to make the order prayed, upon the ground that the original judgment of May 15, 1889, in the case of White v. White, was a lien prior in time and in right upon all of the property of said George E. White. Thereupon the Petaluma Savings Bank commenced this proceeding, in which it reaffirms by its complaint all the allegations of its petition to the superior court, and sets forth the other facts above stated. It also alleges that said George E. White is the owner of about 30,000 acres of land, situated in Mendocino, Trinity, and Humboldt counties, all of which is subject to the lien of its said judgments of May 22 and May 23, 1894, and of all of which said receiver claims to be in possession and control; that it is desirous of having its judgments satisfied by the sale of said lands, but is advised and believes that it would be an idle and foolish act to proceed to sell without the order and permission asked of the superior court of San Francisco—the defendant herein—for the reason that such proceeding would be a contempt of court. It is finally alleged that said George E. White is insolvent, has no personal property, and that the plaintiff has no other remedy for the enforcement of its legal rights. Wherefore it prays this court to issue its writ of mandate, or other appropriate writ, commanding the superior court of San Francisco, and the judge thereof, to make an order which will permit it to enforce its judgments by sale of said lands without molestation. The defendant demurs generally to this complaint, and answers, setting up some special matters of defense. The facts above stated are those confessed by the demurrer. The special matters of defense will be considered hereafter.

This proceeding is taken by the plaintiff out of abundant caution, in order not to incur the penalties of a contempt in interfering with property claimed to be in the custody of a receiver, if an execution sale of the property should be deemed an unwarranted interference, and in order that it may make a sale, the validity of which would be unquestionable; and we are cited by petitioner to cases in which the commencement of actions against receivers without previous leave obtained of the court by which they were appointed, or the unauthorized interference with property in their possession, has been held a contempt, and to other cases in which it has been held that the sale under execution of property in the hands of a receiver is void, and passes no title. The plaintiff does not insist that the law of this state is or ought to be such that it would be justly chargeable with a contempt of the superior court of San Francisco if it proceeded in the usual way to enforce the judgments rendered in its favor by the superior court of Mendocino county, or that a sale of the lands subject to the lien of its judgments without leave of the San Francisco court would be invalid (except as against superior liens, if any such there be). But it claims that it has a clear legal right to proceed to sell, and that it should either be told plainly that it is entitled to proceed without leave, if that is the opinion of the court, or if the court should be of the opinion that leave is necessary, the writ of mandate should issue, as prayed, upon the ground that the superior court has no discretion in such case to deny the order requested.

The position of the defendant with reference to these points is not very easy to determine. His counsel, on the oral argument, refused to commit himself to any definite position; but it would seem, from his memorandum of points and authorities, that he now asserts, in effect, that the plaintiff cannot proceed to enforce its judgments by sale of the lands of George E. White without obtaining the order which the defendant has refused to make. He claims, further, that it was within the judicial discretion of the defendant to grant or refuse the order, and that, having refused, its action cannot be controlled by mandamus, but that the sole remedy of the plaintiff, if aggrieved by the denial of its petition, is an appeal from the order. If these several propositions advanced by counsel for defendant are sound law, as applied to this case, the position of holders of valid liens upon the property of married men is not especially secure or enviable, and it is worth while to consider whether our divorce laws involve the consequences which the position of counsel implies. The only authority for the appointment of a receiver in a divorce suit is to be found in section 140 of the Civil Code, which reads as follows: "The court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case." So far as I am advised, this section has not been the subject of judicial construction, and the powers and duties of a receiver appointed in pursuance of its provisions have not been defined; but it would not seem difficult to determine in what cases and for what purposes he is to be appointed. The whole object of his appointment is to provide security for the payment of such allowance as is made for the maintenance of the divorced wife, and this would be accomplished by investing him with the title and control of some productive property of the husband, out of the income of which he could pay such allowance, or by authorizing the sale of property to create a fund, the income of which would be applied to the same purpose. In either event, and in any case, the receiver would take the property of the husband, or such portion of it as the court might designate, subject to all prior liens and incumbrances; and the right to enforce such liens could not be made to depend upon the mere volition of the court or judge making the appointment. It would necessarily follow, therefore, either that such judge would be invested with authority to determine the validity and priority of all liens upon the property, and that all holders and claimants of such liens must make themselves parties to the divorce suit, and submit themselves to the jurisdiction of the court in which it was pending, or that they must have the right, with or without asking leave of such court, to take such proceeding elsewhere as the law exacts for preserving and enforcing their liens according to their priority. Which of these two positions is assumed by respondent is not, as above stated, very clearly indicated by the argument of counsel, and neither is it very clearly to be implied from the order denying plaintiff's application for leave to sell, or the ground upon which it was based, viz. that the interlocutory judgment of May 15, 1889, in the case of White v. White, was a lien prior in time and in right upon the property of George E. White. I shall not, therefore, devote much space to the discussion of a doctrine which is not distinctly asserted, and has nothing to support it. It is enough to say that there is nothing in the law of California to justify the contention—if such is the contention—that, when a wife sues her husband for a divorce, and obtains the appointment of a receiver of his property for her benefit, not only their community property, but his entire separate estate, are as effectually sequestrated in the hands of the court in which the action for divorce is pending as they would be in case of death or insolvency; and that thenceforth all his creditors must come into that court and by motion or petition in that action seek, not the relief to which in the ordinary course of law they would be entitled, but such relief as it may adjudge and be able to afford, in the exercise of a plenary power, to dispose of the impounded estate and distribute its proceeds.

This proposition being disposed of, the alternative above stated alone remains. It must be true that the holders and claimants of prior liens and incumbrances upon the property held or claimed by the receiver, not being proper parties to the divorce suit, or subject to the jurisdiction of the court in which it is pending, have the right to take such proceedings elsewhere as the law exacts for preserving or enforcing their liens according to their priority. If, for instance, real property has been mortgaged, the holder of the mortgage must commence his action to foreclose in the county where the land is situate within a limited time, or his security and claim are lost, just as, in the present case, the plaintiff must sell the lands, subject to the lien of its judgments, within two years, or lose its security. And, if these steps must be taken, what right has the court appointing the receiver to prevent them? What discretion has it to refuse leave to proceed, if leave must be requested? Certainly not an absolute discretion, for that would amount to a power of confiscation of property rights, which are as full, as complete, and as much entitled to protection as any that exist. It must be, then, that such discretion as the court appointing the receiver has to prevent proceedings by adverse claimants to the property in the custody of the receiver is a regulated discretion which cannot be abused.

This proposition I do not understand to be contradicted, but the respondent contends that there has been no abuse of discretion, and that, even if there had been, mandamus will not lie to compel a judge to make an order which he can only make in his judicial capacity, and which, acting in such capacity, he has refused to make. As to whether there has been any abuse of discretion, that depends upon the scope of the inquiry which a court is entitled to make in passing upon such an application as the plaintiff presented to respondent. It is undoubtedly the prevailing doctrine that courts of equity will not permit their receivers to be sued, or property in their possession to be seized or sold, without leave asked and granted; but since the refusal of leave to sue in other tribunals, or to enforce the judgments of other courts, would in many cases destroy or impair rights which the court appointing the receiver has no power to conserve, it is the boast of such courts that they never refuse leave in a proper case. If a claimant of real property under title adverse to that of the parties represented by the receiver asks leave to commence his action of ejectment, no court would hesitate to grant his motion. It would not attempt to try the question of title,—a question appertaining to another forum,—with a view to denying leave to sue, if, in its opinion, the title asserted was not a good one. Upon the same principle, if a receiver of the superior court of San Francisco should be in possession of land situate in some other county, and subject to a mortgage, the application of the mortgagee for leave to make the receiver a defendant would be granted without any attempt to inquire into the validity of the mortgage, or its priority as a lien, for those are precisely the questions to be determined in the action to foreclose, which, by the express mandate of the constitution, must be commenced in the county where the land is situated. Const. art. 6, § 5.

If, in such a case, the court appointing the receiver should require the mortgagee to satisfy it of the validity of the mortgage, or, in other words, to litigate the whole question of the mortgagor's liability, and to establish it on the motion, as a condition precedent to any permission to sue the receiver in the county where the land was situate, it would be as much an abuse of discretion as if it should make its leave to sue conditional upon a waiver by the mortgagee of all claim of priority as against the receiver; for the doctrine to be deduced from the authorities cited in the briefs is that, whenever the case is such that the court appointing the receiver cannot protect an asserted right in the cause before it, the party will be allowed to proceed in the proper forum to establish his right if he can, and to enforce it by the appropriate means. But the plaintiff here is not asking leave to sue the receiver. It merely asks permission to take the step which the statute makes imperative in order that it may preserve such rights as it has, and the fact that its liens may be subsequent and subordinate to the lien claimed by Frankie White does not seem to be a sufficient ground for destroying them altogether. The holder of a second lien is entitled to protect it, and to preserve such rights as it gives him; and the only way this plaintiff can preserve what it has is to sell the land subject to its liens within the two years prescribed by the statute. Code Civ. Proc. § 671. If it cannot sell without leave, and no leave is granted, its liens, such as they are, will soon expire, after which it will become a mere general creditor, holding a claim subordinate, not only to the supposed lien of Frankie White, but to all liens of subsequent mortgagees and judgment creditors, if any such there be. What excuse, then, does the assumed priority of Frankie White's lien afford for subjecting the plaintiff to this loss, or risk of loss? If her lien is prior, the sale of the land will not destroy her priority. It will merely preserve and perpetuate such rights as the plaintiff has, and will enable it, after her claims are satisfied, to take what may be left of White's estate in preference to those whose liens are of lower rank, or who have no liens at all. If this view is correct, the reason assigned for refusing plaintiff's application to sell is no reason at all, and the refusal itself—on the assumption that leave to sell is necessary—was clearly an abuse of discretion.

This brings us to the question whether leave to sell was necessary, and, if so, whether mandamus lies to compel the respondent to make the order. To my mind it seems clear that, if the first question were answered in the affirmative, the second must receive the same response; for, if the exercise by plaintiff of its clear legal right to preserve its liens depends upon the permission of the respondent, it cannot deny the exercise of such right for a reason that is absolutely futile and groundless. But I am of the opinion that no leave to sell was required, either to avoid the commission of a contempt, or in order to pass a title strictly corresponding to the actual rank of plaintiff's lien, as to which it is unnecessary to express an opinion. A sale by plaintiff would involve no physical disturbance of such possession as the receiver may have, and, therefore, would be no contempt of court. The rights and relative positions of the parties would not be changed. The title transferred would be good as against subordinate liens, and subject to such as were superior, and the question of title would be the proper subject of litigation in actions, commenced in the counties where the lands are situate, between those claiming under the receiver and those claiming through the execution sales, as was the case in Wiswall v. Sampson, 14 How. 52. That case is cited by both parties to the proposition that an execution sale without leave, of property in the possession of a receiver, will pass no title. But it does not sustain the proposition in a general sense. The demanded premises in that action had belonged to Ticknor, who had conveyed them, in fraud of creditors, to Day prior to December, 1840. At that date plaintiff's lessor recovered a money judgment against Ticknor, execution upon which was returned nulla bona. In 1842 another creditor recovered judgment against Ticknor, and thereafter commenced a suit in equity to set aside the conveyance to Day. He succeeded in his action, and, after the conveyance to Day was set aside, a receiver of the property was appointed. While the receiver was in possession, plaintiff's lessor, without leave asked or granted, sold it under an alias execution issued upon his judgment of 1840. The defendant in the ejectment suit claimed under the receiver, and it was held, in his favor, that the execution sale passed no title. The reason for so holding is obvious. By the conveyance to Day the land had been put beyond the reach of creditors, and had been made subject to their claims solely by means of the action in equity to set that conveyance aside. The fund, in other words, was the creation of the court appointing the receiver, and was necessarily subject to its disposition, to be applied to the satisfaction of the claims of such creditors only as could show a right to come in and share in the distribution. To hold, in such a case, that the execution sale passed a title superior to that of the receiver —a title relating back to the date of the first judgment—would have been to hold that a creditor, by prior judgment, may stand by while a junior creditor, at his sole expense and risk, uncovers assets of the debtor, and then step in and reap the entire benefit, which is neither equity nor law. The decision in that case, therefore, lends no support to the claim asserted here, and the general expressions in the opinion of the court which may seem to countenance it must be limited in their effect by reference to the facts of the case under consideration. As to the passage cited from the text of Freeman on Judgments (volume 1, § 207), it seems to be based entirely upon the case of Wiswall v. Sampson, and is not to be construed in a different sense. In that case the court comments particularly upon the argument advanced in behalf of the plaintiff therein to the effect that, since the execution sale involved no physical disturbance of the possession of the receiver, it was therefore no contempt, and hence that the sale should be upheld; but they say, conceding (and implicitly deciding) that there was no contempt, this does not meet the objection. The question is, not whether there was a contempt, but whether the title passed; and no title passed, for the reason that the fund belonged to the court that had created it, for the benefit of the creditor who had by his suit removed the impediments preventing the levy of any execution. It is scarcely necessary to point out the radical difference between that case and this, but it may be observed that neither Frankie White nor the respondent can claim the merit of having created any part of the fund in controversy here, or of having rendered it available for the payment of George E. White's debts. The rights of his creditors, including that asserted by the plaintiff, are conferred by the laws of the state and are not subject to be divested by the refusal of leave to take the steps which the law requires for their preservation; and, since such leave cannot be denied, there is no reason for requiring that it should be asked.

This conclusion, of course, disposes of the case, and it becomes unnecessary to notice specifically the facts alleged in the answer of defendant, who charges, in effect, that the judgments of plaintiff were obtained by fraud, and that an action has been commenced to set them aside; that Frankie White, at the time of the filing of her cross complaint in the divorce suit, filed notice of lis pendens, and afterwards recorded the interlocutory decree of May 15, 1889, in all the counties in which the lands of George E. White are situated. None of these allegations, conceding them to be true, affords a reason for holding that the Petaluma Bank should not be allowed to sell. If its judgments are fraudulent, the receiver is pursuing the proper course in suing to set them aside; but it may be that he will not succeed in establishing the fraud which he asserts, and in the meantime he should not be allowed to destroy the security of debts which may be determined to be valid, without resorting to the usual means of an injunction, and giving other security which will indemnify the bank if it shall ultimately succeed in establishing the validity of claims which are at present apparently valid. As to the rest of the answer, it consists of a claim, upon various grounds (notice of lis pendens, etc.), that Frankie White has a superior lien. But, as has been shown, this fact, if it is a fact, does not justify the destruction of the inferior lien. It is no disadvantage to her if the bank is allowed to keep what it has, unless it should happen to turn out that the bank's lien is really prior, in which case it would, of course, be greatly to her advantage to have destroyed it. Writ denied.

We concur: VAN FLEET, J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.

(111 Cal. 441)

In re COUSINS' ESTATE. (Sac. 83.)[1]

(Supreme Court of California. March 6, 1896.)

GUARDIAN—USE OF WARD'S FUNDS—LIABILITY—RATE OF INTEREST.

1. A guardian who, in good faith, mingles his ward's funds with his own, and uses the same in his business, it not appearing that he was able at all times to invest the same, is chargeable only with legal interest thereon, with annual rests, notwithstanding that the current rate of interest was greater.

2. A guardian who, in good faith and without negligence, loaned his ward's money on mortgage securities which afterwards depreciated, is not liable for interest on a part of the sum loaned which was unavoidably lost, though the loan was made in his own name, and the mortgage was not foreclosed until long after the loan was due, and though the court found that, if the guardian had purchased the property on foreclosure sale, and held it an indefinite time, a greater saving of the ward's funds would have been made, but found that no prejudice resulted from the delay in foreclosing the mortgage.

3. On the sum recovered, he is liable for interest only at the legal rate.

4. A guardian who, without order of court, purchased land for his ward, believing the same to be a good investment, and which was occupied by the ward's mother and stepfather, is, on disaffirmance of the purchase by the ward, liable only for the sum invested with simple interest, though he took title in his own name, so as to dispose of the same without order of court.

Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Estate of Henry Cousins, minor. Appeal by J. M. Fox, guardian of said minor, from an order settling his final account. Reversed.

Bradley & Farnsworth, for appellant. Daggett & Adams, for respondent.

VAN FLEET, J. Appeal by J. M. Fox, the guardian of said minor, from an order settling his final account. But three exceptions are urged, and while they all involve the same general inquiry,—that is, as to the propriety of the rate of interest charged by the court below against the guardian upon certain items of the account,—they each relate to a different item of the account; and, as a different rule of accountability was applied in each instance, it will be necessary to examine them separately. The facts upon which the several exceptions are based appear in the findings of the court, the appeal being upon the judgment roll, unaccompanied by the evidence.

1. The court found, substantially: That, during the whole time that said J. M. Fox has been the guardian of said minor, he has commingled the moneys belonging to his ward with his own, and used said money in his own business, and deposited it in the bank in his own name, and has never at any time kept the same separate and distinct from his own money. That, according to the testimony of the guardian, he could not loan the money all the while, and he thought it better to use the money when he could, and charge himself with regular interest. A good deal of the time it was not used at all, but sometimes he used it, and it was kept mingled with his own funds. That, under the advice of his counsel, in making up his final account, he charged himself with legal interest. That he never made any profit on it. On the contrary, it was a loss. That he may have made a profit in his business in which the money was used. He did not know. And the court finds that said guardian acted in good faith, and without any intent to defraud said ward, and at all

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[1] Rehearing denied

times when said ward, or his parents for him, made demands on the guardian for money for the support and maintenance of the ward, such demands were always complied with, and the money for such purposes on hand. The court further found that, from 1874 up to the time of the trial, the current rate of interest charged on money loaned in Tulare county has been from 10 to 12 per cent. per annum. As a conclusion of law from these facts, the court held that, on all of the moneys of his ward thus mingled and used with his own (the specific items of which it is not pertinent here to state), "said guardian is chargeable with interest at the rate of 10 per cent. per annum, compounded annually," and in the decree the guardian was charged accordingly.

The objection urged to this action of the court is that the rate of interest charged is wholly unauthorized by law; that, upon the facts found, appellant is only liable to pay interest at the rate established by law,—that is, 7 per cent., computed with annual rests. In this contention we think it very clear the appellant must be sustained. The general rule, now thoroughly well established in this state, as to the limit of the liability of a trustee for mingling the trust funds with his own, and their use in his own business, where it is not shown that a larger profit was realized therefrom, is the return of the principal with legal interest thereon, compounded annually. This rule is applicable alike to guardians and executors as to other trust relations. In Estate of Stott, 52 Cal. 403, where the facts were not essentially dissimilar from those found in the case at bar, showing that the executor had mingled the funds of the estate with his own and those of the firm, and from time to time had employed them in his business, but there was no evidence of actual profits, it was held that the trustee was responsible for presumed profits upon the moneys so employed, and that the general rule in such cases was that he should be charged with legal interest, with annual rests,—citing 2 Redf. Wills, p. 886; 2 Williams, Ex'rs, *p. 1670, and note. The rule there announced was followed in Estate of Clark, 53 Cal. 359, where, upon similar facts, it is held that the rule in such cases is to charge the executor with legal interest, compounded with annual rests. In the latter case the court below had charged the executor, upon the facts found, with interest at 1¼ per cent. per month, that being the current commercial rate during the period the fund was held; but this action of the court was reversed, and the above rule directed to be applied. The doctrine was reaffirmed in Re Hilliard's Estate, 83 Cal. 423, 23 Pac. 393; and in the later case of Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639, where the executors had made an improper appropriation of the funds of the estate to the use of one of their number, the same rule was upheld and applied. See, also, Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558; Adams v. Lambard, 80 Cal. 426, 22 Pac. 180.

We think the facts of this case bring it squarely within the doctrine thus established. Certainly, our attention has not been drawn to any element in the case making a different rule applicable. The court below seems to have proceeded upon the theory that, because it appeared that the current, conventional rate of interest prevailing in Tulare county during the period for which the guardian is charged was from 10 to 12 per cent. per annum, the former rate should be applied as a just measure of the guardian's liability; but, as we have seen, this view is erroneous. It is not even found that the funds could have been loaned at any such rate, or at all. Had it appeared that the guardian could, during the time he used the funds of his ward, have loaned them at the rate charged, a different rule might apply (Estate of Holbert, 39 Cal. 597); and, of course, if the facts showed that the trustee had benefited to that extent from his use of the funds, he would be chargeable therefor, upon the well-established rule of equity that he will not be permitted to make any profit out of his office. It was upon this principle that the case of In re Thompson's Estate, 101 Cal. 349, 35 Pac. 991, and 36 Pac. 98, 508, much relied upon by respondent, was decided. There it appeared that the fund with which the moneys of the estate were mingled earned about 11 per cent. per annum net, and it was held that, in view of this fact, the court below did not err in charging the delinquent trustee with interest at the rate of 10 per cent. But, in the absence of such facts, the limit of his responsibility is as above shown. And even the adoption of the rule of presumed profits, to the extent of charging legal interest, is "not for punishing the delinquent trustee, but for the purpose of attaining the actual or presumed gains, and to make certain that nothing of profit or advantage remains to the trustee, except, perhaps, his commission or compensation." Wheeler v. Bolton, supra.

2. The pertinent facts found by the court as to the second item involved are that, on May 27, 1876, the guardian made a loan of $936 of the ward's funds to one Ashton for 12 months, with interest at the rate of 1½ per cent. per month, for which he took a note secured by a mortgage upon certain real and personal property. The loan was made without an order of court authorizing it, and the securities taken in the name of Fox without mention of his trust capacity; but it was made in good faith, for the benefit of the ward, and upon property which at the time afforded ample security. Immediately after the loan, however, the mortgaged property depreciated in value, which fact was known to Fox; but it is found that, if the mortgage had been foreclosed in 1877 (the year of its maturity), it would not have realized any more than when, subsequently, in

1880, foreclosure was had, and the property brought, exclusive of expenses of sale, $415.70; which sum was recovered into the hands of the guardian on August 2d of that year. Prior to this, but just when is not found, Ashton had left the state, and Fox had written to him a number of times demanding payment, and also endeavored to get him to made a deed of the property to the guardian without requiring foreclosure, but without avail. These were the only efforts made to recover the money prior to the foreclosure proceedings. When the property was first put up for sale under the decree, it was bid in by the guardian for $300; but subsequently he refused to take it, and it was resold, with the result above stated. Subsequent to the sale, Fox made efforts to collect the deficiency judgment, but was unsuccessful, as Ashton had no property out of which it could be made. It is also found that, if the guardian had purchased the property on foreclosure sale for the benefit of the ward, and held it, "that at some time between then and now the principal of said loan, and a part of the interest on the same, could have been saved to his ward." Upon these facts the court charged the guardian with $936, the principal of the loan, and interest thereon from May 27, 1876, the day of making the loan, down to January 12, 1895, the date of accounting, at the rate of 12 per cent. per annum, compounded annually, the interest amounting to the sum of $6,804.03.

Appellant contends that the action of the court in the premises was erroneous; that, under the facts disclosed, he was only liable to legal interest, with annual rests, upon the $415.70 of the principal recovered, which was taken and used by him from the date of its recovery; and that, upon the balance of $520.30 of the principal sum, which was lost, he is not chargeable with any interest whatsoever. No complaint is made of the fact that appellant is charged with that portion of the principal lost, and we may assume that the action of the court in that regard is correct, although, under the facts, it is not clear that he would have been so chargeable, since the mere fact of loss, independently of the question of negligence, does not charge the trustee as matter of law with liability therefor. It depends upon the circumstances under which the loss occurred. Wheeler v. Bolton, supra. As to the interest, however, not only in the rate imposed, but in the charging of any interest upon that portion of the principal sum lost, we think the court was in error. It does not clearly appear upon what theory the court proceeded in fixing the rate of interest charged; but, whatever it may have been, we know of no principle which applied to the facts found will support it. The court not only finds that the loan was made in good faith, and for the benefit of the ward, but does not in terms find that the guardian was guilty of negligence. Nor does it find facts from which negligence must necessarily be inferred. The fact, upon which some stress seems to be laid by counsel for respondent, as evidencing improper conduct and purpose, that the loan was made by Fox in his own name and not as guardian, while not to be commended, loses any baleful significance that might otherwise attach to it, by the finding that the transaction was without taint of bad faith, and was for the benefit of the ward. The court distinctly finds that nothing was lost to the estate by failure to take earlier steps to foreclose, and fails to find, at least distinctly, any want of diligence in the efforts made to recover the loan. And we see nothing necessarily showing a lack of ordinary care and judgment in the premises. The fact that Fox did not wish to take the property at the foreclosure sale, and hold it indefinitely, is not in itself significant of neglect or want of care. Nor does the court find that he was negligent in not having done so. It is simply found that, had he done so, something more could have been eventually saved. But mere error of judgment is not sufficient to subject the trustee to punitive responsibility. As said by Mr. Pomeroy: "The law does not cast upon the trustee an extraordinary duty, nor demand an extraordinary care, nor hold him liable for mere error of judgment. Much less does it make him an insurer of the property. If he has exercised the care and judgment of ordinarily prudent men in their own affairs, he will not be chargeable for his mere errors of judgment, nor for accidental injuries and losses." Pom. Eq. Jur. § 1070. And, again, that learned writer says, in section 1071, Id.: "If, however, an investment is made with the exercise of reasonable care, diligence and business prudence, in the form, manner, and securities approved of by the rules of equity, a trustee will not be liable for losses which may occur through the destruction or depreciation of values." In Ellig v. Naglee, 9 Cal. 695, it is said: "Trustees act for the benefit of others, and not for themselves, and the fair exercise of their judgment should be a protection to them. For supine negligence or willful default will render them liable, but to make them liable for mere errors of judgment would tend to discourage good and prudent men from taking any trusts."

The case is not distinguishable in principle from Estate of Holbert, 48 Cal. 630, where the executor of the estate had improvidently, although with honest purpose, made a loan on a piece of real estate, without examining the records, upon which a mortgage already existed for nearly the entire value of the property, as a result of which the amount of the loan was in large part lost to the estate. In reversing the action of the court below in charging the executor with the amount lost, with interest added at the conventional rate, it was said: "Of course, the executor, upon settlement of his accounts, is not to be charged with interest at the rate stipulated to be paid by the borrowers. If such a rule could ever be properly applied, it could only be in a case where mala fides was established; and here, as we have seen, there was none. Nor do we think that, under the circumstances, the executor should be charged with interest, even at the statutory rate. It does not appear, by the record, that he could, in the exercise of reasonable diligence, have loaned it to others at that rate, or at any rate of interest whatever, during the time it has remained in the hands of the borrowers. The basis of accountability under such circumstances is the same as though it had been kept on hand by him for the purpose of making a loan, but without the opportunity of doing so, in which case he would not have been chargeable with interest. The executor should, therefore, have been held liable only for the sum of $732, which is the balance of the loan remaining uncollected after applying the $468 actually received by the executor."

Applying these principles to the facts before us, the appellant should not have been charged with interest upon the part of the principal sum not recovered. As was said by the supreme court of Pennsylvania in a similar case, where it was found that the guardian, in making the loan, had acted in good faith, and with ordinary care and prudence: "It is, of course, a great hardship that the appellant should lose so large a portion of her patrimony; but it would be a still greater hardship to compel her guardian to make good the loss, unless it was occasioned by his carelessness. It has been said that the harshest demand that can be made in equity is to hold a trustee answerable for what was never in his hands, or for a loss not caused by his willful default." Jack's Appeal, 94 Pa. St. 371. Upon the $416.70 recovered, appellant is, under the principles announced in the first part of this opinion, properly chargeable with interest at the legal rate, compounded annually, from August 2, 1880, the date of recovery, for the reason that he has, admittedly, since said date, mingled and used the amount so recovered with his own funds. But he was not, for the reasons stated, chargeable with the rate imposed by the court below.

3. As to the third and last item, the court found that, on November 20, 1884, the guardian, at the request of the mother and stepfather of the minor, with whom the ward resided during his minority, purchased 80 acres of land for the ward with the ward's money, paying therefor $1,250. This was done because both the parents and the guardian believed that it was a good investment for the ward. The investment was made without order or authority of court. Ever since the purchase of the land, the parents of the minor have had the possession, use, and benefit thereof, and the guardian has never derived any rents, issues, or profits therefrom, but has paid all the taxes thereon. The title was taken in the name of the guardian, so that the parents of the ward and the guardian might sell the land without an order of court, and the guardian retained the title for the benefit of the ward until July 23, 1893, when he executed and acknowledged a deed granting and conveying said land to the ward. This deed has not been delivered, but the guardian has since been, and is, ready to deliver the same. The mother of the ward arranged for, and knew of the execution of, the deed. The ward, on February 4, 1895, disaffirmed and refused to ratify the purchase of the land. Upon the facts the court held that the ward was not bound by said purchase, and required the guardian to account for the $1,250 thus invested, with legal interest, compounded annually, from November 20, 1884, the date of the purchase, to January 12, 1895, the date of the accounting. The only complaint made against this action of the court is that there was error in requiring the interest to be compounded, and in that particular appellant must be sustained. Where, as here, the trustee has been guilty of no willful breach of duty, or any intentional violation of the obligations of his trust, he is not to be charged with compound interest. This is not only the general rule, as declared by our Code, but is one which has been repeatedly applied by this and other courts. Section 2261 of the Civil Code provides: "A trustee must invest money received by him under the trust, as fast as he collects a sufficient amount, in such manner as to afford reasonable security and interest for the same." And section 2262 provides: "If a trustee omits to invest trust moneys according to the last section, he must pay simple interest thereon if such omission is negligent merely, and compound interest if it is willful." "The general rule," says Mr. Justice Harrison, in Wheeler v. Bolton, supra, "applicable to an executor, as well as to any other trustee, is that, except in cases in which he has been guilty of some positive misconduct or willful violation of duty, he is not to be charged with compound interest." And in Adams v. Lambard, 80 Cal. 439, 22 Pac. 180, it is said: "It is a general rule that, where the omission of the trustee is due to simple negligence, without any actual intent to cheat or defraud, simple interest alone is allowed the cestui que trust on the trust funds; but, if the omission is willful, compound interest is allowed." In this case the trial court has found against any intentional or willful dereliction of duty on the part of the guardian. That finding is conclusive upon us, and we are not at liberty, even if so disposed, to put the construction upon the acts of the guardian contended for by respondent. The order is reversed, and the court below is directed to settle appellant's account in accordance with the views herein expressed.

We concur: GAROUTTE, J.; HARRISON, J.

(111 Cal. 460)

PEOPLE v. CRAIG. (Cr. 15.)[1]

(Supreme Court of California. March 9, 1896.)

HOMICIDE—MALICE—EVIDENCE—COMPETENCY OF CHILD AS WITNESS—DEGREES OF MURDER —INSTRUCTIONS.

1. On a prosecution for murder of defendant's wife, testimony that, a few weeks prior to the homicide, defendant said that "the Hunters [the wife's relatives] had taken away his wife and children from him, and wouldn't allow him to see his children or his wife, and he wouldn't stand it much longer"; and that, while his wife and children were away from her relatives on a visit, he said that "there would be something happen sure before it would end"; and that if he went out to her father's ranch when they came back, to see them, and they interfered with him, he would put a hole through them,—is admissible on the question of malice.

2. On a prosecution for murder of defendant's wife, whom defendant shot just after shooting her brother, defendant having testified that he shot the brother in self-defense, and that the shot which hit the wife was intended for the brother, it was proper, in connection with prior threats against the whole family, to show that, just after shooting the wife and her brother, he drove rapidly to another house, and, without any warning, killed her father and mother; the jury being charged that it could be considered only for the purpose of determining whether the killing of the wife was accidental or designed, and that it could not be considered by them unless they were satisfied that the killing of the parents was in pursuance of a plan formed prior to the killing of the wife.

3. Under Code Civ. Proc. § 1880, declaring that "children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," cannot be witnesses, the determination of the judge as to the competency of such a witness is not reviewable.

4. An instruction that if the jury found that defendant shot at H., not in necessary self-defense, but unlawfully, etc., but missed him, and thereby killed L., he would be guilty of murder, is not erroneous for not stating the degree of murder he would be guilty of: the court having elsewhere instructed concerning the different degrees of murder.

In bank.

Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

John Craig appeals from a conviction of murder. Affirmed.

Geo. P. Phibbs, F. B. Guthrie, and Johnstone Jones (B. M. Marble, of counsel), for appellant. Atty. Gen. Fitzgerald, for the People.

HARRISON, J. The defendant was tried for the murder of his wife, convicted, and sentenced to death. From this judgment of conviction, and an order denying a new trial, he has appealed.

The facts connected with the killing, as shown by the prosecution, are briefly as follows, viz.: The defendant and his wife had been living separate from each other for several months, the wife living with her children at the "Hunter Ranch" (the property of her father), about three miles north of Los Angeles. On the 25th of July, 1894, soon after sundown, the defendant, having provided himself during the day with some pistols, drove in a buggy from Los Angeles to the Hunter ranch, where he got out, and went to the porch at the back or kitchen part of the house, and attempted to open the kitchen door. Finding it locked, he called out to his wife, who was in the kitchen, and, as she looked through the window and saw who it was, she asked him who gave him the right to come there. Upon his replying that he had the right to come and see his children, she said, "Do you know there is a man on the ranch?" and, upon his inquiring where, she pointed to her brother, George Hunter, who was approaching, saying, "There he comes." As George Hunter came up, Mrs. Craig unlocked the door, and he entered the house, going through the kitchen and dining room to the hall, but immediately returned, going again upon the porch through the kitchen door. As he stepped off the porch, the defendant, who was outside, holding a pistol in each hand shot him with the one in his right hand; and, as Mrs. Craig put out her hands as if to catch her brother from falling, the defendant stepped forward, and, with the other pistol, shot her in the head, killing her instantly. He then stepped over her body into the kitchen, holding up both pistols, saying, "I have got revolvers enough for the whole family," and went into the dining room, where he approached Miss Jensen, who had run out of the kitchen, and threatened to shoot her also. She, however, escaped, and the defendant immediately left the house, and drove away in his buggy.

After the evidence of the killing of the deceased, as aforesaid, had been introduced, Miles Long, a witness called by the prosecution, testified that he had had a conversation with the defendant with reference to the Hunter family, within three weeks prior to the killing, and was then asked to state whether the defendant had made a threat in the conversation relative to his children, and relative to the Hunters. Upon the objection of the defendant, the court excluded the answer, on the ground that the question was leading. He was then asked: "State whether or not, at any time prior to this shooting, within six weeks thereafter, you had a conversation with this defendant relative to his wife having been taken away from him by somebody, and, if so, about when that was." To this question the defendant objected, upon the ground that it was incompetent, irrelevant, immaterial, and not a part of the res gestæ. The court overruled the objection, saying in connection with its ruling: "I suppose the object of this testimony is to show some threat. At present I don't see any connection that it possibly could have with this case, except in that view; and I see no objection to this man's stating that conversation. He has been led up to it, and the time and the subject-matter, and I see no objection to his going on and telling what that conversation was. If it was in regard to threats, or anything of the kind, the jury must be the judges of that, and not the court. I can't pass upon the weight of the testimony;

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[1] Rehearing denied.

nor how much it proves. If it should turn out to be absolutely irrelevant, and did not prove anything at all, we can strike it out. I can't pass upon the testimony in advance." The court thereupon directed the witness to state what the defendant said. The witness thereupon answered that the defendant stated to him, within a period of three weeks, that "the Hunters had taken his wife and children from him, and wouldn't allow him to see his children or his wife, and he wouldn't stand it much longer." Another witness, Emily Snyder, who had testified that Mrs. Craig with her children went to San Francisco in that year, and returned about the last of May, and that, while they were away, she had had a conversation with the defendant, was asked: "Was anything said on that occasion about 'something happening,' or anything of that kind?" And, upon the objection of the defendant to her answering the question being overruled, she testified in answer thereto: "Yes, sir; he said,—that is, while they were in San Francisco,—he said to me that 'there would be something happen sure before it would end'; and then he said that if he went out to the ranch when they came back, and he went to the ranch to see them, if they interfered with him, why he would put a hole through them." It is contended on the part of the appellant that the court erred in admitting this testimony, for the reason that it had no tendency to show any ill will on his part towards his wife, and that upon his trial for her murder it was incompetent to prove ill will or malice on his part towards any other person. This testimony was competent, however, and properly admitted for the purpose of showing the intent of the defendant in killing his wife, and that he acted with malice aforethought. To establish this intent, it was competent for the prosecution to offer any evidence that would enable the jury to ascertain the state of his mind at the time of the killing, and this would be best evidenced by his acts and declarations at or about that time. If the conversation between the witnesses and the defendant embodied a threat on his part, it was proper that it should go before the jury for the purpose of establishing his feeling towards his wife, and determining whether he was actuated by malice. Whether it was of such a character as would authorize such an inference could be determined by the jury only after it had been given, and, while the weight to be given to the testimony was to be determined by them, its admissibility was to be determined by the court before it was known what the testimony would be. The indefiniteness of the threats was not a sufficient reason for excluding the testimony. They were broad enough to include his wife with the other members of her family, and it was for the jury to determine whether she was in fact one of the persons intended by him. Much must be left to the discretion of the trial judge in determining whether the proffered testimony has any relevancy to the issue to be determined, or whether it is such that the jury will be authorized to make any inference therefrom which will aid them in determining the issue they are to try. The court was required to determine primarily whether the general character of the conversation or declaration sought to be shown, as embodied in the form of the question, considered in connection with the evidence already before the jury, was such as to authorize an inference of the intent with which the killing was done. It could not determine in advance whether the answer of the witness would be relevant for the purpose of making such inference. If the answer should be entirely irrelevant, it would be disregarded, or could be struck out; while, if it were relevant, it was proper to be considered by the jury. There was other testimony in the case bearing upon this point. Castoreno testified that the defendant said to him, a few days before the shooting, that "the old folks and his wife was crowding him too much altogether, and they was trying to get the best of him in every respect, and he would put an end to them all some of these nights." It was for the jury to determine from the language used by the defendant in these conversations, taken in connection with other evidence in the case, what was his meaning when he said, "he would not stand it much longer," or "there would be something happen before it would end," or "if they interfered with him he would put a hole through them"; and it was for the jury to determine, too, whether by these remarks he included his wife with the other members of the Hunter family. The testimony of these witnesses was to be considered by the jury in connection with other testimony upon this subject, and it is not to be assumed that the jury would determine any of the questions before them until all of the evidence had been introduced, and the case was submitted to them for a verdict. The court, in admitting the evidence, had limited the scope for which it was to be considered, and, in its instructions to the jury, further told them that, if all the evidence failed to show any motive on the part of the accused to commit the crime charged against him, they were to consider that circumstance in connection with the other evidence in making up their verdict.

The defendant was a witness in his own behalf, and, in recounting the circumstances under which the homicide was committed, testified that the shooting of George Hunter was in self-defense, and that, in the effort to defend himself against him, one of the shots which he had intended for him had accidentally struck his wife, and caused her death. For the purpose of defeating the claim of the defendant that the killing of his wife was accidental, the prosecution called certain witnesses in rebuttal, whose testimony was to the effect that, immediately after the killing, the defendant left the house, and drove rapidly for a distance of about three miles to a house on Buena Vista street, in the city of Los Angeles, arriving there within 20 minutes after the killing of his wife, got out of his buggy, and went up on the porch, where William and Mary Hunter, the father and mother of his wife, were then sitting, and deliberately, without any word of warning, killed them both. The defendant objected to the introduction of this evidence, and now urges it as error for the reason that it tended to establish a different crime from that for which he was on trial, and constituted no part of the transaction connected with the killing of his wife. The introduction of the evidence is upheld by the prosecution on the ground that the killing of the father and mother, and of the wife, was part of a single plan, outlined by the threats of the defendant, and that this evidence tended to establish this purpose on the part of the defendant to exterminate the family, and thus characterize and give point to his threats, and to disprove the claim that the killing of his wife was accidental. We are of the opinion that this testimony was properly admitted. Although a defendant can be convicted for only the offense which he is charged with having committed, evidence which may have the effect to establish another crime than that for which he is on trial is not for that reason inadmissible. If the evidence offered is relevant to establish the crime for which he is on trial, it is not rendered irrelevant by reason of the fact that it could be used to establish another crime for which he might be charged. Evidence of a material fact which tends to show the intent or motive of the defendant, although it tends to prove the commission of another offense by him, is relevant and admissible in a criminal action. Taken in connection with the previous threats on the part of the defendant against the Hunter family, this testimony was relevant for the purpose of showing the scope of those threats, and enabling the jury to determine whether the killing of these persons was a part of the execution of a single plan that had existed in his mind. If the jury should so determine, it would enable them more readily to determine whether the killing of his wife was also a part of that plan, and whether the claim of the defendant that he had accidentally shot her was well founded. The court instructed the jury with reference to this evidence that it could only be considered by them in relation to the motive or intention of the defendant in firing the shot that killed his wife, and that, unless they were satisfied that the killing of William and Mary Hunter was in pursuance of a plan formed prior to the killing of his wife, it could not be considered by them in determining the guilt or innocence of the defendant as to the killing of his wife, but that, if they did find it was in pursuance of such plan, it could be considered for the purpose of determining whether the killing of his wife was accidental or designed.

The ruling of the court that Willie Craig was a competent witness cannot be reviewed on this appeal. The provision in section 1880, Code Civ. Proc., declaring that "children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," cannot be witnesses, implies that it must "appear" to the trial judge that the child is incompetent for the reasons therein named, and, of necessity, requires his capacity to receive impressions of the facts, and of relating them truly, to be determined by the trial judge. The burden is upon the person who objects to the child being a witness to show that he is incapable; and the determination of the judge upon such objection, and an examination of the child, is not a matter for review, any more than is his ruling upon the capacity of an adult who may be offered as a witness. The fact that the testimony of the child differed from that of other witnesses is not even prima facie evidence of his incapacity. Such difference is frequently found in the testimony of adult witnesses.

Objection was taken to certain remarks of counsel for the prosecution, made in their arguments to the jury; but these remarks appear to have been no more than an animated argument upon the testimony in the case, and presented to the jury with no more zeal and earnestness than would be natural in attempting to convince them that it justified a verdict of conviction.

The court instructed the jury that, if they should find that the defendant shot at George Hunter, not in necessary self-defense, but unlawfully, feloniously, and with malice aforethought, but missed him, and thereby then and there killed Emily Craig, he would be guilty of murder. It is urged by the appellant that this instruction was erroneous in not stating to the jury the degree of murder of which he would be guilty. The instruction was not erroneous. People v. Olsen, 80 Cal. 122, 22 Pac. 125. The court elsewhere instructed the jury concerning the different degrees of murder, and the facts necessary for a conviction thereof.

Other exceptions were taken by the appellant to the instructions of the court, and to its refusal to give certain instructions asked on his behalf. It is unnecessary to repeat them here; but, upon a careful consideration of the entire charge of the court, we are satisfied that the jury were correctly instructed upon the propositions of law applicable to the case, and that the instructions requested by the appellant which were not given were not authorized. The judgment and order are affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.

(111 Cal. 503)

YOCH v. HOME MUT. INS. CO. (No. 19,592.)[1]

(Supreme Court of California. March 11, 1896.)

INSURANCE—CONDITIONS—REPRESENTATIONS—WITNESS—LEADING QUESTIONS.

1. An insurance policy insured, "except as hereinafter provided," a building, occupied as a store, and merchandise, "such as is usually kept in a country store"; the latter quoted clause being written in ink. The policy contained a printed condition that, unless otherwise provided by agreement indorsed thereon, it should be void if (any usage of trade to the contrary) gasoline was kept on the premises. *Held* that, if gasoline was an article usually kept in a country store, during the day, for sale, keeping it on the premises for such purposes did not avoid the policy.

2. In an application for insurance, insured signed a document indorsed: "Daily Report of Policy Issued by the H. M. Ins. Co. Instructions to Agents." The face of the document was headed, "Questions," with the directions that, by having the following questions answered, unnecessary correspondence would be saved. Part of the questions showed that they were intended to be answered by the agent. The agent, from information derived from the contractor who built the house to be insured, and without insured's knowledge, wrote beneath the printed questions, which were numbered to 25 inclusive, "(26) Less than fifteen rooms." *Held*, that the fact that insured signed the application without reading it did not constitute a representation on his part that the building contained only 15 rooms, so as to avoid the policy if it was false and material.

3. Where it is sought to avoid a policy on the ground that insured represented to the insurance agent that the building contained less than 15 rooms, it is proper to exclude, as leading, a question asked the agent by insurer as to whether insured stated to him that the building contained less than 15 rooms.

Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by Joseph Yoch against the Home Mutual Insurance Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Van Ness & Redman, for appellant. V. Montgomery and Kendrick & Kendrick, for respondent.

HARRISON, J. The defendant issued its policy of insurance against fire to Mrs. W. H. Brooks, the assignor of the plaintiff, in the sum of $4,000, upon a frame building occupied as a country store, and also upon household furniture and the stock of merchandise, "such as is usually kept in country stores," while contained in said building. Before the expiration of the policy the insured property was totally destroyed, and the present action is brought to recover for the loss thereby sustained. The defendant alleged, as grounds of defense, that the insured kept for sale and allowed gasoline upon the premises, in violation of the terms and conditions of the policy, and that, in her written application for the policy, she made a material misrepresentation in reference to the building to be insured. The cause was tried by a jury, and a verdict rendered in favor of the plaintiff. From the judgment entered thereon, and an order denying a new trial, the defendant has appealed.

The policy was made out upon a printed form, in which, after the agreement of insurance, there were printed certain conditions to be observed by the insured, and certain limitations upon the liability of the insurer. In the insurance part of the policy the defendant insured Mrs. Brooks for the term of one year against all direct loss or damage by fire, "except as hereinafter provided," and intermediate this part of the policy and the printed conditions and limitations was written, with pen and ink, the description of the property upon which the insurance was made. One of these printed conditions was as follows: "This entire policy, unless otherwise provided by agreement indorsed herein or added hereto, shall be void * * * if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises benzine, benzole, gasoline, Greek fire, etc." Testimony was given at the trial tending to show that gasoline is one of the articles of merchandise usually kept in country stores, but that it is customary to keep it in a room or building by itself. It was also shown that, during the month prior to the fire, the insured would, in the daytime, bring small quantities of gasoline—one or two cans—from a building on another lot, which was used for storing it, into a room within the insured building, and adjacent to the store, for the purpose of selling it at retail to her customers. Upon this evidence the defendant requested the court to instruct the jury: "If, from the evidence, you find that, during the period between the delivery to plaintiff of the policy of insurance in this action sued on and the fire, gasoline was at any time for several days kept for sale in the building described in the policy, or in any part of said building, your verdict should be for the defendant." The court refused this instruction, but told the jury: "If you find, from the evidence in this case, that gasoline was, during all or any portion of said time between the issuance of said policy and the said fire, an article of merchandise usually kept in country stores, then and in such case the fact that the insured did keep for sale or allow gasoline, if she did, either by herself or agent, allowing or keeping such article on the insured premises—that is, habitually—is no defense to this action." It is urged by the appellant that, in giving this instruction, and also in refusing to give the one asked by it, the court erred.

A contract of insurance is to be interpreted by the same rules as is any other contract. It must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable. If it is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. The whole contract is to be taken together. When it is partly written and partly printed, the written parts control the printed parts, and, if there is any repugnancy between the two, the printed part must be disregarded. It may be explained by reference to the circumstances under which it was made. In cases of uncertainty it is to be interpreted most strongly against the party who caused the uncertainty to exist. Civ. Code, §§ 1636–1654. Applying these rules to the contract in the present case, it must be held that it was the intention of the defendant to insure gasoline, if it was an article usually kept in country stores, and that, if such was its intention, it was no violation of the policy for the insured to keep gasoline upon the premises as a part of the stock of merchandise. When the defendant agreed to insure a stock of merchandise "such as is usually kept in country stores," it must be presumed to have known the character of the merchandise which is usually kept in country stores, and that gasoline was one of these articles, and, consequently, that its policy covered all such merchandise. Harper v. Insurance Co., 17 N. Y. 194; Pindar v. Insurance Co., 36 N. Y. 648. The court would have no judicial knowledge of the character of merchandise which is usually kept in country stores, and it was therefore competent to offer evidence upon that point, for the purpose of enabling it, when interpreting the language of the policy, to understand the matter to which it related, and the circumstances under which it was made. Elliott v. Insurance Co., 13 Gray, 139; Whitmarsh v. Insurance Co., 16 Gray, 359; Archer v. Insurance Co., 43 Mo. 434; Maril v. Insurance Co. (Ga.) 23 S. E. 463; Fraim v. Insurance Co. (Pa. Sup.) 32 Atl. 613; Wood, Ins. § 64; May, Ins. § 239. When it was shown that gasoline is one of the articles which is usually kept in country stores, the court correctly held that it was a part of the subject of the insurance, and that the insured did not violate the policy by keeping it in stock. The defendant, when it issued the policy in question, knew the character of a country store, and that Mrs. Brooks kept it for the purpose of retailing to her customers all of the articles kept by her, and that the gasoline which she kept was to be disposed of by retail in the same way as the other portion of her stock. To give to the policy the construction now claimed by the defendant would be to hold that, although it agreed with her to insure all the stock she usually kept in her store, yet, if she continued to keep that stock, she forfeited all rights under the policy. The clause in the policy above quoted, and which is relied on by the appellant, cannot be construed as having this effect. The qualification therein which excepts the policy from becoming void, viz. "unless otherwise provided by agreement indorsed hereon," is found in the policy itself. The subject-matter of the risk—the stock of merchandise "such as is usually kept in country stores"—was written on the policy by the insurer; and, as the defendant must be deemed to have intended thereby to insure all such articles as are usually kept in a country store, it must be held that this was an "agreement indorsed" upon the policy, which removed the exemption from liability that would otherwise have existed. Insurance Co. v. De Graff, 12 Mich. 124. If there be any repugnance between the written phrase, "such as is usually kept in country stores," and the printed clause, "any usage or custom of trade or manufacture to the contrary notwithstanding," the former controls the latter, as being the more deliberate expression of the contracting parties. Fraim v. Insurance Co. (Pa. Sup.) 32 Atl. 613; Civ. Code, § 1651.

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[1] Rehearing denied.

Counsel for appellant has cited the case of Insurance Co. v. Lenheim, 89 Pa. St. 497, in support of his contention; but this case seems to stand by itself. Mr. Freeman, in his note to the case (33 Am. Rep. 778), says that the case "is utterly opposed to the decisions in all the other states, and that it is quite difficult to reconcile it with previous decisions in the same state." A subsequent case in the same state (Fraim v. Insurance Co., supra) appears to be at variance with the rule in the Lenheim Case. It may also be observed that the opinion of the court in the Lenheim Case rested materially upon the fact that, in the policy then before it, the condition exempting the insurer from liability for loss where turpentine was kept, was "in immediate connection" with the clause by which it insured the property specified, "except as hereinafter provided," whereas, in the present case, the words "except as hereinafter provided" are in direct proximity to the words "loss or damage by fire" which is insured against, and may be regarded as a limitation upon the causes of fire against which the insurance is made, rather than as a qualification of the contract of insurance. In subsequent portions of the policy there are certain causes of loss for which the insurer expressly declares that it will not, under any circumstances, be liable; and it is more reasonable to construe these as the matter referred to by the phrase "except as hereinafter provided," than those provisions in which it is declared that in certain contingencies the policy shall be "void."

The policy sued on contains the following provision: "This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof." It is alleged, in the answer, that the policy was issued upon the written application of the assured, in which it was stated that the building to be insured contained less than 15 rooms, whereas, in fact, it contained 20 rooms; and that the materiality of this representation consisted in the fact that the rate of premium for the risk assumed was greater for a building with 20 rooms than it was for a building with 15 rooms. It was sufficiently shown at the trial that the building contained more than 20 rooms, but it was also shown that the statement in the application that there were less than 15 rooms was written therein by the agent of the defendant from information which he had obtained at his own instance, and without any direction on the part of the insured, from one Dungan, the carpenter who had built the house; and it was not shown that either the assured or her husband had made any statements or representations to the agent in reference thereto. The defendant offered in evidence a document signed by Mr. Brooks which is claimed to be the application. This document is indorsed: "Daily Report of Policy Issued for the Home Mutual Insurance Company. Instructions to Agents." The face of the policy is headed, "Questions," with the following direction, evidently intended for the agent of the defendant, viz.: "By having the following questions so fully answered that the company can get a clear idea of the risk, and can verify rates, the agent will avoid much unnecessary correspondence." Under this are various printed questions, numbered consecutively to 25, and beneath these printed questions there was written, upon a blank line on this printed page: "(26) Less than fifteen rooms." The agent of the defendant testified that, before he presented this document to Mr. Brooks for signature, he had written these words in the application from information which he had obtained from Dungan, and he did not testify that he made any inquiry of Mr. Brooks concerning the number of rooms in the house. Mr. Brooks testified that, when the application was presented to him for his signature, he signed it without reading it, and that, when he signed it, he had no knowledge that these words were there. It does not clearly appear whether the matter referred to in these words was the subject of a question which was intended to be put to Mr. Brooks, and to which no answer was written in the application, or whether the words constitute a statement written by the agent of the defendant for the information of his principal. It is quite as consistent with the evidence on this point that the jury should have found that these words were written by the agent for the information of the company, as that they were an answer to any question put to Mr. Brooks by the agent. In the line numbered 24, the questions, "Have you personally examined the risk?" and "Do you recommend it?" are evidently questions which were to be answered by the agent, and he testified that the answer to the next question, "Has the risk been recently rejected?" to which the answer "No" is written, was not discussed by him with Mr. Brooks.

The court instructed the jury, in substance, that if Mr. Brooks, in applying for the policy, made a written representation that the building contained less than 15 rooms, they should find for the defendant; but, if they should find that the facts contained in the application respecting the number of rooms were obtained by the defendant from Dungan, and from the diagram or plans furnished by him, and that Brooks made no representation personally in the matter, but signed the application without knowing what it contained as to the number of rooms, it did not constitute a defense. This instruction properly directed the jury in their deliberations upon their verdict, and their verdict thereunder is justified by the evidence. Whether Mr. Brooks made any representations to the agent concerning the number of rooms in the house was to be determined upon a direct conflict of evidence; and, if the jury believed that he did not, his signing the application with the ambiguous phrase, "Less than fifteen rooms," without knowing that it was there or the purpose for which it had been inserted, cannot be construed as a written representation by him that the building contained less than 15 rooms. The rule that one who signs an instrument which contains terms of obligation upon himself is not absolved from such obligation by showing that he signed the instrument without reading it, has no application in a case like the present, where the instrument signed contains no words of obligation, and the clause invoked against the signer does not purport to be a statement by him, or in answer to a question put to him. The policy sued on does not refer to this application, or in any way incorporate its contents into the conditions upon which the contract of insurance is made; but the appellant sought by extrinsic evidence to connect the two instruments, and make the one dependent upon the contents of the other. In such a case the evidence should be very clear that the statements in the application relied on to defeat the action were made by the applicant, and that, at the time of making them, the applicant knew that they were to form the basis of the policy to be issued to him. Dunbar v. Insurance Co., 72 Wis. 492, 40 N. W. 386; Schwarzbach v. Protective Union, 25 W. Va. 663; Combs v. Insurance Co., 43 Mo. 148; Rowley v. Insurance Co., 36 N. Y. 550; May, Ins. § 144 et seq.

Certain rulings of the court at the trial were excepted to by the appellant, but we are of the opinion that no error was committed in these rulings. In answer to the question asked of Freeman, "In whose handwriting was the statement, 'Less than fifteen rooms'?" he subsequently stated it to be in his own handwriting. The question whether Brooks stated to him that there were less than 15 rooms in the building was clearly leading, and was properly excluded upon that objection. Whether Brooks made such a statement was a material point of inquiry, and it would have been competent for the defendant to ask of Freeman whether any statement was made by him on that subject, and, if so, what it was; but the defendant omitted to make such inquiry. Equally proper was it for the plaintiff to show by Brooks that he did not make such statement, and that, at the time he signed the application, he was not aware that the statement was there. The only objection to these questions was that they were irrelevant and immaterial, and this objection was properly overruled. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(111 Cal. 628)

FATJO v. SWASEY. (S. F. 53.)[1]

(Supreme Court of California. March 21, 1896.)

APPEAL—REVIEW—TIME OF TAKING—APPEAL—TRUSTEE—REMOVAL—ALIENATION BY BENEFICIARY—QUIETING TITLE.

1. The sufficiency of the evidence to sustain the findings of the court cannot be reviewed, unless the bill of exceptions contains specifications of the particulars wherein the evidence is insufficient.

2. Code Civ. Proc. § 939, requires an appeal to be taken within 60 days from the rendition of the judgment, to enable the court to review the evidence, and not merely within 60 days after the notice of the rendition of the judgment is served on the appellant.

3. Where property is given by a testator, in trust, to be converted into cash as soon as it shall be, in the judgment of the trustee, for the best interest of the estate, and the income paid to certain beneficiaries, equity may remove the trustee, and appoint another with all the discretionary powers conferred on the original trustee.

4. Civ. Code, § 867, providing that the beneficiary of a trust for the receipt of the rents and profits of land may be restrained from disposing of his interest in such trust during life, by the instrument creating the trust, is not in conflict with section 863, providing that an express trust in land vests the whole estate in the trustee, subject, only, to the execution of the trust, the beneficiary taking no estate in the property, so as to repeal the latter section, and grant to the beneficiary a present estate and alienable interest in the property, unless restrained from alienation by the instrument creating the trust, as the first section applies only to the rents and profits.

5. Civ. Code, § 1338, providing that, where the will directs the conversion of land into money, such property shall be deemed personalty from the time of testator's death, does not affect the title of a trustee to whom land is so devised, so as to prevent an action by him to quiet title to the land.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by A. V. Fatjo against G. A. Swasey to quiet title to land. There was a judgment for plaintiff, and defendant appeals. Affirmed.

G. A. Swasey and Moses G. Cobb, for appellant. Van Ness & Redman, for respondent.

BELCHER, C. L. H. Bascom died, February 22, 1881, in Santa Clara county, leaving real and personal property therein, and also leaving a last will, in which he nominated his wife, Annie M. Bascom, and his son, Alpheus L. Bascom, as the executrix and executor thereof. The provisions of the will, so far as they need be noticed, are as follows: "I give, devise, and bequeath to my said executors, all and singular, all my property, real, personal, and mixed, separate or common, wheresoever situated, including all moneys belonging to me, or of which I may die seised or possessed, in trust, nevertheless, and to and for the following purpose and benefits only, and not otherwise. To sell, all and singular, the estate and property above named, and which may come into their hands, or either of them, as such executors, as soon after my death as, in their judgment, may be most for the interest of my estate, and convert the same into cash, and such cash, together with all moneys belonging to said estate, shall be disposed of in the manner following, to wit, to be divided into eight shares, one share to go to each of my children, subject to the following conditions, such shares to be equal in amount: To my daughter, Henrianna B. Swasey, one share, which my said executors shall invest in such way as that she shall have the use and enjoyment of all the income thereof during her life, free from the control, interference, or hindrance of her husband, and on her death to vest in her children in fee. * * * I further provide that, in the event of the death of any of my said children, I leave the share of my estate to which he or she would have been entitled to his or her issue lawfully begotten, or, should any of my children die without such lawful issue, I direct my executors to invest such share for the benefit of the survivors and their children, in equal shares, on the same terms, trusts, and conditions as hereinbefore expressed, severally, as to such survivors."

In due time the said will was admitted to probate, and the persons named as executrix and executor thereof were appointed, and entered upon the discharge of their duties as such. Thereafter the estate was regularly administered upon and closed by a decree of distribution, whereby the property described in the complaint herein was distributed to said Annie M. and Alpheus L. Bascom, as trustees, pursuant to the provisions of said will. Henrianna B. Swasey had three children, all of whom had reached the age of majority, and, in September, 1885, they conveyed to their mother, by a deed duly executed, "all the real and personal estate, situate in the state of California or elsewhere," derived by them "through the last will and testament" of the said decedent. On December 1, 1887, Mrs. Swasey obtained a loan of $1,000 from one Tennyson, for which she gave him her promissory note and a mortgage on a part of the property described in the complaint to secure its payment. Immediately thereafter Tennyson assigned the said note and mortgage to the defendant, who had advanced, through Tennyson, the money so loaned. The said mortgage was duly recorded, but the assignment thereof was never recorded.

In February, 1889, Mrs. Swasey and others commenced an action for the partition of the land distributed to the trustees, alleging, in the complaint, that she had an estate of inheritance therein to the extent of one undivided one-sixth interest in the fee thereof, and also alleging that the trustees, Annie M. and Alpheus L. Bascom, had no interest in or right to the said land, or any part thereof. Said Tennyson was made a party to the action, and was served with summons, but suffered his default to be entered. It was alleged that he held a mortgage made by the plaintiff, Mrs. Swasey, "on her share of said premises, to secure a note for $625, dated March 17, 1887, and payable in two years, which said mortgage was recorded on the 24th day of March, 1887, in the recorder's office," etc. And the prayer of the complaint as to said Tennyson was that the mortgage given by Mrs. Swasey to him be declared to be a charge only on the share assigned to her. The case was tried, and on July 2, 1890, an interlocutory decree was entered, adjudging that Mrs. Swasey and the other beneficiaries of the trust had no vested or present interest in the land described in the complaint, except as such beneficiaries, and further, adjudging that four-sixths of the said land be partitioned to said Annie M. and Alpheus L. Bascom, trustees under said will. And by consent of all the parties a sole referee was appointed to make a partition of the premises in accordance with the decree. On July 18, 1890, an action was commenced by the beneficiaries of said trust to remove said trustees, and for the appointment of another trustee or trustees to act in their place and stead. In said action Annie M. Bascom tendered her resignation as trustee, which was accepted by the court, and thereafter, by the judgment and decree of the court, Alpheus L. Bascom was removed from his position as such trustee, and A. V. Fatjo, the plaintiff herein, was duly appointed as sole trustee of said estate, and was "authorized and empowered to discharge the duties arising from said trust, originally conferred by said decree of distribution upon said A. M. and A. L. Bascom." Thereupon said Fatjo duly qualified as such trustee under said appointment, and ever since has been "the duly authorized, qualified, and acting trustee of said estate of L. H. Bascom, deceased." On December 29, 1890, a final decree in the said partition suit was made and entered, whereby the premises described in the complaint in this action were awarded and set apart to said A. V. Fatjo, as trustee, "to hold the same in trust under said last will and testament of L. H. Bascom, deceased." In October, 1893, the defendant herein, G. A. Swasey, commenced an action to foreclose the mortgage given by Mrs. Swasey to Tennyson, and by the latter assigned to him. The plaintiff in this action was made a party defendant, but the court ordered the action dismissed as to him. The usual decree of foreclosure against Mrs. Swasey was duly entered therein, as prayed for, on January 5, 1894.

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[1] Rehearing denied.

Thereafter, on January 10, 1894, the plaintiff commenced this action to quiet his title to the premises partitioned to him, as trustee, and it was held, as in the partition suit, that Mrs. Swasey had no interest in the land, and that the defendant, as her mortgagee, had acquired no lien under the mortgage or the decree of foreclosure which he could assert against the plaintiff's title. Judgment was accordingly entered in favor of the plaintiff, from which the defendant has appealed on a bill of exceptions.

1. One of the points urged for a reversal is that finding 6, made by the court below, in regard to the partition suit and the judgment rendered therein, was defective, and not supported by the evidence. This point cannot be considered, for the reason—First, that the bill of exceptions contains no specifications of the particulars wherein the evidence was insufficient to justify any of the findings; and, second, an exception to the decision, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within 60 days after the rendition of the judgment. Code Civ. Proc. § 939. Here it appears that the judgment was rendered December 8, 1894, and the appeal was taken February 8, 1895, more than 60 days after the rendition of the judgment. The claim that the appeal was taken within 56 days after notice of the rendition of the judgment was served cannot be availed of. The rule invoked applies only to the time for giving notice of a motion for a new trial.

2. The validity of the trust created by the will is not questioned, but it is contended that the court had no power to substitute the plaintiff in the place of the original trustees, because the discretionary power granted to them "was born of a particular confidential relationship between the testator and those chosen as trustees," and no such relationship existed between the testator and the plaintiff. It is said: "A discretionary power cannot be delegated. A trust cannot be delegated to a person not contemplated in its original creation." And hence it is argued that, when the original trustees went out, the trust lapsed, and the title to the property vested in the beneficiaries. This position cannot be sustained. Every trust naturally implies a confidential relationship between the truster and the trustee, and yet no rule is better settled than that "courts of equity have inherent jurisdiction over all matters of trust and trustees, and they never allow a trust to fail for want of a trustee." Perry, Trusts, § 240. And the rule is declared in our Civil Code as follows: Section 2283: "The superior court may remove any trustee who has violated or is unfit to execute the trust, or may accept the resignation of a trustee." Section 2289: "When a trust exists without any appointed trustee, or where all the trustees renounce, die or are discharged, the superior court of the county where the trust property, or some portion thereof, is situated must appoint another trustee, and direct the execution of the trust. The court may in its discretion appoint the original number, or any less number of trustees." Under these provisions, and in a proper proceeding, it appears that the court accepted the resignation of one of the original trustees and removed the other, and then appointed the plaintiff as their suc-

cessor, and conferred upon him "all discretionary powers mentioned in said will, and therein or otherwise conferred upon said original trustees." There can be no question that the action of the court in this respect was authorized, and that the new appointee, when he accepted the place, succeeded to all the rights, duties, and responsibilities of his predecessors.

It is further contended that the trustees had never sold the property or any part thereof, and that their failure to do so operated to destroy the trust and vest the title in the beneficiaries. But this cannot be so. The will provided that the property should be sold as soon after the testator's death as, in the judgment of the trustees, might be most for the interest of the estate. The trustees, then, were to exercise their own judgment as to when the sale should be made, and, if they erred in this regard, the only remedy was an application to the court for an order directing them to proceed and execute the trust, or for their removal.

3. The next question is, did Mrs. Swasey have any mortgageable interest in the trust property? Appellant contends that she had, and that the finding of the court to the contrary was not justified by the evidence and was erroneous. Section 863 of the Civil Code provides as follows: "Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust." It is claimed by appellant that this section is in conflict with section 867 of the same Code, as amended in 1874, and that, to the extent of the conflict, the former was repealed by the amendment of the latter. As originally passed, section 867 read as follows: "The beneficiary of a trust for the receipt of the rents and profits of real property cannot transfer, or in any manner dispose of, his interest in such trust." And as amended it reads: "The beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, may be restrained from disposing of his interest in such trust during his life, or for a term of years, by the instrument creating the trust." The contention is that the last-named section, as it now reads, "grants to the beneficiary a present estate and alienable interest in the property, unless restrained from alienation by the testator." We see no irreconcilable conflict between the two sections. The first relates to the trust property, and declares that the beneficiary takes no estate or interest therein. The last relates to the rents and profits of the trust property, which the beneficiary is entitled to receive, and which were recognized by the section, as originally passed and as amended, as an interest in the trust. Up to the time of the amendment, this interest in the rents and profits could not be transferred, but now it may be unless restrained by the instrument creating the trust. It follows, if Mrs. Swasey had no estate or interest in the real property, that her children had none which they could convey to her. Whether she had and has an interest in the income to be received and enjoyed by her during her life, which could be assigned or levied upon under execution, is a question which does not arise here and upon which we express no opinion.

4. It is claimed that the plaintiff cannot maintain this action to quiet his title to the real property because section 1338 of the Civil Code provides that, "when a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death." A sufficient answer to this claim is that the devisee of real property subject to a trust acquires a legal estate in the property (sections 863 and 864, Civ. Code), and the law has always been "that the direction in wills to convert land into money, or money into land, is for the benefit of those for whose use the conversion is intended to be made, and that, as to them, it is deemed to have been made from the death of the testator." Estep v. Armstrong, 91 Cal. 659, 27 Pac. 1091. Such a direction, however, does not affect the title to or character of the property, so far as the legatees or heirs are concerned.

It is unnecessary to consider the other questions discussed by counsel. We conclude that the trust was valid in its creation, and that the title to the property, subject only to the execution of the trust, vested in the original trustees, and is now vested in the plaintiff, and that Mrs. Swasey had no mortgageable interest in the property, and the defendant acquired no lien thereon by the execution of his mortgage or the foreclosure thereof. It follows that the judgment should be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(111 Cal. 523)

O'CONNOR v. WITHERBY. (L. A. 13.)[1]

(Supreme Court of California. March 11, 1896.)

NATIONAL BANKS—INSOLVENCY—ACTION TO ENFORCE ASSESSMENT — PLEADING — STOCKHOLDERS.

1. The allegation of the complaint, in an action for an assessment on shareholders in a bank, that "defendant, though demanded, has failed and refused to pay said assessment, or any part thereof," is a sufficient averment, as against a general demurrer, of nonpayment at the time action was commenced.

2. The complaint, in an action by the receiver of an insolvent national bank to enforce an assessment on the shareholders, made by the comptroller of the treasury, need not aver that there was a necessity therefor, or that the comptroller determined that there was such necessity, though the law provides that the comptroller may enforce the individual liability of the stockhold-

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[1] Rehearing denied.

ers, if necessary to pay the debts of the bank. It is enough that the complaint alleges that the comptroller made the assessment and directed its enforcement.

3. In such an action, the necessity of the comptroller's making so large an assessment cannot be litigated.

4. As against creditors of a bank, one cannot allege that he was not the owner of stock therein, the certificate therefor standing in his name, and he being a director and vice president of the bank, and the certificate having been indorsed by him in his own name.

Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Andrew J. O'Connor, receiver, against O. S. Witherby. Judgment for plaintiff. Defendant appeals. Affirmed.

E. Parker, W. T. McNeally, and Trippet, Boone & Neale, for appellant. V. E. Shaw and E. W. Britt, for respondent.

McFARLAND, J. The Consolidated National Bank, organized under the laws of congress, failed on June 21, 1893, and on June 23, 1893, the United States comptroller of the currency appointed the plaintiff herein, O'Connor, receiver of said bank. On October 25, 1893, the said comptroller made an assessment for $250,000, equally and ratably upon the shareholders, to the amount of 100 per cent. of the par value of the shares of the capital stock of said bank, and on November 25, 1893, he made an order directing the plaintiff, as such receiver, to institute suit to enforce against each shareholder his personal liability under such assessment, and under that order this action was brought. It is averred, in the complaint, that, at the time of the failure of said bank, defendant, Witherby, was a shareholder to the amount of 100 shares, represented by certificate No. 211 for 25 shares, and by certificate No. 212 for 75 shares. Defendant denied the ownership of said shares. There was a jury impaneled in the case, but, at the close of the evidence, the court instructed the jury to find a verdict for plaintiff, which was done, and judgment was accordingly rendered for plaintiff. Defendant appeals from the judgment and from an order denying a new trial. We have given due consideration to the able and elaborate briefs of respective counsel, but in stating our conclusions we do not deem it necessary to discuss the points made at any great length. The main contentions of appellant are that the complaint is insufficient, and that the court erred in instructing the jury to find for plaintiff.

1. The contention that the complaint does not contain a sufficient averment of nonpayment cannot be maintained. It is averred that "the defendant, though demanded, has failed and refused to pay said assessment or any part thereof"; and this is a sufficient averment of nonpayment at the time of the commencement of the action. There was only a general demurrer. The law provides that the comptroller may enforce the individual liability of the stockholders if necessary to pay the debts of the bank; and the main contention of appellant, as to the insufficiency of the complaint, is that it does not aver such necessity, nor that the comptroller determined that there was such necessity. Appellant relies, mainly, on Kennedy v. Gibson, 8 Wall. 498, to support this contention. But, in that case, the complaint showed that the receiver had brought the action of his own motion, without any order of the comptroller to do so, and without any action of the comptroller towards enforcing the individual liability of stockholders; while the court held that the receiver was the mere instrument and creature of the comptroller, and that the latter must decide when it is necessary to institute proceedings against the stockholders, and for what amount. And it is as to this general action of the comptroller that the court say: "The fact must be distinctly averred in all such cases." But an averment that the comptroller made the assessment, and directed the action to be brought, is a sufficient averment,—as against a general demurrer, at least,—that he had determined the necessity of such action. This was expressly decided by Justice Shiras in Welles v. Stout, 38 Fed. 67, where the complaint was like the one in the case at bar. He refers to Kennedy v. Gibson, supra, and says: "Certainly the comptroller would not have made this assessment unless he had decided that it was necessary to enforce the personal liability of the stockholders. The evidence that he had reached the conclusion that it was necessary to resort to the liability of the stockholders is found in the fact averred,—that he made this assessment and ordered it paid." The contention of the appellant that the complaint is insufficient in this respect cannot, therefore, be maintained.

The point made by appellant that the court erred in striking out part of his answer is not tenable. The part stricken out was an averment that the comptroller, in making the assessment, acted without due information of the assets and liabilities of the bank; that such assets, independent of the liability of the stockholders, were sufficient to pay all the liabilities except $125,000; and that a levy of 50 per cent. upon the capital stock would have been sufficient. This averment constituted no defense. The action of the comptroller "cannot be controverted in a suit against a stockholder. It is conclusive upon him, and makes it his duty to pay." Casey v. Galli, 94 U. S. 681. See, also, Kennedy v. Gibson, supra, and Bank v. Case, 99 U. S. 628. In Kennedy v. Gibson the court say: "It would be attended with injurious consequences to forbid action against stockholders until the precise amount necessary to be collected shall be formally ascertained. * * * If too much be collected, it is provided by the statute that any surplus which may remain after satisfying all demands against the association shall be paid to the stockholders." The owner of stock in a national bank holds it in view of, and subject to, the provision of the law under which the bank is organized.

2. We do not think that the judgment should be reversed because the court instructed the jury to find for the plaintiff. Of course, such an instruction could not be upheld where there was conflicting evidence as to material facts, which the jury had the right to pass on; but, where there is no substantial conflict of evidence as to the facts determinative of the case, or such facts are admitted, there the judgment will not be reversed for such an instruction, although the practice is hazardous, and can be sanctioned only in the clearest cases. In the case at bar the 100 shares in question were originally represented by certificate No. 94, held by Mrs. Howard, wife of Bryant Howard, president of said bank. The evidence shows that this stock was transferred to the appellant on June 30, 1891. Appellant contends that there was a conflict of evidence on this point. We do not see anything in the record as to this matter which could properly be called a conflict; but, if there was, it was immaterial. As between the bank, or its creditors, and the appellant, there was no actual legal transfer of the stock until July 2, 1892; and whatever occurred, or did not occur, before that time, between appellant and Mrs. Howard, is of no importance in this case. The certificates remained in the name of Mrs. Howard, and appellant had no right to represent them. But, on July 2, 1892, the actual transfer was made on the books of the bank, when certificate No. 94 was surrendered, and the two new certificates, Nos. 211 and 212, in lieu thereof, were issued to the appellant, regularly signed by the president and cashier, and corresponding entries made on the books of the bank. This was nearly a year before the suspension of the bank, down to which time the certificates remained in appellant's name, and no other transfer of them was made. There was no conflict of evidence as to these facts. Appellant contends, and testified, that he did not know that these certificates had been issued to him, and had not authorized them to be issued. Of course, a man cannot be made liable to the creditors of a bank merely because, without his knowledge, and under circumstances which did not put him on inquiry, some one had, without authority, caused some stock to be issued in his name. But in the case at bar, in the first place, appellant, during all of the time of these transactions, was a stockholder, a director, and vice president of the bank, attended directors' meetings, and gave advice as to the bank's business, and certainly ought to have known his relations to it. He held himself out as sustaining the bank and indorsing its solvency. And, in the second place, he indorsed these very two certificates with his name in his own handwriting; and this is conclusive proof, by his own admission, that he knew, or ought to have known, that they had been issued to him. He was one of the persons to whom the creditors of the bank had the right to look for the purpose of giving it credit; and he has shown nothing which enables him to escape from that position. See Irons v. Bank, 27 Fed. 591; Keyser v. Hitz, 133 U. S. 147-149, 10 Sup. Ct. 290; Finn v. Brown, 142 U. S. 56, 12 Sup. Ct. 136.

The real alleged grievance of appellant is that he was deceived and defrauded by Bryant Howard. Howard was his trustee of a large amount of property, his attorney in fact, and his confidential agent to manage his business. While appellant does not deny that the indorsements on the certificates are in his own handwriting, he says that he trusted Howard implicitly, and signed all the papers which the latter presented to him, that he did not know what the certificates were when he indorsed them, and that Howard procured him to indorse them for a fraudulent purpose. Whether this be the true state of facts, or whether appellant takes this position for the purpose of repudiating the ownership of property which, in 1892, was supposed to be valuable, but which a year afterwards was a good deal worse than worthless, is a question between plaintiff and Howard. As to the creditors of the bank, appellant was the owner of the stock. With secret transactions between him and Howard they are not concerned. In Keyser v. Hitz, supra, the court said: "There was no connection between her liability to be assessed and the alleged fraudulent intent with which her husband caused the transfers of stock to be made." In the case at bar, it is unimportant how much of the time the certificates were in the possession of Howard, for he was appellant's private agent and trustee, with power to deal for appellant in the purchase and sale of stocks.

Under the foregoing views, we see no disputed material facts for the jury to pass on, and therefore we see no warrant for reversing the judgment on account of the said instruction complained of. And, under these views, the numerous exceptions taken by appellant to rulings of the court on the admissibility of evidence, refusals to give certain instructions asked, etc., are immaterial, and need not be specially noticed. The judgment and order denying a new trial are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

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5 Cal. Unrep. 302

ERTLE v. PLACER COUNTY et al.

(Sac. 69.)

(Supreme Court of California. March 18, 1896.)

JURISDICTION OF SUPREME COURT — AMOUNT INVOLVED.

The supreme court has no jurisdiction of an appeal from an order, made after final judgment, refusing to strike out plaintiff's cost bill, which amounts to less than $300.

Department 1. Appeal from superior court, Placer county; W. H. Grant, Judge.

Action by John Ertle against Placer county and others. From an order made after final judgment, defendants appeal. Dismissed.

L. L. Chamberlain and F. P. Tuttle, for appellants. Ben. P. Tabor and John M. Fulweiler, for respondent.

PER CURIAM. This is an appeal from an order of the superior court, made after final judgment, denying defendants' motion to strike out plaintiff's cost bill, amounting to only $65.45. The only ground of the motion was that the memorandum of the items of costs, though properly verified and filed with the clerk, was not served on the defendants within the time prescribed by section 1033 of the Code of Civil Procedure. As the whole amount of costs claimed by plaintiff was less than $300, this court has no jurisdiction of the appeal. Fairbanks v. Lampkin, 99 Cal. 429, 34 Pac. 101. Therefore the appeal is dismissed.

(111 Cal. 553)

THOMPSON v. BOARD OF SUP'RS OF ALAMEDA COUNTY. (S. F. 277.)[1]

(Supreme Court of California. March 17, 1896.)

STATUTES—TITLES OF ACTS—REPEAL.

1. St. 1893, p. 288, entitled "An act providing for the sale of railroad and other franchises in municipalities, and relative to granting of franchises," provides that every franchise to erect telegraph or telephone wires, to construct railroads on public streets, or to exercise any other privilege granted by the governing body of any county, city and county, city, town, or district, shall be granted under the conditions of the act. It prescribes the character of notice to be given for the sale, and provides that the franchise must be awarded to the highest bidder. *Held*, that such act does not violate Const. art. 4, § 24, declaring, "Every act shall embrace but one subject, which shall be expressed in its title."

2. St. 1893, p. 288, relating to sale of franchises by municipal corporations, was not repealed by County Government Act, § 25, subd. 40, giving the board of supervisors power to grant franchises over "highways for all lawful purposes, on such terms and conditions and restrictions as in their judgment may be necessary and proper," which took effect the day after taking effect of St. 1893, p. 288.

3. St. 1893, p. 288, providing for the sale of railroad and other franchises in municipalities, and relating to the granting of franchises for telephones, telegraphs, and railroads on highways, provides that they "must be awarded to the highest bidder." *Held*, that such statute requires the franchise to be sold for cash, and that an offer to pay percentage of the gross receipts, or to do or provide any other thing, in consideration of such franchise, cannot be considered.

Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Petition by Arthur D. Thompson for a writ of mandate to compel the board of supervisors of Alameda county to accept the bid of petitioner, and to declare him the highest bidder at the sale of the franchise for an electric railroad on certain highways of the county. From a judgment denying the writ, petitioner appeals. Affirmed.

S. B. McKee, for appellant. Chas. E. Snook, for respondent.

GAROUTTE, J. This is a proceeding by mandate to compel the board of supervisors of Alameda county to accept the bid or tender of one Thompson, the petitioner, and to declare him the highest bidder at the sale of a franchise for an electric railroad upon a certain defined route over the highways of that county. The proceedings of the board of supervisors leading up to the sale of this franchise were taken under a recent act of the legislature found in the Statutes of 1893, at page 288. That statute is entitled "An act providing for the sale of railroad and other franchises in municipalities, and relative to granting of franchises," and provides: "Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate railroads along or upon any public street or highway, or to exercise any other privilege whatever, hereafter proposed to be granted by the board of supervisors, common council, or other governing or legislative body of any county, city and county, city, town or district within this state, shall be granted upon the conditions in this act provided, and not otherwise." The act then prescribes the character of notice to be given for the sale, the time of the publication thereof, and fixes the day when tenders will be received for such franchise or privilege. The concluding clause of the section is: "The franchise or privileges must then be awarded to the highest bidder."

It is urged by respondents that the act is unconstitutional, as being violative of section 24, art. 4, of the constitution of this state, which declares: "Every act shall embrace but one subject, which shall be expressed in its title." The alleged violation is claimed to consist in this: that the title refers to sales of franchises by municipalities only, while the body of the act attempts to deal also with franchises issued by counties at the hands of their respective boards of supervisors. We have no doubt but that the word "municipalities," as used in the title of the act, is not broad enough to include counties; but the title proceeds further, and uses the very general language, "and relative to the granting of franchises." These words are broad, not limited in terms to municipalities, and appear, by a fair and reasonable construction, to cover all the legislation found in the body of the act.

The act went into effect March 23, 1893, and it is insisted that it was repealed by subdivision 40 of section 25 of the county government act, which went into effect upon the following day. That section declares the general permanent powers of boards of supervisors, and subdivision 40 thereof gives the board power "to grant franchises along and over the public roads and highways for all lawful purposes, upon such terms and conditions and restrictions as in their judgment may be necessary and proper, and in such manner as to present the least possible obstruction and inconvenience to the traveling public." The law looks with disfavor upon repeals by implication, and we see no such inconsistency in these two provisions as to call for a determination by this court that the earlier provision was repealed by the later. We think full force and effect may be given to both. The franchise may be sold to the highest bidder, and still the terms, conditions, and restrictions upon which the franchise will be granted may be fixed by the board of supervisors under its general permanent powers. We conclude there is no repeal of that portion of the statute here involved by subdivision 40 of section 25 of the county government act.

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[1] Rehearing denied.

We pass to a consideration of the tenders or bids made for the franchise. There are various matters discussed by counsel pertaining to this question, but, weighing the case from the angle at which we view it, the consideration of a single one disposes of this litigation. The act declares that the franchise must be awarded by the board of supervisors to the highest bidder, and, in order that petitioner may be entitled to the writ asked for, he must show himself to be such bidder. There were but two tenders or bids presented upon the day fixed for the sale. Vandercook, the successful buyer, made a bid to the following effect: He offered $25 cash, and also agreed "to pay all of the expenses of advertising in connection with the said matters, and also agreed to erect and maintain clusters of five incandescent lamps each, or their equivalent, at twenty different places along the route described, at such locations as the board might direct, and also agreed to furnish said county power sufficient to run a ten horse power motor at the county infirmary in Alameda county, when and during the time the railroad is in operation, and further agreed to pay to the county of Alameda one-fourth of one per cent. of the gross receipts of the said railroad after the first five years of operation." The petitioner, Thompson, made a bid offering to give the county 2 per cent. of the gross receipts after the road had been completed five years. The board refused to accept his bid, whereupon he then and there made another bid, substantially duplicating Vandercook's bid, except as to the percentage of the gross receipts, and offered 2 per cent. of the gross receipts as aforesaid. Respondent insists that there are material differences in these two bids in other respects, but for present purposes we may assume them to be duplicates in the conditions and terms stated.

The only legally substantial thing we find in petitioner's bid is the offer of $25 cash. When the law says a franchise must be sold to the highest bidder, without stating other terms or conditions of sale, it means sold for cash. It does not contemplate that it may be bartered away for meats and produce to feed the inmates of the county infirmary, or traded off for horses to be used in the fire department of the municipality. The moment you give a construction to the law by which the officers selling may accept a consideration for the franchise in any other commodity than money, the whole purpose and object of the act becomes a nullity, for then a discretion is vested in such officers which, most probably, is not subject to review; and values of personal property to be received, or services to be rendered in return for privileges and franchises dealt out, may assume magnified proportions, in the eyes of the municipal or county officers conducting the sale, entirely unjustified by the actual facts. If such things were allowed, the law would be a failure, and utterly inadequate to meet the purposes for which it was enacted. It would thus seem that petitioner's offer to furnish power for the county infirmary, and erect clusters of electric lamps at 20 different points upon the road, cannot be considered; for the officers intrusted with this sale had no more right to accept such properties and benefits in consideration of the franchise than they had to accept horses, cattle, or sheep.

We are also clear in holding that an agreement to pay a percentage of the gross receipts of the road, after completion and when in operation, cannot be received as a legal bid or tender under this act. As already suggested, when a statute provides that property shall be sold to the highest bidder, in the absence of anything in the statute to the contrary, it must be held to mean "to the highest bidder for cash." The gross receipts of a prospective electric road may be little, and they may be much. The sum total of its annual receipts is a most indefinite and uncertain quantity. Such amount is elusive, and dependent upon many conditions. The franchise may be bought, and the road put in operation for the single purpose of shutting off competition with other roads, and with no intention of making its gross receipts anything but merely nominal; and, under such circumstances, the bidder might well offer 10, 20, or 30 per cent. of its gross receipts for the franchise. Parties desiring to purchase in good faith, for the purpose of operating a competing line, could not afford to make any such bid. At the same time a bid from them of 2 per cent. of the gross receipts might bring more money to the county or municipal treasury than the higher offer from the other parties. These suggestions show how unsatisfactory and indefinite sales of franchises and privileges based upon a percentage of gross receipts would be. But, beyond all such reasons, the statute contemplates a cash sale, and a percentage of gross receipts is in no sense cash.

For the foregoing reasons, we are justified in holding that petitioner has not shown himself to be the highest bidder, and his application for a writ of mandate was properly denied. It becomes unnecessary to discuss the legal appropriateness of the remedy of mandate, in view of what has been said. The judgment is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

111 Cal. 541

HENSLEY v. SUPERIOR COURT OF SACRAMENTO COUNTY. (S. F. 423.)

(Supreme Court of California. March 12, 1896.)

DECEDENTS' ESTATES — ORDER FOR NOTICE TO CREDITORS—SUFFICIENCY—MANDAMUS.

1. Under Code Civ. Proc. § 1490, requiring notice to creditors of a decedent to file claims to be published "as often as the judge or court shall direct, but not less than once a week for four weeks," the order for notice need not specify the times of publication, unless a greater than the minimum number is required.

2. Code Civ. Proc. § 1492, provides that, when the notice to creditors to file claims has been duly made, an order showing that due notice has been given, and directing it to be entered and recorded, "must be made by the court." *Held*, that mandamus will lie to compel the court to make such order.

In bank. Petition by the executrix of the estate of Calvin P. Hensley against the superior court of Sacramento county for writ of mandamus to compel defendant to enter an order of due notice to creditors. Granted.

Stewins & Elliot, for petitioner. Albert M. Johnson and Hiram W. Johnson, for respondent.

PER CURIAM. The superior court refused to make or enter an order or decree of due notice to creditors in the estate of one Calvin P. Hensley, deceased, pending therein, notwithstanding it appeared that an order had been theretofore made therein directing "that notice to the creditors be given in the Daily Record Union"; and that under said order a notice, proper in form, had been duly published in the designated paper once a week for a period of four successive weeks. Petitioner, the executrix of said estate, seeks mandate here to compel the making and entry of such decree. It appears that the judge of the superior court refused to make the order for the reason that he construed section 1490 of the Code of Civil Procedure[1] to require that in all instances the order for notice to creditors must specify the number of times the notice shall be published, and that as the order, the substantive part of which is above set out, did not so specify, it was held void, and the notice given under it, for that reason, of no effect. We regard this view of the statute as erroneous. While not wholly free from ambiguity, we think it sufficiently clear that the meaning of section 1490 is that only in those instances where the court, in its discretion, by reason of the circumstances, deems it proper to require a more extended publication than the minimum required by the statute, is it necessary to specify the time of publication in the order. In all other instances the order may be silent in that respect, and when it is so a publication of proper notice thereunder, as in this instance, not less than the minimum number of times required by the section, is a compliance with the law, and constitutes legal notice to the creditors. What is said in Wise v. Williams, 88 Cal. 30, 25 Pac. 1064, suggesting a different construction of the section, was not pertinent to the question then before the court, and is therefore obiter; the fact in that case being that the notice was published without *any* order having been made, and no question as to the requirements of such an order arose. The construction here given accords with the practical construction very generally given the act by the bench and bar alike throughout the state for a great many years, and, even if its correctness were less obvious, should manifestly, on considerations of public policy, be adhered to, in order to avoid the disturbance in titles to real estate passing through the probate court during such period, which would otherwise follow. We think, therefore, that the order of publication in this instance was sufficient, and that, upon the showing made, it was the duty of respondent to make the order applied for.

Nor is there any doubt that mandamus will lie in such a case. Section 1492, Code Civ. Proc., provides that when notice to creditors has been given as provided in the previous sections, and due proof thereof is made, "an order or decree showing that due notice to creditors has been given, and directing that such order or decree be entered in the minutes and recorded, must be made by the court." Where, as here, the law affixes a right to specific relief from certain facts, and there is no question made as to the existence of such facts, the court has no discretion to refuse the relief. In such a case the limit of the discretionary power of the court has been reached, and nothing but a clear duty remains; and if the relief is refused, and there is, as in this instance, no appeal, or other plain, speedy, and adequate remedy, mandamus will lie to compel it. Wood v. Strother, 76 Cal. 545, 18 Pac. 766; Keller v. Hewitt (Cal.) 41 Pac. 871; Johnston v. Superior Court, 105 Cal. 666, 39 Pac. 36. Let a peremptory writ issue as prayed.

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111 Cal. 567

SUMMERLAND, Assessor, v. BICKNELL, County Auditor. (S. F. 166.)

(Supreme Court of California. March 17, 1896.)

CONSTITUTIONAL LAW — LOCAL ACTS — COMPENSATION OF COUNTY OFFICER.

The proviso to section 216 of the amended county government act (St. 1895, pp. 1–11), that the percentage on poll and personal property taxes, which the assessor, in other counties, is allowed to retain as compensation, shall not be retained by the assessor in counties of the second class, is not repugnant to Const. art. 1, § 11, providing that "all laws of a general nature shall have a uniform operation," nor to article 4, § 25, prohibiting the enactment of any local or special law "affecting the fees or salary of any officer." The fact that there is but one county of the second class is immaterial.

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[1] Code Civ. Proc. § 1490, requires notice to creditors of a decedent to be published "as often as the judge or court shall direct, but not less than once a week for four weeks."

In bank. Petition by Theodore Summerland, as assessor of Los Angeles county, for a writ of mandamus to Charles F. Bicknell, as county auditor of said county. Denied.

R. B. Carpenter, for petitioner. C. H. McFarland and J. A. Donnell, for respondent.

McFARLAND, J. This is a petition by the plaintiff, as assessor of Los Angeles county, for a writ of mandamus to the defendant, as auditor of said county, directing the latter to audit the accounts of the former, and to allow him 15 per cent. on all state and road poll taxes, and 6 per cent. on all personal property taxes collected by said assessor.

Various sections of the Political Code and of the county government act are cited by counsel in their briefs; but, in determining the question here presented, it is only necessary to consider sections 162 and 216 of the county government act, as amended by the act of January 25, 1895,—to be found on pages 1–11 of the Statutes of 1895. By said section 162 the several counties of the state are classified according to their population "for the purpose of regulating the compensation of all officers," and by that classification Los Angeles is in the second class, and at present is the only county in that class. Section 216 provides that the salaries and fees mentioned in the act shall be in full for all services rendered by officers and their deputies and assistants, and that the principals must pay their own deputies, except as otherwise provided in the act, but that the assessor shall receive and retain for his own use 6 per cent. on all personal property taxes collected by him, and 15 per cent. on all state and road poll taxes, and also $5 for every 100 names of persons returned by him as subject to military duty. Then follows the proviso out of which this litigation arises, and it is as follows: "Provided, however, that in counties of the second class the percentage received by the assessor on poll taxes and personal property taxes, and also amounts allowed for returning names of persons subject to military duty, and which in counties of the other classes is allowed to the assessor as compensation, shall be paid by him into the county treasury, and no part thereof shall be retained by him as compensation, and all expenses in collecting the same shall be paid by the county."

It is contended by plaintiff that the proviso last above quoted is unconstitutional and invalid, and that, therefore, it should be disregarded, and the other parts of the section held applicable to the assessor of Los Angeles county as well as to all other assessors. It is contended that said proviso violates section 25 of article 4 of the constitution, which provides that the legislature shall not pass "local or special" laws "for the assessment or collection of taxes," "affecting the fees or salary of any officer," "in all other cases when a general law can be made applicable"; also, that it is repugnant to section 11 of article 1, which provides that "all laws of a general nature shall have a uniform operation"; and to section 5 of article 11, which provides that the legislature shall regulate the compensation of public officers in proportion to duties. We do not think that the contention can be maintained as to either of the constitutional provisions invoked. When such a classification of counties as the constitution warrants has been made by the legislature, a statutory provision which applies equally to all the counties of that class is neither local, special, nor wanting in uniformity. And by section 5, art. 11, it is expressly provided that the legislature "shall regulate the compensation of all such [county] officers in proportion to duties, and for this purpose may classify the counties by population." Such was the classification and regulation provided for in sections 162 and 216 of the county government act. In Cody v. Murphey, 89 Cal. 522, 26 Pac. 1081, this court in bank said, by Mr. Justice Garoutte: "A law applicable to all counties of a class as made or authorized by the constitution is neither a local nor special law. If it applies to all the counties of a class authorized by the constitution to be made, it is a general law; and whether there may be few or many counties to which its provisions will apply is a matter of no consequence." That case arose out of the county government act, and involved the power of the legislature to classify counties for the purpose of regulating compensation of officers, and the court further said: "There can be no question as to its being uniform in its operation. It acts upon all counties and all officers of counties of the twenty-fifth class." See, also, People v Henshaw, 76 Cal. 436, 18 Pac. 413, and Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66. And the fact that there is only one county in a particular class makes no difference. It is not the province of a court to determine how many classes are necessary. "The proper determination of that question of necessity depends upon a variety of considerations, which are for the legislature and not for the courts." Longan v. County of Solano, 65 Cal. 125, 3 Pac. 463. See, also, Welsh v. Bramlet, 98 Cal. 225, 33 Pac. 66.

Whether or not the provision of section 216 in question works a hardship to the plaintiff is not a legitimate question here. He gets, as assessor, a salary of $3,800 per annum, and the section provides that "all expenses in collecting the same [said taxes] shall be paid by the county," and it is averred in the answer that all such expenses were paid by the county. Appellant says that the provision that the county shall pay such expenses is unconstitutional. That question is not before us, although we may properly say that whether or not the legislature can provide for the payment of the actual expenses of collecting such taxes, the amount to be ascertained as in the case of other demands, is at least an open question. But, under any view, the only question in the premises would be whether or not the provision as to compensation is a wise and proper law, and that question must be answered by the legislature, not by the courts. The prayer of the plaintiff is denied and the petition dismissed.

We concur: GAROUTTE, J.; HARRISON, J.; VAN FLEET, J.; HENSHAW, J,; TEMPLE, J.

(5 Cal. Unrep. 294)

PEOPLE v. ST. CLAIR. (Cr. 91.)

(Supreme Court of California. March 17, 1896.)

LARCENY—EVIDENCE.

A conviction of larceny of a horse and cart will not, after denial of a new trial, be disturbed, where there was evidence that the property was stolen; that defendant, when seen, shortly afterwards, traveling away with it from the scene of the larceny, tried to evade identification, and when arrested with the property, a few hours afterwards, 23 miles away, made false statements in explanation of his possession.

Department 1. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Frank St. Clair was convicted of grand larceny, and from the judgment, and an order denying a new trial, he appeals. Affirmed.

J. G. Swinnerton and A. V. Scanlon, for appellant. Atty. Gen. Fitzgerald, for the People.

PER CURIAM. Defendant was convicted of grand larceny, and now appeals, insisting that the evidence is insufficient to support the verdict. The jury passed upon its sufficiency, and the trial court also did, when it denied a motion for a new trial. Under these circumstances, this court will not hold the evidence insufficient to support the verdict, unless defendant's guilt has no support therein. In this case a larceny of a horse and cart was committed. A short time thereafter the defendant was seen in possession of the property, traveling rapidly away from the scene of the larceny. At this time, when seen, he acted suspiciously, as though trying to evade identification. A few hours thereafter he was arrested 23 miles from the scene of the larceny, still traveling in an opposite direction, with the property in his possession. When arrested he made false statements in explanation of his possession. Upon this state of facts, we will not disturb the verdict of the jury. Judgment and order affirmed.

(5 Cal. Unrep. 295)

EPPINGER et al. v. KENDRICK. (Sac. 46.)[1]

(Supreme Court of California. March 17, 1896.)

PLEADING — ANSWER — DUPLICITY — EVIDENCE — SUFFICIENCY—INCONSISTENT DEFENSES—HARMLESS ERROR.

1. In an action on a note against one as surety, defendant denied the suretyship, and alleged that he joined in the execution for the accommodation of plaintiff, and that, if he were liable as surety, the principal maker had put in plaintiff's hands sufficient wheat to pay the note, and directed that the proceeds thereof be applied thereon, and that plaintiff did not so apply them. *Held* that, though the defenses were not separately pleaded, the answer was sufficient, when questioned, for the first time, on motion to exclude evidence offered thereunder.

2. In an action on a note, on the issue as to whether defendant signed the note for the accommodation of the maker or for the accommodation of plaintiff, the payee, to enable him to use it as collateral, the testimony of defendant and the agent who acted for plaintiff in securing defendant's signature was directly contradictory. There was evidence of subsequent circumstances which, on their face, appeared contradictory of defendant's claim, but, as explained by him, did not discredit his testimony. *Held*, that a verdict for defendant would not be disturbed.

3. Where inconsistent defenses are pleaded, neither can be used as an admission to destroy the other.

4. Where, in an action on a note, defendant claims that he signed the note merely for the accommodation of plaintiff, to enable him to use it as collateral, and has already testified as to the circumstances of the transaction, as claimed by him, it is not prejudicial to plaintiff to permit defendant to be asked as to what was his understanding as to the purpose of his signature.

5. Where there is no evidence to show any consideration for a note, other than the circumstances disclosed in the statement of counsel, preceding a question asked by him as to whether there was any other consideration, permitting such question to be asked is not prejudicial.

Commissioners' decision. Department 1. Appeal from superior court, Glenn county; S. Millington, Judge.

Action by Eppinger & Co. against J. K. Kendrick and another. From a judgment for defendant Kendrick, and an order denying a new trial, plaintiffs appeal. Affirmed.

Geis & Kelly, for appellants. Hurst & Hurst and C. L. Donohoe, for respondent.

HAYNES, C. This action was brought against M. P. Farnham and J. Kendrick upon two promissory notes, each dated August 19, 1891, payable one day after date, one for $2,000 and the other for $800, to the order of Eppinger & Co., upon which there was claimed to remain unpaid $1,119.04 and interest. Farnham, having been adjudged an insolvent debtor, did not answer, and the action proceeded against Kendrick alone, whose answer consisted of a general denial and a special defense, in which it was alleged that on September 12, 1887, Farnham was indebted to the plaintiffs in the sum of about $6,000, and, at the request of Oscar C. Schultz, manager and agent for said plaintiffs in their mercantile business at Germantown, he executed, with Farnham, a promissory note for $2,000, payable to the order of the plaintiffs one day after date, with interest at the rate of 1 per cent. per month; that he executed the same upon the representation of said Schultz that plaintiffs needed money, that Farnham's note was not good as collateral security, and that his (Kendrick's) name would be used for no other purpose than to make the note good as collateral security at the bank; and that the notes in suit were given in renewal thereof, that he did not execute any of the notes at the request of Farnham, and that, as to him, they were without consideration. It was also alleged that, in 1890, Farnham delivered to plaintiffs a quantity of wheat sufficient to have paid said note, with the request that it should be applied thereon, but that Schultz said that he wanted to use the note longer, and he would see Kendrick, and obtain his consent, but did not do so; that he received no consideration for the execution of any of the notes; and that Farnham did not request him to execute them. The jury returned a verdict for the defendant, and this appeal is from the judgment entered thereon, and from an order denying a new trial.

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[1] Rehearing granted.

Plaintiffs' motion for judgment on the pleadings was properly denied. Whether the general denial was sufficient to prevent judgment, in the absence of proof, need not be considered.

Plaintiff also objected to evidence under the special defense, upon the ground that it does not state facts sufficient to constitute a defense. The special defense, so called, really contains two special defenses: (1) That defendant was not Farnham's surety, but joined in the execution of the notes for the accommodation of the plaintiffs, to enable them to raise money upon them as collateral; and (2) that, if he were liable as surety, the principal maker had put in plaintiffs' hands sufficient wheat to pay them, and directed that the proceeds be applied upon the original note, and that they did not so apply it. These defenses should have been separately pleaded; but no objection was taken by motion to require them to be separately stated, nor by special demurrer for ambiguity or uncertainty. Though defectively pleaded, the answer stated a defense, and the objection to evidence upon that ground was properly overruled. So, too, the objection that the agency of Schultz for the plaintiffs is not sufficiently alleged cannot be sustained. The answer in that regard is sufficient, as against an objection to evidence, though defectively pleaded, whatever might have been held if it had been specially demurred to.

The question principally discussed by counsel goes to the sufficiency of the evidence to justify the verdict. The defendant testified that, at the time the original note was executed (September 12, 1887), Mr. Schultz came to him, and said the plaintiffs needed money, that Farnham was owing them, and that he wanted him to go on Farnham's note so that they could use it as collateral; that Farnham did not request it; that defendant declined to execute it, but Schultz appealed to him, reminding him that he had accommodated him in many ways, that as a friend he wanted him to sign it so he could use it as collateral, and he then agreed to do so; and that the notes in suit were renewals, without any new agreement or consideration. Mr. Schultz testified, in relation to the making of the original note, as follows: "Mr. Eppinger had been up and saw that the account was very large, and said the account had to be reduced, told me to go out and see Farnham, which I did, and told him what Mr. Eppinger said. Mr. Farnham said he could not pay at present, and stated he had consummated a transaction with Mr. Kendrick on a patent plow, and was willing that I have the royalty. I told him that wasn't satisfactory to my people at all. I then says, 'If Mr. Kendrick will sign your note with you for $2,000, you can secure Kendrick by allowing him to retain the royalty on the plows he is to manufacture, as security for the money.'" These statements of defendant and Schultz are materially conflicting; but appellants contend that the other evidence given by and on behalf of defendant renders defendant's statement as to the transaction so improbable that the court cannot consider it, and that therefore there is no material conflict. One of these items of evidence relates to the plow contract. Sometime prior to the making of said note, a contract was made between Farnham and Kendrick, by which Kendrick was to manufacture a patented plow for Farnham, under which Farnham was to receive a royalty of $10 for each plow sold; and, at the suggestion of Schultz, at the time the original note was made, an additional agreement was made by which Kendrick was to retain the royalty to the extent of $2,000, and pay the same to plaintiffs; and, if Farnham should otherwise pay the note, this latter agreement should be canceled. Schultz learned of the plow contract when he went to see Farnham, and that, we may reasonably suppose, led Schultz to make the effort to have Kendrick go upon Farnham's note. It should not be overlooked that Schultz nowhere denies that he, and not Farnham, requested Kendrick to go on the note; nor did he deny that he represented to Kendrick that he wanted his signature to enable him to use it as collateral with which to raise money; nor was Schultz's suggestion that Farnham should secure defendant by allowing him to retain and apply the royalty upon the note inconsistent with that purpose. Kendrick did not solicit security from Farnham, but this contract was made at Schultz's suggestion, and was written and retained by him, and the plaintiffs thereby obtained from Farnham whatever security the royalty afforded.

Appellants contend, however, that it is not reasonable that plaintiffs, if they desired to use the note as collateral, would have made it payable one day after date. But, on the other hand, it may be said that, if Kendrick's purpose was to secure the plaintiffs' claim against Farnham, it is equally improbable that he would have placed himself in a situation in which he was liable to be sued the second day thereafter, instead of stipulating for time to enable Farnham to pay. So far, therefore, as the evidence relates to the making of the original note, the evidence is sufficient to justify the jury in finding that defendant was an accommodation maker for the benefit of plaintiffs. The notes here in suit were given in renewal of the former note, the one for $2,000 representing the principal, and the one for $800 representing the interest. There does not appear to have been any new consideration, or any new agreement or understanding at the time they were executed; and defendant testified that they were to be used in place of the other note. The circumstances relied upon by plaintiffs to show that the notes were not executed by Kendrick, otherwise than as security for Farnham, occurred afterwards. There is credited on one of these notes, September 7, 1892, $714.32, and on the other, at the same date, $285.68, making, together, $1,000, and that payment was made by a check drawn by the Bank of Willows on the Bank of California to the order of Mr. Kendrick, and therefore appeared to have been made by him; but he testified that it was Farnham's money, and came from his wheat, and was represented by another check, which he took to the bank at Willows, and got its check on the Bank of California for it. According to the testimony of Mr. Kendrick, Schultz never demanded any payment from him until in July, 1892, and that that was the first time Schultz said or did anything showing that he held him personally liable, and that defendant then denied his liability; that Schultz then said, "You live right here by Mr. Farnham, and you can take a crop mortgage on his crop, and get your money from Farnham. We live down at Dixon, and we do not have the opportunity. Hochheimer & Co. will take what he has, and we cannot get it." Kendrick took a crop mortgage from Farnham, but the date of the mortgage I do not find. On June 6, 1893, Kendrick sold to plaintiffs 50 tons of wheat at $1.15 per hundred, to be delivered in July, the proceeds to apply on these notes, and this makes the amount of the only other credit upon the notes, amounting, together, to $1,156.73, credited on July 15, 1893. On July 4th, prior to this delivery, Kendrick wrote Schultz, in reply to some communication from him, as follows: "Dear Sir: I have just telegraphed you, 'I would with one proposition. See letter.' You said, when here, I could have all month. I mean I will ship immediately with this proposition: Those notes are to be taken up when I pay the $1,000 this month, and a new one made payable 1st of August, 1894. The note will be just as good, and if there is any crisis I will not be compelled to pay it until the time we agreed I could have when you were here." Mr. Kendrick wrote another letter two days later of similar import. The first of these letters was evidently written in reply to some communication from Schultz urging an immediate shipment of the wheat, which, under the contract, was to be shipped in "July." Mr. Kendrick explains what he did by saying he was informed by Schultz that his company was in a bad fix, and, he inferred, "were liable to go under"; that he did not want these notes outstanding; that he "wanted a note that could not touch them for a year," so he could get the wheat out of Farnham's crop, and that was why the letters were written; that he was afraid the company might break up, leaving the notes in the hands of others. That there were grounds for this fear appears from Schultz's letter to him of July 18, 1893, in which he said: "During this awful stringency of money, every available thing was sent to the city, so that it may be some few days before I can get your old note." I fail to find, in any of the transactions subsequent to the making of these renewals, any conclusive evidence affecting the uncontradicted testimony of the defendant as to the circumstances and representations attending the original transaction. Upon the face of some of these subsequent transactions, they would appear to be inconsistent with defendant's claim; but, as explained by him, they do not so affect his testimony as to remove the conflict conceded to exist between the testimony of Schultz and Kendrick as to the original transaction. Besides, defendant was corroborated to a greater or less extent by Farnham and some other witnesses. Upon this branch of the case we cannot say that the jury were not justified in finding for defendant.

This conclusion makes it unnecessary to consider whether the plaintiffs were bound to apply the proceeds of the wheat delivered to them by Farnham in 1889 upon the old note, nor whether the answer of defendant was such as to make that claim available as a defense. It is well settled that a defendant may plead as many defenses as he may have, though they are inconsistent, and neither of two inconsistent defenses can be used as an admission to destroy the other.

Appellants also contend that the verdict is against law, because it is in disregard of 10 different instructions given them by the court. These instructions cannot be repeated here. We have examined each one, and each instructs the jury that, if they find, from the evidence, that certain facts exist, their verdict must be for the plaintiffs; but whether those facts exist was a question for the jury. So that the question is not whether there was a palpable violation of the instructions, but whether the evidence justified them in finding upon these facts as the verdict shows they must have done in order to find for the defendant. The fourth instruction given at defendant's request, relating to the alleged failure of plaintiffs to apply the proceeds of the wheat delivered to them by Farnham in 1889 in payment of the original note, need not be considered, as the verdict of the jury can be sustained under the defense that Kendrick was, as to the plaintiffs, an accommodation maker.

The defendant was asked by his counsel the following question: "At the time of the signing of these renewal notes, what was your understanding as to the purpose of your signature thereto?" Plaintiffs were not prejudiced by the ruling permitting it to be answered. The witness had already testified to the circumstances surrounding the transaction, that he did not sign them for Farnham, that he was not asked to become security for Farnham, that he received no benefit or anything of value, and that the request therefor came from the plaintiffs. The answer was that "it was to be used in place of other note," and there was no evidence to the contrary. The following question was also objected to: "Was there any other or further consideration for the signing of the new notes, other than the $2,000 note that had been previously given?" This question also followed a statement which appeared to be a full recital of all the circumstances connected with the transaction, and was doubtless intended to cover any other possible consideration; and, in the connection in which it was put, cannot properly be considered a conclusion of law. But, if it were so, as there was no evidence tending to show any consideration other than the circumstances already disclosed, we cannot see that plaintiffs were prejudiced.

We are also referred, by folios, to numerous other exceptions taken by appellants, and which are not argued, nor even restated, in appellants' brief. We have, however, examined each of them, and find no error justifying a reversal. We advise that the judgment and order appealed from be affirmed.

We concur: BRITT, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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111 Cal. 549

SHAY v. CHICAGO CLOCK CO. (S. F. 257.)

(Supreme Court of California. March 17, 1896.)

JUDGMENT BY DEFAULT—AUTHORITY OF CLERK TO ENTER — INEXCUSABLE NEGLECT — APPEAL — AMENDMENT OF JUDGMENT—DISMISSAL—DEFECT OF TRANSCRIPT.

1. A refusal to set aside a default judgment against a corporation for excusable neglect was proper, where the complaint and summons were duly served on its secretary, and five days afterwards handed by him to its president, who read them, and observed their date, but took no action in regard to them till after judgment by default had been entered.

2. Code Civ. Proc. § 585, subsec. 1, authorizing the clerk to enter judgment in actions on contracts to recover money or damages if defendant fails to answer, does not authorize him to enter judgment by default in an action for trespass.

3. Pending appeal, the judgment cannot be amended or corrected by the trial court.

4. A motion to dismiss an appeal because the transcript does not contain the clerk's certificate that the bond is in due form, as required by Code Civ. Proc. § 953, was properly denied when it appeared that, in a former motion to dismiss the appeal, such certificate was filed, and the clerk entered it under a different number.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Frank Shay against the Chicago Clock Company for conversion. From a judgment by default for plaintiff, and an order refusing its motion to set aside the same, defendant appeals. Judgment reversed. Order affirmed.

Geo. H. Perry, W. W. Allen, Sr., and W. W. Allen, Jr., for appellant. E. P. Cole, for respondent.

HARRISON, J. The plaintiff brought this action to recover damages for a trespass committed by the defendant in taking and carrying away certain personal property of the plaintiff. Service of the summons and of a copy of the complaint was made upon the defendant May 18, 1895, and on May 29th its default for failure to appear was entered by the clerk. June 5, 1895, judgment was entered against the defendant, and in favor of the plaintiff, for the sum of $2,000. June 7th a motion was made to set aside the default and judgment, on the ground that the same were entered and given "through inadvertence and excusable neglect of the defendant." This motion was denied, and the present appeal is taken from this order and also from the judgment.

1. The court properly refused to set aside the default of the defendant. The facts shown by it in support of the motion indicated inexcusable neglect. The summons and copy of the complaint were served upon its secretary on the 18th of May, and he delivered them to the president of the defendant on the 23d. The president read the papers that day, and observed their date, but, without making any inquiry as to the time when they were served, kept them in his possession until after the default had been entered. He stated, at the hearing of the motion, that he did not send for his attorney, or send the papers to him, but kept them, thinking that his attorney would be in every day, and therefore waited until he should come, and that, when he did see him, the default had been entered.

2. The judgment was entered by the clerk, and, after stating that the defendant had been regularly served with process, and that its default had been duly entered, further recites: "Upon application of E. P. Cole, Esq., attorney for said plaintiff, to the clerk, judgment is hereby entered against said defendant in pursuance of the prayer of said complaint." The authority of the clerk to enter judgment, if the defendant fails to answer the complaint, is limited to actions "arising upon contract for the recovery of money or damages only," and in such actions he is authorized to enter judgment "for the amount specified in the summons." Code Civ. Proc. § 585, subsec. 1. The present ac-

tion is not upon a contract, but is for damages for a trespass, and the summons which was issued upon the complaint does not specify any sum for which judgment will be entered, but states that "plaintiff will apply to the court for the relief in said complaint demanded." As the judgment was therefore entered by the clerk without any authority from the court, it is erroneous. A motion was made, upon suggesting a diminution of the record, to file, as a part of the record on the appeal, a document purporting to be a judgment entered in the cause September 27, 1895, nunc pro tunc as of June 5, 1895; but, as the appeal from the original judgment was made June 19th, the judgment was thereby removed from the superior court, and, while an appeal from a judgment is pending, that court has no power to amend or correct its judgment.

3. The respondent objects to a hearing of the appeal upon the ground that the transcript, instead of containing a certificate of the clerk that the undertaking on appeal is in due form, as required by section 953, Code Civ. Proc., contains a copy of the undertaking itself. It appears, however, that, upon a motion heretofore made by the respondent to dismiss the appeal, he filed a certificate of the clerk that, on the 19th day of June, 1895, the defendant appealed from said judgment and order, "and upon said date filed two undertakings on appeal, one on the said appeal from said judgment, and one on the said appeal from said order, both of which undertakings are in due form." An appeal will not be dismissed for a defect in the transcript, if, at the hearing of the motion, it appear that the defect suggested has been cured. Warren v. Hopkins (Cal.) 42 Pac. 986. At the time this objection was made, the above certificate of the clerk was on file in this court; and, although it had been entered by the clerk under a different number (S. F. No. 206), it was none the less a part of the records of this court in the same appeal, and, upon our attention having been directed to it, is entitled to as much consideration as if it were presented by a new certificate to the same effect. The judgment is reversed. The order refusing to set aside the default is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

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111 Cal. 580

BATEMAN et al. v. COLGAN, Comptroller.

(S. F. 424.)

(Supreme Court of California. March 18, 1896.)

State Harbor Commissioners—Implied Powers—San Francisco Depot Act—Statutes—Construction—Repeal.

1. Pol. Code, §§ 2520–2553, vesting control of the San Francisco harbor front in a board of state harbor commissioners, authorizes the commissioners (section 2524) "to erect all such improvements" as may be necessary for the safe loading and unloading of merchandise, "and for the safety and convenience of passengers passing into and out of the city and county of San Francisco," and enumerates the steps to be taken by the commission in advertising for proposals, letting contracts, etc. The San Francisco depot act (St. 1891, p. 110) provides that the harbor commissioners shall construct a railroad ferry and passenger depot "in the manner and method authorized by law." *Held* that, in carrying out the requirements of the depot act, the commissioners rightly proceeded under Pol Code, § 2524, and not under the public buildings act (St. 1875–76, p. 427).

2. The fact that Pol. Code, § 2524, does not expressly authorize the board of state harbor commissioners to employ an architect does not prevent them from proceeding under such section in building the depot provided for by the San Francisco depot act (St. 1891, p. 110), since the authority to make such improvements implies the power to employ all necessary means therefor.

3. Pol. Code, § 2524, giving the board of state harbor commissioners control of the San Francisco harbor front and all improvements thereon, and directing the manner in which the commissioners shall proceed in making such improvements, was not impliedly repealed by the public buildings act (St. 1875–76, p. 427), which was a general law applying to all boards charged with the erection of public improvements, there being no irreconcilable conflict between the two acts.

In bank. Original application by one Bateman and others against Colgan, state comptroller, for a writ of mandate. Granted.

Sullivan & Sullivan, for petitioners. Atty. Gen. Fitzgerald, for respondent.

VAN FLEET, J. This is an original application to this court for the writ of mandate to require the respondent, as state comptroller, to draw his warrant against the San Francisco depot fund, in the state treasury, in payment of a demand in favor of petitioners, arising under a contract awarded them by the board of state harbor commissioners for furnishing certain work and material in the construction of the new railroad ferry and passenger depot, provided for by the act of the legislature designated the "San Francisco Depot Act." St. 1891, p. 110.

The real purpose of the proceeding is to secure a determination of the question, about which controversy has arisen, as to which one of two somewhat divergent statutes controls said commissioners in proceeding to carry out the purposes of said depot act; i. e. whether, in adopting plans and letting contracts for such purpose, they should follow the method pointed out in the provisions of the Political Code giving them control of the San Francisco harbor and water front, or whether they are governed therein by the provisions of an act commonly known as the "Public Buildings Act" (St. 1875–76, p. 427), which latter act, besides certain other minor differences in method, requires the plans, estimates, etc., to be submitted for approval to the governor, treasurer, and secretary of state, and the contracts thereunder to be certified by the attorney general, before commencing construction. Said depot act provides that the commissioners shall construct such depot "in the manner and method authorized by law," and, in taking steps for the erection of such depot building, the commissioners have thus far, under the advice of counsel, proceeded according to the provisions of the Political Code, and particularly section 2524 thereof, wherein is provided the steps to be taken by them as to advertising for proposals, letting contracts, etc., in making improvements upon the harbor front, in instances involving an expenditure of more than $3,000; and it was in pursuance of such proceedings that the contract of petitioners was let.

The objection of respondent, and the ground of his refusal to draw his warrant, is that the commissioners should have followed the requirements of said public buildings act, and that their proceedings thus far in the premises are void. His argument is, in brief, that the building of such a structure as that provided by the depot act is not within the general powers of said commissioners conferred by the Code; that such power is a special one, derived solely from said act; that the building thus provided for is a public building, within the purview of said general building act; and that, when the legislature provided that it should be constructed "in the manner and method authorized by law," it referred by this language to the general building law, and not to the special provisions of the Code governing the harbor commissioners, and must be held to have placed the construction of said depot under the provisions of said general act.

We discover nothing substantially tending to support this contention, but it involves, in our judgment, a misconstruction of both the provisions of the Code and those of the depot act. The latter act, as we construe it, was neither intended to, nor does it, confer any additional power upon the board of harbor commissioners, except the single one of enabling said board to anticipate their revenues, and create an indebtedness for the building of such depot, which, by reason of the restrictions of sections 2526 and 2527 of said Code, the board did not theretofore possess. That, but for such restrictions, the board possessed ample authority, at any time, to provide a suitable building of the kind, for the convenience and need of the public, there can be no question. The provisions of the Political Code (sections 2520–2553, inclusive) provide a very complete and comprehensive scheme for the government of the harbor of San Francisco, and its water front (so far, at least, as the same is within state control), and vest such control and management exclusively, with certain exceptions not pertinent here, in said harbor commissioners. By section 2524 the board is authorized, among other things, to construct, repair, and maintain "all the wharves, piers, quays, landings and thoroughfares the wants of commerce may require, and, generally, to erect all such improvements as may be necessary for the safe landing, loading and unloading, and protection of all classes of merchandise, and for the safety and convenience of passengers passing into and out of the city and county of San Francisco." Under this very broad and plenary grant of power, the only obstacle in the way of such an "improvement" by that board as that contemplated by the depot act was the want of funds from its ordinary source of revenue to erect a building of the cost and character needed, and it was this obstacle, arising from the limitations upon the power of the board above adverted to, which the depot act was evidently designed to remove. This purpose of the act is found expressed in its initial section, which provides that, "for the purpose of providing a fund for the payment of the indebtedness hereby authorized to be incurred by the board of state harbor commissioners for the erection and furnishing of a general railroad, passenger and ferry depot at or near the foot of Market street, in the city and county of San Francisco, at a cost not to exceed six hundred thousand dollars, which the said board of harbor commissioners are hereby authorized to construct, in the manner and method authorized by law, and at a cost not to exceed six hundred thousand dollars, the state treasurer shall immediately after the issuance of the proclamation of the governor, hereinafter provided, prepare suitable bonds of the state of California," etc. The words, "hereby authorized to construct," are not to be taken, in view of the foregoing provision of the Code, as conferring any additional power upon the board to that already possessed, but as a legislative declaration, in keeping with the primary purpose of the act, that the needs of commerce and the public required, in the judgment of the legislature, that the erection of such building should be proceeded with. And it was doubtless in full recognition and contemplation of the very general power and control vested in said board under the provisions of the Code that the legislature wholly refrained, in said depot act, from making any direction or specification whatsoever as to the character, style, plan, or dimensions of the structure to be erected, leaving all matters of detail wholly to the wide discretion vested in said commissioners, and limiting them solely as to the matter of total expenditure. And it must be assumed, in the absence of any express declaration showing a different intent, that, in directing the board to proceed "in the manner and method authorized by law," reference was had to the manner and method for making improvements provided in the law governing said board. That this was the intention of the framers of the law, and that it was intended that the work was to be intrusted solely to said board, is further strongly indicated by the requirement of section 4 of the act, that the proceeds of the sale of the bonds therein provided for shall be kept in a separate fund, to be designated the "San Francisco Depot Fund," and used only for the erection and furnishing of said depot; and that "drafts and warrants upon said fund shall be drawn upon and shall be paid out of said fund in the same manner as drafts and warrants are drawn upon and paid out of the San Francisco harbor improvement fund."

It is further contended, however, that the provisions of section 2524 for advertising and letting of contracts, etc., under which petitioners are proceeding, were superseded or repealed by the provisions of the public buildings act. This claim is based upon the fact that section 2524, which still remains the same in that respect, was approved February 28, 1876, and that said buildings act was approved at the same session, on March 23, 1876, nearly one month later; and the contention is that, the provisions of the two acts being inconsistent, the latter must prevail. But we discover no necessary inconsistency. The public buildings act is a general law, applying to all boards, commissioners, and officers, without special designation, charged with the erection of any state asylum or other improvement. Section 2524 is a part of a special act, applicable to one particular board, and it is well settled that statutes bearing upon the same subject-matter must, if possible, be construed together, and that a general provision will be controlled by one that is special. It is not pretended that there is any express repeal, and it is an established rule of construction that the law does not favor a repeal by implication, but that, where there are two provisions relating to the same subject-matter, they must, if possible, be construed so as to maintain the integrity of both. And, where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter so far as coming within its particular provisions. The rule is well stated in Van Denburgh v. Village of Greenbush, 66 N. Y. 3, where it is said: "It is a rule of construction that a special statute providing for a particular case, or applicable to a particular locality, is not repealed by a statute general in its terms and application, unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would be taken strictly, and, but for the special law, include the case or cases provided by it." And, as stated by Judge Cooley: "The repugnancy between two statutes should be very clear to warrant a court holding that the one later in time repeals the other, when it does not in terms purport to do so. This rule has peculiar force in the case of laws of special and local application, which are never to be deemed repealed by general legislation, except upon the most unequivocal manifestation of intent to that effect." Cooley, Const. Lim. (6th Ed.) 182.

This rule is peculiarly applicable to the case before us. Here the legislature has, by special provisions, confided to the board of harbor commissioners control of the harbor front, and all improvements to be made thereon, in terms sufficiently broad to comprehend the character of improvement here provided for, and has made special provisions for the manner in which they shall proceed in making such improvements,—provisions which, it is admitted by respondent, should be held to control in all general work to be done by the board. In such a case, it would require very specific language, indeed, to permit us to hold that these special provisions were intended to be affected by a general statute, the terms of which are not essentially repugnant. The two should rather be regarded in pari materia, and be taken together in ascertaining the legislative will. Furthermore, we have a legislative construction that the provisions of section 2524 were not repealed, or intended to be, by the general act. In 1887 (St. 1887, p. 222), and again in 1889 (St. 1889, p. 380), the legislature amended that section in other respects, but in each instance re-enacted the provisions in question. And, as a further legislative construction that the general provisions of the buildings act were not intended to apply to the proceedings of the harbor commissioners, the legislature, in 1895 (St. 1895, p. 237), amended section 3 of said buildings act so as to require separate contracts to be let for the different classes of work and material to be required in any contemplated building or improvement, and made the law in this particular applicable, "whether the same be let by the state board of harbor commissioners or any other of the aforesaid commissioners, directors, trustees, or other officer or officers," with which last requirement the commissioners in this instance have complied.

It is further objected that the provisions of section 2524 could not have been intended to apply to a work of this character, because the board of harbor commissioners is not authorized thereby to employ an architect, which it is argued is in the essential nature of things rendered necessary in the construction of such a building. But, where power is given to perform an act, the authority to employ all necessary means to accomplish the end is always one of the implications of the law, and, notwithstanding the omission of any special provision to that end, it was competent for the board, in carrying out the purposes of the act, to employ all necessary means to fulfill its requirements. We think the proceedings of the board in the premises were in accordance with the law, and that petitioners are entitled to the relief asked. Let the writ issue as prayed.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; HENSHAW, J.

(111 Cal. 606)

GILMAN v. McCLATCHY et al. (Sac. No. 37.)[1]

(Supreme Court of California. March 20, 1896.)

LIBEL—PRIVILEGED PUBLICATION—PLEADING—DAMAGES.

1. In an action for libel, the defense of privileged publication, within Civ. Code, § 47, must be pleaded.

2. Civ. Code, § 47, subd. 3, authorizing the publication as privileged of a communication made "without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive innocent, or who is requested by the person interested to give the information," does not authorize a newspaper to publish an article connecting a private individual with the commission of a criminal offense, which was false in fact, though published in the ordinary course of business as a news item, without malice, and in the belief that it was true.

3. A verdict for $500 compensatory damages in an action for libel is not excessive, where the publication falsely charged plaintiff with having committed a criminal offense.

Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by Charles H. Gilman against C. K. McClatchy and others. From a judgment in favor of plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

C. T. Jones and Armstrong & Bruner, for appellants. Holl & Dunn and Johnson & Johnson, for respondent.

HENSHAW, J. Appeals from the judgment and from the order denying a new trial. Plaintiff's action was for damages resulting from a libel of and concerning him, published by defendants in their newspaper, the Evening Bee. Defendants admitted the publication and their responsibility therefor, but denied that it was libelous. As an affirmative defense, in justification, they pleaded that the publication was true. In mitigation of damages, they further averred their belief in its truth, and that the publication was made only after a due and careful inquiry, which satisfied them of the truth of the matters in the publication contained. The libel was a publication of what purported to be the narrative of one Stella Truitt of the circumstances of a rape committed upon her by Gilman (this plaintiff) while she was employed as a servant in his house. "Mrs. Truitt," so began the account, "has every appearance of an honest woman, and, as she told her story, tears rolled down her cheeks."

The findings of the court, all sustained by the evidence, may be quoted at length, as they contain a sufficient recital of all facts necessary to this consideration: "First. The publication set out in the complaint was false, defamatory, malicious, and unprivileged. Second. The averment in the defendants' first answer by way of defense, 'that said publication was and is true,' was and is untrue. Third. The averments in defendants' second answer by way of defense, 'that the facts contained and related in the said publication are true,' are each and all untrue. Fourth. The averments in defendants' third answer by way of defense, in substance that plaintiff unlawfully and feloniously assaulted one Estella Truitt, with intent to commit the crime of rape upon her, are not proven beyond a reasonable doubt, nor by a preponderance of evidence, and are each and all untrue. Fifth. The publication was not made because of any personal ill will of defendants, or any of them, towards the plaintiff; but it was malicious in the sense which the law imputes because it was not true, and was defamatory, unprivileged, and injurious. Sixth. The defendants at the time of the publication believed it to be true, though it was not true. Such belief was based upon a false story reported to have been related by one Mrs. Estella Truitt, on Saturday morning, August 20th, to neighbors of plaintiff, at a house near his residence. A reporter of the defendants went to said house, and found there the said Mrs. Truitt and three or four other women, with a reporter of another paper and the chief of police of the city of Sacramento. At this conference, the reporter of the defendants obtained his information as it was given to him in part by Mrs. Truitt, but in the greater part by the other women present. From what he thus heard, he wrote the article complained of, except that portion known as the 'head lines,' and submitted it to the defendants, who directed it to be published if a warrant for the arrest of plaintiff, upon the complaint of Mrs. Truitt, should be issued. The plaintiff, having been informed by another reporter of the defendants of the proposed publication, went to the defendants some hours before the publication, and declared the story to be false, and protested against its publication, because, as he said, it would injure him in his business. The head lines were written by one of the editors or employés of the defendants. The warrant was issued about 3 o'clock p. m., and the publication was made in the third edition of the paper, at about 4 o'clock p. m. The affidavit upon which the warrant was issued was made by Mrs. Truitt, and charged the defendant with having committed the crime of rape upon her person, in the city of Sacramento, on the 11th day of August, 1892, but did not otherwise state any of the circumstances or details of the alleged offense. Seventh. The averment contained in the fourth paragraph of the third division of the answer pleaded 'in mitigation for the publication of the article complained of,' that said Estella Truitt 'made the statement in substance as contained in said publication concerning the plaintiff' to the chief of police at his office, is not true; but it is true that at the residence of Mrs. Kelly, a near neighbor of plaintiff, she did state to said chief of police that said plaintiff had committed a rape upon her. The averment in said paragraph that said publication 'was, in all its substantial details, correct and true,' is not true." Under these findings, the court awarded plaintiff, who was a merchant, carrying on business in Sacramento, the sum of $500, as compensatory damages.

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[1] Rehearing denied.

By far the greater part of the argument of appellants is devoted to an attempt to show that the published matter was privileged, either under subdivision 4 of section 47 of the Civil Code, or under subdivision 3 of the same section. These subdivisions are as follows: Section 47, Civ. Code: "A privileged publication is one made: * * * (4) By a fair and true report, without malice, of a judicial, legislative or other public official proceeding, or of anything said in the course thereof." "(3) In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive innocent, or who is requested by the person interested to give the information." Here it should be said that the defense of privilege is one which, to be availed of, should be pleaded. And there was no plea of privilege in this case. Goodwin v. Daniels, 7 Allen, 61; Langton v. Hagerty, 35 Wis. 150; Bell v. Parke, 11 Ir. Com. Law, 413.

But, passing this objection, we proceed to the consideration of the contentions which form appellants' chief reliance. The first of these may be disposed of briefly. The publication is not, and does not purport to be, a report of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof. It is no more nor less than its head lines represent, "A Damaging Tale against a Sacramento Merchant," the materials for which were gathered by the reporter, as the court found, partly from Mrs. Truitt, but principally at secondhand from the neighborhood friends and gossips. Moreover, it was not fair and true, as the court further finds. It may have been a true report of what these women told the reporter, but that is not the truth which will justify a publisher. If A. says B. is a thief, and C. publishes the statement that A. said B. was a thief, in a certain sense this would be the truth, but not in the sense that the law means. It would constitute no defense to C., for it would be but a repetition by him of a slanderous charge. His defense must consist in showing that in fact B. was a thief.

The claim that the publication was privileged under subdivision 3 of section 47 of the Civil Code rests, as counsel for appellants phrase it, upon "the fundamental postulate that in this state whatever every citizen has a right to know, that a newspaper has a right to print and publish." The freedom of the press is most carefully protected by constitutional safeguards. "Congress shall make no law abridging the freedom of speech or of the press." Const. U. S. Amend. art. 1. "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Const. Cal. art. 1, § 8. Freedom to speak and publish their sentiments is essential to the enjoyment of liberty by a liberty-loving people. To guard against any possible encroachment upon this cherished and most valuable prerogative, it is preserved to the people by the organic laws of the land. The founders of the nation would have the press of the country subject to no censorship. The evil workings of such a system were all too visible at that time, as at the present, in the European governments in which it exists. Moreover, it was well considered that, in a self-governing nation, absolute freedom for the interchange of ideas, for instruction and persuasion, was vital to the growth, development, and stability of our institutions. Thus, we come to have, as part of our heritage, such phrases as a "muzzled press," "strangling free speech," a "servile press,"—terms at which the very children shrink and shudder. Like O'Connor's epithet, "naufragous villain," without understanding their meaning, they recognize them as words of solemn and awful import. These truths are but platitudes, so well are they known and understood. There can be no fear that they will be either overlooked or forgotten, and they should not be. The press itself, should need ever arise, will see that they are not. But there is an obverse of the picture which is not so often looked at. The growth of the enormous power of the press has brought with it corresponding responsibilities. Do the newspapers wield that power with just regard to the duties which it entails upon them? If they do not, then the wrong is a great one; for a libelous publication in a single issue of a newspaper serves to set wagging the thousand tongues of slander, which thereafter can never be silenced, even by the power which provoked them to utterance. By one who lived to experience the evil of which he wrote, it is said: "Men's reputations are tender things, and ought to be like Christ's coat, without seam. Who can see worse days than he that, yet living, doth follow the funeral of his reputation?" (Lord Bacon's Charge against Lumsden.) As the law stands, pecuniary compensation is all that can be recovered for a libel, however damaging it may be. But no one pretends that this compensation re-establishes the injured man or rehabilitates his reputation. The damage done may be, and frequently is, irreparable. In this case, appellants ask for such an extension of the law as would give immunity to publishers of libels provided express malice in the publication be absent. In other words, their contention resolves itself to this: That a newspaper is a purveyor of news. The people have the right to read the news. Any story gleaned by a reporter as this was gleaned, and published in the ordinary course of newspaper business, without personal malevolence against the victim of the tale, should be held privileged. In support of this contention, there is neither authority, law, nor justice. No point of similarity can be found between this case and those which protect a publisher who in good faith discusses the habits, qualifications, and official conduct of a person holding a public office, or presenting himself as a candidate therefor. Even in the latter cases a "line must be drawn between hostile criticism upon public conduct and the imputation of bad motives or criminal offenses where such motives or offenses cannot be justly and reasonably inferred from the conduct." Neeb v. Hope, 111 Pa. St. 145, 2 Atl. 568. But to extend this doctrine, and to seek to apply it, as here, to a charge infamous in its nature and false in its facts, against a private individual, would be to put upon the people a greater evil than that which the constitution sought to prevent.

The contention is completely disposed of in this state by the case of Wilson v. Fitch, 41 Cal. 363. In the same connection, the following language of the supreme court of Michigan, in McAllister v. Press Co., 76 Mich. 338, 43 N. W. 431, is apposite: "It is argued that a newspaper in this day and age of the world, when people are hungry for the news, and almost every person is a newspaper reader, must be allowed some latitude and more privilege than is ordinarily given under the law of libel as it had heretofore been understood. In other words, because the world is thirsting for criminal items, and the libel in a newspaper is more far-reaching and wide-spreading than it used to be when tales were only spread by the mouth, or through the medium of books or letters, there should be greater immunity to gossip in the newspapers, although the harm to the person injured is infinitely greater than it would be if published otherwise. The greater the circulation, the greater the wrong, and the more reason why greater care should be exercised in the publication of personal items. No newspaper has any right to trifle with the reputation of any citizen, or, by carelessness or recklessness, to injure his good name and fame or business. And the reporter of a newspaper has no more right to collect the stories on the street, or even to gather information from policemen or magistrates, out of court, about a citizen, and to his detriment, and publish such stories and information as facts in a newspaper, than has a person not connected with a newspaper to whisper from ear to ear the gossip and scandal of the street. If true, such publication or such speaking may be privileged; but, if false, the newspaper, as well as the citizen, must be responsible to any one who is wronged and damaged thereby. It is indignity enough for an honest man to be arrested and put in prison for an offense of which he is innocent, and for which indignity ofttimes he has no redress, without being further subjected to the wrong and outrage of a false publication of the circumstances of such an arrest and imprisonment, looking towards his guilt, without remedy. And no sophistry of reasoning, and no excuse of the demand of the public for news, or of the peculiarity and magnitude of newspaper work, can avail to alter the law, except, perhaps, by positive statute, which is doubtful, so as to leave a party thus injured without any recompense for a wrong which can even now, as the law stands, never be adequately compensated to one who loves his reputation better than money."

The court found that the publication was made without express malice or malice in fact. In the absence of such malice, plaintiff would not be entitled to punitive damages, but he has not been awarded any. Malice in law still remained, and, the publication being indisputably a libel per se, he was entitled to recover compensatory damages. Childers v. Publishing Co., 105 Cal. 284, 38 Pac. 903. It cannot be said that the award of $500 was excessive for that purpose. In Wilson v. Fitch, supra, this court, without other showing than that here made, upheld an award of $7,500 as compensatory damages. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

(111 Cal. 571)

JACOB et al. v. DAY et al. (Sac. 68.)[1]

(Supreme Court of California. March 18, 1896.)

HYDRAULIC MINING — RIGHT TO MAINTAIN DITCH OVER ADJOINING LAND—ADVERSE POSSESSION—CUSTOM — PLEADING AND PROOF — ESTOPPEL BY JUDGMENT—INJUNCTION—WHEN GRANTED.

1. In an action to abate, as a nuisance, a ditch over plaintiff's land, maintained by defendant to carry the detritus from an hydraulic mine to a river, evidence of a custom of using such a ditch in all hydraulic mining is admissible under the general issue.

2. Under Rev. St. U. S. § 2339, providing that a right to use water for mining, acquired by local custom and judicial decisions, shall be protected, "and the right of way for the construction of ditches * * * for the purposes herein specified is acknowledged and confirmed," a patentee of mining land, over which an adjoining owner had for several years, by local custom and from necessity, maintained a ditch to carry detritus from an hydraulic mine to a river, took subject to the easement.

3. Error in striking from a complaint a plea of estoppel by judgment was harmless, where plaintiff subsequently put the judgment roll in evidence.

4. A judgment of nonsuit, in an action by the owner of an hydraulic mine to prevent the issuance to another of a patent to land over which he had constructed a ditch to carry the detritus from his mine, based on a motion reciting that "the evidence shows that plaintiff merely has an easement over the land," and that such right was fully protected by Rev. St. U. S. §§ 2339, 2340, and that "he has not shown any right to purchase the land from the United States," did not estop the judgment defendant from setting up, in a subsequent action against him to abate the ditch as a nuisance, that he had acquired an easement by custom and adverse possession.

5. An injunction will not be granted against the use by defendant of a ditch across plaintiff's

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[1] Rehearing denied.

land for carrying detritus from an hydraulic mine, on the ground of an improper and injurious exercise of the easement, where it appears that the water in the ditch caused a slight caving in of plaintiff's land, and a slight wearing away of the bed rock, but did not cause or threaten any appreciable damage.

Department 2. Appeal from superior court, Trinity county; Edward Sweeney, Judge.

Action by Henry Jacob and others against John C. Day and others. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Affirmed.

J. W. Turner, H. R. Given, and John D. Goodwin, for appellants. Cross, Ford, Kelly & Abbott, for respondents.

HENSHAW, J. Appeals from the judgment, and from the order denying a new trial. The action was brought to abate an alleged nuisance maintained by defendants upon the lands of plaintiffs, for an injunction, and for damages. The nuisance consisted of a tailrace, sluiceway, cut, or ditch, by which the water bearing detritus from defendants' hydraulic mine was carried across the land of plaintiffs, and discharged into the Trinity river. This ditch had been used in connection with the working of the Bartlett & Evans Mine for many years prior to and after the acquisition of a patent. That mine is the property of defendants, and a patent therefor had been obtained in 1869. The land of plaintiffs, crossed by this ditch, is now known as the "Barthol Jacob Gold Placer Mine." But at the time of the construction of the ditch, and for many years of its use thereafter, plaintiffs' land was open, unappropriated, public mineral land of the United States. Entry and payment for the Barthol Jacob Mine were made in October, 1887. This action was commenced within five years from the date of the issuance of the patent. Defendants rely upon title by prescription, which was pleaded, and, in this connection, proved continuous adverse use under claim of right for more than five years, continuously, after October, 1887. They also rely upon title under section 2339, Rev. St. U. S., asserting that their right is one embraced within the provisions of that section, and sanctioned by the mining custom of the district. This custom was not pleaded, but the claim is made that evidence thereof is admissible under the general issue. The principal questions thus presented are: (1) Did defendants acquire a right of way for the ditch by virtue of the provisions of section 2339 of the Revised Statutes of the United States? (2) Did they acquire a right of way by prescription?

There are certain essentials to the practical conduct of all hydraulic mining operations. Water must be obtained in quantities, and carried to the mining ground under pressure sufficient to disintegrate and wash down the natural bank. For these purposes, in the mining districts of this state, reservoirs, ditches, flumes, and pipe lines are indispensable. The soil and gravel thus eroded must be carried by gravity, and the force of the refluent water, through cuts, sluiceways, and flumes, where the gold, by reason of its greater specific gravity, is deposited, caught, and gathered. Lastly, by aid of the same beneficent agent, the resulting waste matter, soil, and gravel must be carried away through convenient channels, so as not to impede further operations. The water itself does not lose its utility to the miner, nor become an impediment to his work, during any of these processes. Through them all it is not only of high utility, but an absolute necessity. It is therefore inaccurate to call it waste or superfluous water, or to describe the work which it does in carrying tailings as a drainage of a mine. To drain land is to rid it of its superfluous moisture. In the case of a quartz or drift mine, drainage is an appropriate term, when applied to the means by which water which is in them—always superfluous, and a hindrance to the work—is met and disposed of. But "hydraulic mining" is defined to be "mining by means of the application of water under pressure through a nozzle, against a natural bank." Civ. Code, § 1425. Water here is not superfluous. It is of the essence of the work. It does not become superfluous even when it has aided in the extraction of the last particle of gold, since it still must serve the necessary purpose of clearing the ground for further operations. These facts are of such general knowledge and undisputed acceptance,—so inherent in the character of hydraulic mining,—that they scarcely need the evidence of local custom, or any evidence at all, for their establishment. But in this case they were established by abundant and uncontradicted evidence, including that of the plaintiff himself. It was proved that the mine was situated in the Red Hill district, that it was in a region where hydraulic mining was customarily carried on, and that all hydraulic mines have, and must have, a tunnel, flume, or ditch, such as this, to carry away and dispose of the detritus. The plaintiff himself testified that "you can't operate a mine unless you have some such means." The objection to the introduction of this evidence is disposed of by the case of Colman v. Clements, 23 Cal. 245. In support of title, evidence of mining rules and customs may be given without averring such rules and customs.

We are thus brought to the consideration whether the ditch, in connection with its use, vested in defendants a right to its continued use and enjoyment, under section 2339 of the Revised Statutes of the United States, or, in other words, did title to the Barthol Jacob Mine pass from the government to plaintiffs subject to defendants' rights in the ditch? This question, we think, must be answered in the affirmative. Section 2338, it is true, excludes easements for working mines, drainage, etc., from the purview of the act, leaving these matters for state regulation. But by section 2339 are protected to the fullest extent all the rights and easements enumerated in that section and in section 2340. "Whenever * * rights to the use of water for mining * * * purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for the construction of ditches * * * for the purposes herein specified is acknowledged and confirmed." There is here a recognition of rights to the use of water for mining purposes, and of rights for the construction of ditches for such purposes. As has been said, the use of water for the purpose of carrying off the tailings, and the construction of the ditch to aid therein, are as essential functions to the successful conduct of hydraulic mining as is the first use to which the water is put, in washing down the natural bank. Every use of water for purposes of legitimate mining, sanctioned by local custom and law, is recognized as a right, and protected as such, and within the protection is embraced the ditch by which the use is made practicable. It does not defeat the conclusion to say that a flume might have been substituted for a ditch, for it is shown that a ditch is the usual and customary means employed. By section 2339, the right of way for the construction of ditches by which water is used for mining purposes is recognized and confirmed. It must be apparent that the use of water in such a ditch is an essential feature of hydraulic mining, and for that reason should not be confounded with the discharge of superfluous water which is encountered in quartz and drift mines. The latter is always superfluous,—always a hindrance. It never serves a useful purpose. It is an accident and detriment to the operation of the mine. It is disposed of by pumps and drainage tunnels, and that disposition frequently involves enormous expense and loss. Not infrequently such a mine cannot be kept free from water at a cost which will justify further operations, and the result is that the mine is shut down and abandoned. Thus water plays no part in the legitimate and ordinary working of such mines. Its appearance is both an accident and a misfortune. It is an easement for the accidental requirement of drainage of such a mine that is contemplated by section 2338. But, in the hydraulic mine, water must be present, and must be used for the enumerated purposes, or work cannot proceed. And it can only follow that if congress, in protecting and conferring rights to the use of water and rights of way for ditches for mining purposes, did not include such ditches as this, then hydraulic mining, as universally understood and conducted in this state, is without the purview of section 2339. Nor has the question thus presented any features in common with the propositions determined in the Gold Run Ditch & Mining Co. Case, 66 Cal. 138, 4 Pac. 1152, and the North Bloomfield Gravel Min. Co. Case, 9 Sawy. 531, 18 Fed. 753. In the Gold Run Case the question determined was the right to dump hydraulic débris into the principal navigable river of the state, "to the endangerment of habitations and the cultivation of large tracts of country, upon which are cities, towns, and villages, and to the impairment of the navigation of the Sacramento river." In the North Bloomfield Case the same questions were presented as to the effect upon habitations, riparian lands, and the navigability of the Feather, Yuba, and Sacramento rivers. But in the case at bar no question is raised as to the disposition of the débris. Plaintiffs do not complain of any deposit of débris upon their land, but object to the transportation of the débris by ditch across it. The ditch and its use are a part of the recognized system by which hydraulic mining is, and always has been, conducted in this state; and as is said by the supreme court of the United States in Jennison v. Kirk, 98 U. S. 453, by the act of which section 2339 is a part, congress "proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached." It is concluded, upon this question, that the title to the Barthol Jacob Mine passed to plaintiffs, under the patent, subject to the easement of the right of way for this ditch under section 2339 of the Revised Statutes of the United States. Any consideration of title by prescription thus becomes unnecessary.

The court erred in striking from plaintiffs' complaint the plea of estoppel by judgment. Upon the face of the pleading, an estoppel was set out; and, as plaintiffs relied upon that estoppel as one of the foundations for their claim of title, it was proper that they should plead it. But the error was without injury. Upon the trial, plaintiffs offered in evidence the judgment roll in the case. It appeared that, when Jacob made application for his patent, Evans, the predecessor of defendants, commenced the action in question, opposing the application so far as it affected a strip of land 60 feet in width, embracing the ditch in question. A motion for a nonsuit in that case was made and granted. The ground upon which it was granted does not appear. But among the grounds urged were "that the evidence shows that the plaintiff merely has an easement over the lands of defendant," and "that, under sections 2339 and 2340 of the Revised Statutes of the United States, all rights of plaintiff, if he has any, are fully protected, and that he has not shown any right to purchase the fee of said lands from the United States." The judgment of nonsuit so granted could not raise an estoppel against defendants in this action.

It is unquestionably the law that an easement must be used in such a manner as to impose as slight a burden and damage upon the servient tenement as practicable. It is but the application of the familiar maxim, "Sic utere tuo ut alienum non lædas." In this case, appellants claim a right to an injunction restraining defendants from an improper and injurious exercise of their easement. While defendants have a right to operate their ditch, they have no right so to operate it as to render it a nuisance to, or destructive of, the servient tenement. But the court found "that the running of tailings through said tailrace or sluice ditch, in the ordinary course of mining, caused a small portion of the Barthol Jacob Gold Placer Mine, along the side of said tailrace or sluice ditch, to cave down and wash away, and said tailrace to cut down further into the bed rock; but no material or appreciable injury or damage was thereby caused or done to the plaintiffs, or either of them, or to any part of their said mining property, nor is any damage or injury threatened thereby." Under the rule de minimis, there is here no showing which would entitle appellants to the injunction sought. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

111 Cal. 599

TREVASKIS v. PEARD et al. (Sac. 55.)

(Supreme Court of California. March 20, 1896.)

MINING CLAIM—FAILURE TO DO ASSESSMENT WORK — ADVERSE POSSESSION — PROOF OF ABANDONMENT.

1. The owner of a placer mineral claim does not forfeit his right thereto, so as to render it subject to relocation, by a failure to perform the required annual assessment work during a time when adverse possession is held by another, where he commences action for its recovery within the statutory time.

2. Proof of the abandonment of a mining claim by a defendant may be given by plaintiff, in ejectment therefor, without a special plea, where the defendant pleads, and relies on as a defense to the action, a location prior to that of plaintiff.

3. Where the owner of a mining claim, which was erroneously included in a sale under a decree of court, moved his effects from the claim, and absented himself for two years, allowing the purchasers to work it without objection, while knowing that their title was invalid, and intending to claim it only in case their development rendered it profitable to do so, his acts will constitute an abandonment.

Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action in ejectment by Harriet Trevaskis against Thomas Peard and others. Judgment for defendants, and plaintiff appeals. Reversed.

A. D. Mason and F. J. Dennis, for appellant. Chas. W. Kitts, for respondents.

HENSHAW, J. Appeals from the judgment and from the order denying a new trial. The action was brought under section 738, Code Civ. Proc., to settle conflicting claims to the land in controversy, being certain placer mining claims. Thomas Peard is the only defendant interested in this hearing; but, as he appears merely as respondent, and has himself prosecuted no appeal, his attack upon certain findings and conclusions of law which he claims are unsupported or unsound cannot be considered. The objections which may be reviewed are those alone which appellant urges.

In 1887 the lands in question were public mineral lands of the United States. Upon that date they were located by Peard and others, to whose rights Peard afterwards succeeded. In this location was included about 17 acres to the north of and adjacent to the land in controversy. The land in controversy lies in section 2; the 17 acres, in section 35. One hundred dollars' worth of labor was yearly expended upon the premises by Peard until the year 1891. In 1889, however, an action was prosecuted against him to foreclose a miner's lien upon his claim. The complaint sought to subject to the lien, not the land here in controversy, but the 17 acres above referred to. Peard made default in this action, and the judgment declared a lien upon the land in controversy as well as upon the 17 acres, and decreed a sale in satisfaction of the same. All the land was accordingly sold in compliance with the decree and order of sale which conformed thereto; but, after the sale, the court amended its judgment and the order of sale by striking therefrom the portion of the land here in controversy, and limiting the lien to the 17 acres described in the complaint. The sheriff's deed, executed after these amendments, purported to convey all of the land, that here in controversy as well as the 17 acres, to the purchaser, Simmons. Thereafter Simmons conveyed all of his interest to Henry Trevaskis (husband of this plaintiff) and to Ida Marion. Trevaskis and Marion continued to hold and work the claim. In December, 1893, this defendant Peard commenced an action in ejectment against Henry Trevaskis and Ida Marion to recover the premises here in dispute. Harriet Trevaskis was not made a party to that action. Judgment therein passed for Peard. Thereupon Trevaskis and Marion abandoned their claim upon it, and Harriet Trevaskis and her married daughter, Ella Raymond, entered upon it and located it as vacant mineral land. Ella Raymond thereafter sold to her mother her interest in the location for an expressed consideration of one dollar, and in due time this action was commenced. In her complaint, plaintiff alleged the location by Peard in 1887, but averred that Peard had not performed the annual amount of work required by law for the years 1891 to 1894 inclusive; that, therefore, the claim became "jumpable," and "Peard's interest was forfeited"; and that she had, under these circumstances, made a valid location. Peard answered, denying that plaintiff had any interest in the land, pleaded his action against Henry Trevaskis as a bar, and set up a valid claim under the first location. He averred that the attempted location of Harriet Trevaskis and Ella Raymond was fraudulent and void, and that the land, at the time thereof, was not subject to location. The court, by its findings and conclusions, determined that the rights which plaintiff and her colocator acquired were separate property; that Ella Raymond had "loaned the use of her name to enable plaintiff to secure title to more land than plaintiff herself could legally locate," and had conveyed her interest to plaintiff; that plaintiff complied with the law in making her location; but that the premises were not subject to relocation. It decreed that plaintiff had no interest or estate in the premises, and that defendant Peard was the owner, and entitled to the possession thereof.

There is, in the foregoing, a determination that a married woman, who is a citizen, may make a valid location of mineral lands, and that such a claim is her separate property. Though much argument has been advanced for and against the soundness of this proposition, the question is not presented by this appeal. Appellant is not complaining, and respondent is not in a position to object. The findings and conclusions are unassailed in this particular, and this consideration must be confined to a discussion of the objections of appellant.

The first of these objections is that the court did not find upon the claim of forfeiture, and that Peard had, in fact, forfeited his claim by failure to do the legal amount of work thereon since the year 1890. The facts in this regard have already been stated. The forfeiture pleaded was claimed to have resulted because of this failure. But, in the year 1890, defendant was ousted, and Henry Trevaskis and Ida Marion let into possession under the sheriff's deed. They maintained this possession as of their own right, and against Peard, continuously, until he had prevailed against them in his ejectment suit to recover the land. So long as Peard's suit was commenced within the time limited by the statute, he cannot be held to have forfeited his claim by a failure to perform the work under such circumstances. Otherwise, one might, by force, maintain possession for a year, and then assert a forfeiture against the dispossessed unfortunate owner. The court found the facts of Peard's ouster by the claimants under the sheriff's deed, that they had continuously held possession of the property ever since, and done the legal amount of work annually thereon, and that Peard had commenced, within the statutory time, an action in ejectment, which was then pending. While the ultimate fact that no forfeiture resulted is not found, yet that is the only determination which could follow the facts actually set forth, and, indeed, it is embraced in the conclusion that the ground was not subject to relocation at the time of plaintiff's entry for that purpose; for, had Peard forfeited, the land would have been relocatable.

The second objection is that no finding is made upon the question of abandonment. Abandonment was not pleaded, but evidence of abandonment may be given, without a special plea, under a denial of title. Bell v. Mining Co., 36 Cal. 214; Willson v. Cleaveland, 30 Cal. 192. In the foregoing cases, the proof was sought to be made by defendant denying plaintiff's title in ejectment. But we conceive the rule to be applicable to a case such as this. Plaintiff, by her pleading, called upon defendant to declare the nature of his claim. This he did by asserting rights under a location earlier than her own, which location, if still valid, necessarily avoided her own; and she undertook to defeat the claim of a valid, prior, subsisting location by evidence of its abandonment. She was within her right in so doing. The court, it is true, did not find upon the question of abandonment; but its declaration that the land was unlocatable at the time of plaintiff's entry carries with it the necessary deduction that there had been no abandonment. It may, for the purpose of this consideration, be treated as a finding to that effect. Even so the evidence fails to support it. There is no conflict, and it is, briefly, as follows: The witness Dean, for the plaintiff, testified that, after the foreclosure suit of Stevens v. Peard, Peard went away and was gone for two years. When he came back, witness asked him if he was going to the claim (the claim in controversy) to work. "He said, 'No'; that it had cost him enough, in lawyers' fees and dead work; that he had abandoned it, and would never return there again unless he crossed it in going to some other place." Peard, when called to the stand, made no denial of this, but testified "that in 1890 he moved the furniture, cooking stove, and other things he had, in a cabin he occupied on the claim, away, before he went to God's Country; that he mined in God's Country for over two years, and was never again on the claim until three weeks before he commenced suit against Trevaskis, Stevens, and Mrs. Marion (December 2, 1893), when he went into their tunnel; that he knew of the sheriff's deed and location, under which Trevaskis and Stevens held possession, and, since his return from God's Country, knew of the work they did on the claim; that he never ordered them to quit, or notified them that he owned the claim; that the reason he gave them no such information was because he intended to let them go ahead, if they saw fit, and develop the claim, and if they struck pay he would claim it; * * * that his counsel had informed him that the decree, certificate of sale, and sheriff's deed were invalid, and passed no title to the portion in section 2, as the complaint in that action only described the mining claim as being in section 35; * * * that, being so advised by his counsel, and knowing that his title to the property of the Mt. Charles in section 2 was good, although so sold to Simmons by the sheriff, he had held back while Trevaskis, Stevens, and Mrs. Marion were trespassing thereon; that it was their business to look out for their own title, and he was glad they were doing the work, as it would save him doing it; that he therefore laid back, never informed them he claimed any interest therein, or forbid them working; never claimed any of the gold they took out, or interfered with them in any manner, until he brought suit December 2, 1893." This is all of the evidence upon the question.

It is not a matter of regret that the scheme outlined by defendant's testimony is no better in law than it is in good conscience. Abandonment, it is true, is a matter of intent; but that intent may be proved by the acts and conduct of a party, even against his express declarations to the contrary (Myers v. Spooner, 55 Cal. 260); and, if the intent has been formed, and once acted upon, the abandonment is as absolute, "if it exists for a minute or a second, as though it continued for years" (Waring v. Crow, 11 Cal. 366). In Seymour v. Wood, 53 Cal. 303, plaintiff in ejectment moved his possessions from the mining claim, and went to Mexico, where he followed mining for several years. He denied that he had abandoned his claim, but admitted that he knew defendants were working it and had applied for a patent. The question of abandonment was submitted to a jury, which returned a verdict for plaintiff. This court said that the verdict should have been set aside, and a new trial ordered, as the abandonment was clearly established. But the evidence in that case was not so convincing as that presented by this record. Defendant's admission of abandonment is not denied. He not only removed his effects from the claim, and prosecuted mining for years in another part of the country, but himself admits a conditional abandonment at least. He had abandoned it, unless others, by their work and labor, developed it into a paying property. No such conditional abandonment can be recognized. It must be all in all, or not at all, and there can be no hesitation in this case in declaring it to be absolute. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; GAROUTTE, J.

112 Cal. 31

O'CONOR v. MORSE et al. (L. A. 96.)

(Supreme Court of California. March 24, 1896.)

PRINCIPAL AND SURETY — RELEASE OF SURETY — TENDER.

1. In an action against B. and two others on a note, it appeared that such note was held by plaintiff as collateral security, and that B. paid one-third of the amount for which it was security, and offered to pay the balance; but plaintiff refused to accept it, because he did not want the comakers sued. *Held*, that B. was released from liability to plaintiff on such comakers subsequently becoming insolvent.

2. Where one of several sureties pays his proportion of the amount for which they are liable, and offers to pay the balance, which the obligee refuses to receive, such surety is discharged from liability, though he does not comply with Civ. Code, § 1500, providing that an obligation for the payment of money is extinguished by a due offer of payment, if the amount is deposited in the name of the creditor with some bank of deposit, and notice thereof is given to the creditor.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Andrew J. O'Conor, as receiver of the Consolidated National Bank of San Diego, against E. W. Morse, C. E. Heath, and J. H. Braly on a promissory note executed and delivered by defendants to one F. W. Stewart, who deposited it as collateral security for his own note in such bank. From a judgment for plaintiff, defendant Braly appeals on the judgment roll. Reversed.

J. W. Hughes, for appellant. V. E. Shaw, for respondent.

BELCHER, C. This is an action upon a nonnegotiable promissory note for $1,308.95, bearing interest at the rate of 1 per cent. per month, compounding monthly. The case was tried by the court without a jury, and the findings were in substance as follows: On October 31, 1890, the defendants, E. W. Morse, C. E. Heath, and J. H. Braly, executed and delivered the said note to one F. W. Stewart, to be used as collateral security for his own note, to be given to the Consolidated National Bank of San Diego. Thereafter, Stewart executed his own nonnegotiable note for the same sum to the said bank, and as collateral security for the payment thereof duly indorsed, assigned, and delivered to the bank the said note. On the day of its date defendant Braly paid on said note one-third of the amount due thereon, to wit, $436.32. The interest on the note was paid up to October 30, 1891, but no other payments on account of interest or principal were ever made. On May 11, 1893, the bank was still the owner and holder of the said note. On that day the defendant Braly, through his duly authorized agent, J. C. Braly, called at the bank, and offered to pay the said note, but stated that he did not want it stamped "Paid" upon its face, but wanted such an indorsement made as would show the amount paid, and that it had been paid by J. H. Braly. In answer to a question by the cashier as to what he intended to do with the note, he replied that he was instructed to turn it over to attorneys to bring suit on it. From what was said the cashier understood that he wanted the note so indorsed that J. H. Braly could sue upon it, and he referred the matter to Mr. Howard, the president of the bank, and stated to him that accepting payment "would result in a suit against Heath and Morse." Mr. Howard replied to the cashier, in the absence of Mr. Braly, "that is a matter we must consider." He further said that "the relations of Mr. Morse and Heath to the bank were such that the matter must be considered before suit could be allowed." The cashier then told Mr. Braly to call the next day, and at that time, or later, the president stated to the cashier that he didn't care to have Mr. Stewart and Mr. Morse sued. Braly went back to the bank the next day, as requested, and Mr. Howard, the then president of the bank, stated to him "that they had concluded to hold the note, and make it out of the other parties." Defendant Braly offered to prove, by defendants

Morse and Heath, that they were solvent at the time he offered to pay the bank, but that, on the 25th day of August, 1893, they and each of them became insolvent, and have continuously since been insolvent, which offered evidence the court excluded upon the ground that it was irrelevant, incompetent, and immaterial, to which ruling defendant Braly duly excepted. And, as conclusions of law, the court found that the effect of the offer to pay, on May 11th, was to stop the running of interest, and to release said defendant Braly from the obligation to pay attorney's fees, but that he was not released from his obligation to pay the note, and that plaintiff was entitled to judgment against the three defendants for the principal due on the note, with interest thereon to May 11, 1893, amounting to $1,068.25. Judgment was accordingly so entered, from which the defendant Braly appeals on the judgment roll alone.

The Civil Code, § 2831, declares a surety to be "one who, at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor." In Montgomery v. Sayre, 91 Cal. 206, 27 Pac. 648, the action was upon a promissory note given as collateral security under circumstances similar to those found here, and it was held that the maker of the note was, in law, a surety. The note in suit was executed to be used as collateral security for the payment of Stewart's note, and was accepted and held by the bank as such collateral security. The appellant must, therefore, be regarded as only a surety, and the question is, was he exonerated from liability on the note by the refusal of the bank to accept payment thereof, because it would result in a suit against the comakers, and "they had concluded to hold the note, and make it out of the other parties"? "A surety is exonerated (1) in like manner with a guarantor; (2) to the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety, or inconsistent with his rights, or which lessens his security; or (3) to the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety which, it is his duty to do." Civ. Code, § 2840. In Hayes v. Josephi, 26 Cal. 535, the action was to recover, from a surety on an undertaking given for the release of an attachment, the amount of the judgment subsequently recovered. The defense was that, subsequent to the recovery of the judgment, the surety tendered to the creditor the full amount of the judgment, and he refused to receive it, and that at that time the judgment debtor was solvent, but afterwards, and before the commencement of the action, became, and ever since has been, wholly insolvent. At the trial the court refused to admit evidence in support of the allegations of the answer, and gave judgment for the plaintiff on the pleadings. On appeal, it was held that the offered evidence should have been admitted, and that, if the facts alleged were established, the surety was discharged from his obligation on the undertaking. In the opinion of the court, rendered by Sawyer, J., it is said: "The law requires the creditor to act in the utmost good faith toward the surety, and will not permit him to do anything that will unnecessarily tend to prejudice his interests. The creditor will certainly not be permited to place obstacles in the way of the surety, which tend to hinder him in the pursuit of such remedies as are guarantied to him by the law. The surety is entitled to pay the debt, and thereby at once acquire the right to proceed against the principal. * * * If it is the legal right of the surety to pay the debt, and at once proceed against the principal debtor, it necessarily follows that he is entitled to have the money accepted by the creditor in order that he may proceed. It is the duty of the creditor to receive it, and a gross violation of duty and good faith on his part to refuse, thereby interposing an insurmountable obstacle in the way of the pursuit by the surety of his most prompt and efficient remedy. * * * If the creditor refuses to receive the money when tendered, he as effectually prevents the surety from promptly pursuing his most efficient remedy as he would by entering into a valid contract with the debtor to extend the time of payment. The reason why a valid contract between the creditor and principal to extend the time of payment discharges the surety is, as we have seen, because the creditor by his further contract places an obstacle in the way of prompt and efficient action on the part of the surety to protect his interest. The principle applies here with equal force." In Sharp v. Miller, 57 Cal. 415, this court said: The plaintiff "refused to accept the money which was offered. Having tendered the money, the defendants, as sureties, did all they contracted to do. The tender made, although it was refused, was equivalent to a payment by them. Solomon v. Reese, 34 Cal. 36. And by it they were discharged from their obligation as sureties upon the appeal bond. Hayes v. Josephi, 26 Cal. 535." The note in suit was held by the bank as collateral security, and appellant was liable thereon as principal for one-third which he paid, and as cosurety with Morse for one-third, and as cosurety with Heath for one-third. Chipman v. Morrill, 20 Cal. 136. He had a right to pay the balance due on the note, and to look to his co-makers for their pro rata shares thereof. The bank refused to accept the money because it did not want the comakers sued. But this the bank had no right to do, and, as said in Hayes v. Josephi, the refusal was a gross violation of duty and good faith on its part.

It is objected, however, that it does not appear that appellant was prejudiced by the refusal, since there is nothing to show that Morse and Heath subsequently became insolvent; the finding to the effect that appellant offered to prove their solvency and subsequent insolvency, which evidence was excluded, having no place in the record. It is true that findings should be of the ultimate facts, but this finding cannot be disregarded on the ground urged. It is found in the record, and, so far as appears, was made and accepted without objection on either side. It must be assumed, therefore, for the purposes of this appeal, that the facts were as appellant offered to prove them to be.

It is further objected that appellant was not discharged from liability on the note because he did not comply with the provisions of section 1500 of the Civil Code, which reads as follows: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor with some bank of deposit within this state of good repute, and notice thereof is given to the creditor." A similar objection was made and overruled in Randol v. Tatum, 98 Cal. 390, 33 Pac. 433. On page 395, 98 Cal., and page 433, 33 Pac., it is said: "E. A. Billings did not, when plaintiff refused to receive her money in payment of rents, deposit the same, or any part of it, in a bank or elsewhere, in compliance with the provisions of section 1500 of the Civil Code." And, after a full discussion of the question it is said, at the close of the opinion: "Even if the obligation of defendants must be regarded as that of sureties for the payment of a debt, still I think the tender sufficient to discharge the sureties." As the case is presented on the record here, we think it clearly appears that the appellant was exonerated from liability on the note, and that the court erred in rendering judgment against him. The judgment should be reversed, and the cause remanded.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded.

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111 Cal. 559

BIGELOW v. BALLERINO. (No. 19,480.)

(Supreme Court of California. March 17, 1896.)

EMINENT DOMAIN—VACATING STREET—RIGHTS OF ABUTTING OWNERS—COMPENSATION—ESTOPPEL TO CLAIM DAMAGES.

1. The fact that, after a public alley had been vacated by the city, an abutting owner took possession of all land in his front previously covered by the alley, and of a narrow strip lying between its further side and a newly-opened street, in the mistaken belief that he was entitled to a frontage on such street, will not estop him from claiming damages for the closing of the alley without his consent.

2. An abutting owner's easement in the street is "property," within Const. art. 1, § 14, providing that private property cannot be taken for public use without compensation.

McFarland, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by L. N. Bigelow against Bartolo Ballerino to quiet title to land. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Horace Bell, and Geo. H. Smith, for appellant. A. W. Hutton, for respondent.

HENSHAW, J. Appeals from the judgment and from the order denying a new trial. Negro alley was, and for many years had been, a public street and highway of the city of Los Angeles. It extended northerly and southerly, and plaintiff and defendant owned opposite frontages upon it. Plaintiff's land was on the west, while defendant's property was on the east, side of the alley. The municipal authorities vacated and abandoned Negro alley, and established a new street to the west thereof, called Los Angeles street. The east line of Los Angeles street and the west line of Negro alley, while in close proximity, did not coincide. There was left a narrow wedge-shaped strip of land between the lines of the two streets. After the vacation of the old and the establishment of the new street, the defendant asserted the right to a frontage upon Los Angeles street corresponding to that which he had enjoyed upon Negro alley. This claim, while not sound in law, drew some support from the language of the revised charter of Los Angeles (approved April 1, 1876). Acting upon this claim, he encroached upon, took, and held possession of so much of Negro alley and the wedge-shaped strip as lay between the lines of his property extended and the east line of Los Angeles street. Plaintiff then commenced this action to quiet her title to the wedge-shaped strip and the western half of Negro alley, conceding to defendant the ownership of the eastern half thereof. The answer interposed several defenses, one of which was that even though Negro alley had been abandoned by the authorities as a public street, and though the fee to the westerly one-half of it might be in plaintiff, yet defendant still retained the easement of a right of way over all of the land formerly within the alley for the necessary and convenient use of his property. Here it should be said that this property, with a frontage of 107 feet, was covered by a brick building two stories in height, the lower story being fitted and used for stores. The court found that Negro alley had been for many years a public street of the city, found that it had been legally abandoned and vacated as a public street, and found and decreed ownership in plaintiff of the disputed strip and portion of the alley. It found that defendant had taken possession of all the lands between his property and the line of Los Angeles street, but that his claim thereto was unfounded, excepting as to the easterly half of Negro alley. It made no specific findings upon defendant's claim of easement, but decreed that, by taking possession of this land, defendant waived all right to other compensation for any damage which he may have sustained by reason of the closing and vacating of the alley, and is estopped from contesting the validity of such closing and vacation.

The findings and decree of plaintiff's ownership in fee of the disputed strip and of the western half of Negro alley are sufficiently supported by the evidence. She was therefore entitled to resist any unwarranted encroachments of defendant (as by building) upon this land.

The conclusion of law that defendant is estopped from contesting the validity of the closing of Negro alley, and has waived all claim to damages, by reason of the fact that he took possession of the land fronting his premises, is not sound. The principle by which defendant's conduct is to be judged is, as respondent's counsel correctly state, the principle of election. It does not appear that he petitioned for or consented to the closing of the alley, but it is said that because, upon the day after the closing, he moved upon and took possession of the vacated land fronting his property, he thereby made his election to take that land in lieu of damages or other compensation, and thus, of necessity, acquiesced in the proceedings leading to the vacation, and will not be permitted thereafter to assert any other claim or right. But in all this an essential element of a binding election is lost sight of, and that is the full knowledge by the elector of his rights. Election is based upon the well-settled rules of estoppel. Where one to whom two or more courses are open, with full knowledge of his rights and liabilities, follows one in preference to another, thereafter he will not be permitted to retrace his steps and pursue another course, to the injury of any person who, with the right to do so, has relied upon the election first made. Burroughs v. De Couts, 70 Cal. 371, 11 Pac. 734; In re Smith's Estate (Cal.) 40 Pac. 1037. But Ballerino's acts in taking possession of the land were manifestly prompted by a mistaken belief that he had title to it, and, indeed, this does not seem to be questioned. He was not then acting with knowledge of his rights, and to say to him that, because he had under honest error claimed more than he was entitled to, he should take less, and yet still be bound by his election, would be to subvert entirely the meaning of the principle. The court did not decree him what he elected to take; he did not elect to take what the court decreed he should have; and by no application of the doctrines of election or estoppel is he forbidden present freedom of action by reason of his past conduct. Of course, if Ballerino had taken under a well-founded claim, and had thereafter, for example, brought an action for damages, the reason for and the justness of the application of the principle would both be apparent. Ballerino cannot, therefore, be held to be estopped by conduct, acquiescence, or election, and the court's conclusion of law in this regard cannot stand.

In their form the proceedings of the municipal authorities looking to and concluding in the passage of the ordinance vacating Negro alley were due and regular. But back of this lies the vital consideration: what effect do these proceedings have upon the rights of a nonconsenting owner of abutting property? Section 14, art. 1, of the constitution, declares that private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner. The owner of property abutting upon a public street has an easement in the street, distinct from the public's right of way, which easement is his property. In Eachus v. Railway Co., 103 Cal. 614, 37 Pac. 750, this court in bank, speaking through Mr. Justice Harrison, said: "The right of the owner of a city lot to the use of the street adjacent thereto is property, which cannot be taken from him for public use without compensation; and any act by which this right is impaired is to that extent a damage to his property. When a city subdivides a tract of land of which it is the owner into blocks and streets, and sells the same, it thereby dedicates the streets to public use; and the purchaser of one of those lots acquires an easement in the street fronting upon his lot, for the purpose of ingress and egress, which attaches to the lot, and in which he has a right of property as fully as in the lot itself; and any subsequent act of the municipality by which that easement is destroyed or substantially impaired for the benefit of the public is a damage to the lot itself, within the meaning of the constitutional provision, for which he is entitled to compensation. Such easement is a right of property incident to the lot itself; and any damage sustained by the owner in its destruction or impairment is a damage peculiar to himself, and independent of any damage sustained by the public generally. For the purpose of determining this damage, it is immaterial whether he has the fee in the street, or only an easement for its use. In either case it is property, for an injury to which he is entitled to relief,"—citing City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6; Rude v. City of St. Louis, 93 Mo. 413, 6 S. W. 257; Hobson v. Philadelphia, 150 Pa. St. 595, 24 Atl. 1048; Schaufele v. Doyle, 86 Cal. 107, 24 Pac. 834. If needed, authorities might be indefinitely multiplied in support of this proposition. The following are but a few of many: Haynes v. Thomas, 7 Ind. 38; Concord v. Pembroke, 50 N. H. 530; Lindsay v. City of Omaha, 30 Neb. 512, 46 N. W. 627; Pearsall v. Board of Sup'rs, 74 Mich. 558, 42 N. W. 77; Gargan v. Railway Co., 89 Ky. 212, 12 S. W. 259;

Heinrich v. City of St. Louis, 125 Mo. 424, 28 S. W. 626; Anderson v. Turveville, 6 Cold. 150; Story v. Railroad Co., 90 N. Y. 122; President, etc., of City of Cincinnati v. Lessee of White, 6 Pet. 431; Lewis, Em. Dom. § 114; Parker v. Catholic Bishop, 146 Ill. 158, 34 N. E. 473; Elliott, Roads & S. p. 662; 1 Hare, Const. Law, 377, 382; Tied. Mun. Corp. § 311. The constitutional rights of an owner of private property which is sought to be taken or damaged for public use are two: First, the right to compensation; and, second, the right to have that compensation made or paid into court before his property is taken or injuriously affected. Either or both of these rights he may waive; that is to say, he may waive his right to any compensation, or he may waive his right to prepayment of compensation. But, where there is no such waiver, the property owner may rest secure in the protection which the constitution affords him that his property shall not be taken or damaged without compensation first made. It is not incumbent upon him to demand that the authorities shall respect his rights; the duty is theirs to work no unlawful invasion of them. The vacation of a highway when duly and legally effected involves something more than a mere constructive closing, which would leave the street still a street, but no longer subject to municipal control. It involves a physical closing as well, which entitles the owners of the soil once occupied by the highway to take full and complete possession of their land. Brook v. Horton, 68 Cal. 554, 10 Pac. 204; City & County of San Francisco v. Burr (Cal.) 41 Pac. 482; Com. v. Inhabitants of Westborough, 3 Mass. 406; Hobart Co. v. County of Plymouth, 100 Mass. 159; Jackson v. Hathaway, 15 Johns. 447; Barclay v. Howell's Lessee, 6 Pet. 498; Nicholson v. Stockett, Walk. (Miss.) 67; Elliott, Roads & S. p. 661; Thomp. Highw. p. 188; Ang. & D. Highw. § 326. It is such a closing as this which the court found to exist when it quieted plaintiff's title to that portion of the land in controversy, formerly Negro alley. It was right in so doing, under its further findings and conclusions of law, that defendant was estopped from contesting the validity of the closing or of claiming damages therefor. But these conclusions, as has been said, are not supported. It follows that Ballerino has waived none of his rights, and may insist that, as against him, the vacation or closing is without validity or effect until prepayment to him, or into court, of such sum as would compensate him for his property taken and damaged thereby.

It does not result from this that the proceedings of the municipal authorities looking to the closing of the alley are void. It would matter little whether the authorities first compensated the property owners and then declared the alley closed, or first declared it closed and then made compensation, provided it be distinctly understood that in the latter case, which is the case at bar, no rights attach or are lost, no invasion of the property rights of a nonconsenting owner may be worked, and no substantial impairment of his easement result, until compensation has been made to him in the constitutional mode. In other words, the sequence of the acts becomes immaterial, saving that in the present instance, as against nonconsenting property owners, the ordinance of vacation is without force or validity to work the taking or damaging of their property until compensation has been made to them. Chambers v. Railroad, 69 Ga. 320; Langford v. County Com'rs, 16 Minn. 375 (Gil. 333); Brown v. City of Seattle, 5 Wash. 35, 31 Pac. 313, and 32 Pac. 214. Until that time, as to them, the street still remains a public street to the full extent necessary to protect them in their constitutional rights. Ballerino, then, so far as the evidence in this record shows, is entitled to all of the rights he formerly enjoyed in Negro alley, among which is included his easement in the piece of land which is a part of Negro alley, and which is here claimed by plaintiff. Though the fee of that piece is decreed by the court to be in plaintiff, she is not entitled to exercise any acts of dominion over it in derogation of Ballerino's rights. Her title to the wedge-shaped strip lying without the alley, and her right of possession and dominion over it, is absolute against Ballerino. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; TEMPLE, J.

I dissent: McFARLAND, J.

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111 Cal. 588

SAN PEDRO LUMBER CO. et al. v. REYNOLDS et al. (No. 19,585.)

(Supreme Court of California. March 19, 1896.)

BILL FOR ACCOUNTING—MULTIFARIOUSNESS—CERTAINTY—TENDER.

1. A complaint of a corporation against its agent alleged that defendant, as its trusted agent, had entire charge of a branch business; that by various kinds of misconduct, specially described, he caused losses comprised in a large number of separate items, and became liable for large sums of money, the true amount of which could not be determined without an accounting of his trust; that, while the amount of indebtedness was unknown, defendant transferred to its president stock to secure it against loss; and asked for an accounting to determine the amount of defendant's indebtedness, and for a foreclosure of its lien on the stock. *Held*, that the complaint was not bad for multifariousness.

2. Nor was it subject to the objection of uncertainty in not alleging with particularity how and when each item of liability arose, and its amount.

3. A tender in settlement of an account of a sum less than the amount due is not sufficient as a tender of payment.

4. A complaint of a corporation alleging that defendant, as its trusted agent, has entire charge of a branch business, and by various kinds of misconduct, specially described, caused losses,

comprised in a large number of separate items, and thereby became liable for large sums of money, the amounts of which could not be determined without an accounting, is sufficient to entitle plaintiff to an accounting.

Department 2. Appeal from superior court, Los Angeles county.

Action by the San Pedro Lumber Company and John A. Hooper, its president, against Merick Reynolds and John A. Pirtle, for an accounting and to foreclose a lien. From a judgment for plaintiffs, defendants appeal. Affirmed.

Stephen M. White and R. H. F. Variel, for appellants. Geo. R. B. Hayes, H. W. Latham, and M. L. Graff, for respondents.

McFARLAND, J. This is an appeal by defendants upon the judgment roll from a judgment in favor of plaintiffs. Whatever may appear to be the merits of the case on the appeal from an order denying a new trial,—which we learn from counsel is on its way here,—we do not see anything on the face of the judgment roll which calls for a reversal. The pleadings and findings (and briefs) are quite voluminous; and it is contended by appellants that the complaint is fatally defective, and that the findings do not support the judgment. There was a demurrer to the complaint upon the ground, first, of want of a statement of facts sufficient to constitute a cause of action, and also upon the grounds that several causes of action have been improperly united, that the complaint is ambiguous, that it is unintelligible, and that it is uncertain; and upon the 4 latter grounds there are 86 specifications. It is impracticable to notice here all these matters in detail, and we will state only our general views as to the sufficiency of the complaint. The complaint is quite lengthy, and we will give only its substance. It is averred that the plaintiff the San Pedro Lumber Company was during all the times mentioned in the complaint a corporation engaged in the lumber business, and having its principal business and place of business at San Francisco; that the plaintiff John A. Hooper was its president; that it had a branch of its business in the county of Los Angeles; that the appellant Reynolds was its trusted agent and employé at Los Angeles for several years prior to September, 1889, and had the sole charge and management of its business at the latter place; that it was his duty to safely keep and accurately account for all moneys and property of the company coming into his hands at Los Angeles, and to oversee and direct all other employés of the company at that place, and see that they honestly and properly performed their duties; that he was to furnish from time to time statements of the accounts, affairs, and property of the company, and pay over all moneys received by him; and that "it was generally his duty to care for and protect in all particulars the financial interests and welfare and the business and property of said corporation in connection with said branch of the said business of said corporation in said county." It is then averred that prior to September 25, 1889, the appellant at divers and sundry times received considerable sums of money for the use and benefit of said company, which he never paid over or accounted for; that he appropriated to his own use moneys coming into his hands as such trusted agent and in the conduct of the business; that considerable sums of money were lost to the company through the dishonesty and embezzlement of other employés in consequence of the neglect of said appellant to properly discharge his duty as such agent and manager of said business; that considerable sums of money and property were lost to the company through the willful failure and neglect of appellant to discharge his duties, and his willful and wrongful mismanagement and fraud; and that during all of said times the said appellant "had the direct charge and control of the books and accounts of said corporation, and that he willfully and fraudulently caused the same to be kept in a false and fraudulent manner, for the purpose of covering up his aforesaid irregular transactions in connection with the discharge of his said trust." It is also averred "that plaintiff is unable to state the precise amount of the several items, but, according to his information and belief, charges that the full amount thereof equals in the aggregate $65,000, or thereabouts." It is further averred that on said September 25, 1889, while the amount of the indebtedness of appellant to the company was "unsettled and unascertained and in dispute," the appellant Reynolds, "in order to secure" to said company the payment by him of all moneys then due or owing by him to it, "or which might thereafter, upon careful investigation of the books and affairs of the said company, be found to be due or owing from the said Merick Reynolds to said corporation, or for the payment of which the said Merick Reynolds was at that time in law or equity liable to said corporation, or for which he might be in any manner liable by reason of having been the agent and employé thereof as aforesaid," executed to Hooper, president of said company, a written transfer and assignment of the following property: First, 111$^5/_6$ shares of the capital stock of the San Pedro Lumber Company; second, 101 shares of the capital stock of the L. W. Blinn Lumber Company; and third, 1,182 shares of the capital stock of the Russ Lumber & Mill Company. The said first two blocks of stock stood in the name of one Talbot, who held them as security for an indebtedness from Reynolds to him (as trustee) for about $13,000, evidenced by a promissory note, which fact was mentioned in said assignment. The assignment, which is copied in full in the complaint, expresses the conditions on which it was made, and they are the same as those averred in the complaint as above stated. Afterwards the corporation respondent, for the purpose of enabling said

Hooper to carry out the design of said assignment, purchased the said note of said Talbot, and the amount of said note is included in the cause of action in this case. There are averments of about 20 different methods by which it is charged appellant's misconduct caused the loss to respondent; such as fraudulent entries and falsifications of balances, footings, etc., in the account books; lumber and other property sold and not accounted for by appellant and others under his direction; rebates, discounts, rents, etc., collected and not accounted for; payments by debtors of the company not accounted for; private bills of appellant and employés under his direction, charged to and paid by the company, etc. It is further averred that to determine the amount of money due said corporation by reason of the said matters averred as aforesaid, and to secure which the said assignment of said capital stock was made, "the taking of an account of the books and affairs and business of the said corporation so carried on under the management and control of said defendant Merick Reynolds, as hereinbefore alleged, is necessary." It is averred that the defendant Pirtle claims some interest in the stock described in said assignment, but that whatever interest he may have is subject, etc., to the claim and lien of plaintiffs. The prayer is "for an accounting between the said defendant Merick Reynolds and the San Pedro Lumber Company of and as to all the matters hereinbefore set forth, in order to determine the true and correct amount of said indebtedness and claim against said defendant, and which he should pay to the said San Pedro Lumber Company by reason of his failure to discharge, and the aforesaid violations of, his trust"; that after such accounting said company have judgment against said defendant for the amount found due; that the said stock be sold, and the proceeds of the sale be applied in the usual manner followed in the foreclosure of liens; and that the defendants be barred and foreclosed of all right, etc., in or to the aforesaid stock.

The foregoing is a short statement of the substance of a long complaint, but it contains all that is needful for a consideration of its sufficiency, except such further matter as may be mentioned hereafter. It is difficult to see how a general demurrer could have been sustained to the complaint, for it certainly states facts sufficient to constitute a cause of action upon the $13,000 note. Nor is the cause of action upon the note mentioned in that part of the demurrer which is based upon the improper joining of several causes of action. Indeed, the case, so far as the complaint is concerned, seems to be argued on both sides upon the theory of leaving out of view the averments about the note; and the contention of appellants' counsel is that the other parts of the complaint are defective, because they do not state sufficient facts, because they improperly unite several causes of action, and because they are ambiguous, etc. They say in their brief: "If the action is only to recover $13,000, the amount of the note, and the interest thereon, and to sell the pledged property, it may be, and probably is, sufficient to withstand the first ground of demurrer; but if it is relied upon to recover any other indebtedness arising out of the contract, either express or implied, it fails to show how the indebtedness arose, the time of the creation or the amount thereof, and is all in one count." But, as the question of the validity of the averments other than those which concern the note give rise to the litigation, and is interwoven with the findings and judgment, we may as well follow counsel, and consider whether or not the complaint—leaving out of view the averments about the note—is vulnerable to the attacks of the demurrer.

The complaint sets forth only one cause of action, which is for the enforcement and foreclosure of a lien; and, as necessary to the determination of the amount for which the lien may be enforced, an accounting. For those purposes the averments of the complaint are sufficient. They show that the appellant was the trusted agent of respondent, acting in a fiduciary capacity, and having for a long period of time the entire charge and control of its business at Los Angeles; and that by various kinds of misconduct, which are specially described, and which are averred to consist of a large number of items, he caused losses, and became liable in large sums of money, the true amounts of which cannot be ascertained and determined without an accounting by appellant of the administration of his trust. This is sufficient ground for an accounting in equity. "Even where jurisdiction in equity is limited to cases where at law there is no full, complete, and adequate remedy, a court of equity has jurisdiction to enforce a pledge of stock given as security for claims and liabilities then existing or afterwards to be incurred, where these claims and liabilities are alleged to consist of a large number of items of money loaned, notes discounted, and indorsements made for accommodations. Such a case gives rise to a matter of account, and account is a matter of equity jurisdiction." Jones, Pl. § 641; and see cases there cited. "And also where the accounts are too complicated to be dealt with in a court of law, a court of equity will entertain jurisdiction." 1 Story, Eq. Jur. § 262; Taylor v. Tompkins, 2 Heisk. 89. But, in addition to all this, the case at bar presents a fiduciary relation between the parties in the nature of a trust, which brings it especially within equitable remedies. The case of Thornton v. Thornton, 31 Grat. 212, is very similar to the case at bar. There the defendant had been intrusted for several years with the management of plaintiff's property in Fairfax county, and was charged with many acts of misconduct similar to those charged in this case; and the court enjoined the defendant from proceeding with an action which he had commenced in a court of law, and held that it was "a proper case for equitable interposition." The court quotes from the opinion of Vice Chancellor Stuart in Makepeace v. Rogers, 11 Jur. (N. S.) 215, as follows: "I conceive that, wherever the relation between the person who seeks an account and the person against whom he seeks it partakes of a fiduciary character, a trust is reposed by the plaintiff in the defendant, and that that trust is not the same as is represented to exist in the ordinary employment of an agent, such as a builder or other tradesman." And it is stated that, "in affirming this judgment of the vice chancellor Lord Justice Turner said there was no authority to show that a bill would not lie at any time by a principal against his agent for an account." In Pom. Eq. Jur. § 1421, it is said: "The instances in which the legal remedies are held to be inadequate, and therefore a suit in equity for an accounting proper are: * * * (2) Where the accounts are all on one side, but there are circumstances of great complications or difficulties in the way of adequate relief at law; (3) where a fiduciary relation exists between the parties, and a duty rests upon the defendant to render an account." And it is said in a note that: "Where the relation is such that a confidence is reposed by the principal in his agent, and the matters for which an accounting is sought are peculiarly within the knowledge of the latter, equity will assume jurisdiction." Many authorities are cited by the author to these points. See, also, Conyngham's Appeal, 57 Pa. St. 474; Weaver v. Fisher, 110 Ill. 146.

Such, then, being the nature of the action, and the facts averred warranting the institution of such an action, the points made by appellant that each averment of acts of misconduct by appellant constitutes a separate cause of action, which cannot be properly joined with either of the others, and that the complaint is uncertain, etc., because it does not state more particularly how each item of alleged liability arose, when it was created, and especially its amount, cannot be maintained. The purpose of the action was to call appellant to an accounting touching matters peculiarly within his knowledge, and arising out of the trust reposed in him; and we think that for this purpose the cause of action is stated with sufficient particularity. West v. Brewster, 1 Duer, 647; Green v. Brooks, 81 Cal. 333, 22 Pac. 849; Rippe v. Stogdill, 61 Wis. 38, 20 N. W. 645; Colonial & U. S. Mortg. Co. v. Hutchinson Mortg. Co., 44 Fed. 219. And the character of the complaint is not changed by the averment that before the commencement of the action an investigation had shown that the respondents had suffered a loss of "upwards of $65,000."

We are not able to see any insufficiency of the findings to support the judgment. They dispose generally of the issues made by the pleadings, are very full, and the objections to them are mainly those made to the complaint. There is a good deal of adverse criticism by appellant's counsel of the finding of the court concerning certain bookkeepers and other employés of respondent, that "it was not their duty to keep a correct and accurate, or any, set of books, or to send monthly statements of the business in said county of Los Angeles to the principal office of the company in San Francisco." The statement that it was not their duty to keep accurate books is, considered by itself, a very awkward one; but it was evidently made in response to the averment and contention of appellant that other employés were alone responsible for certain manipulations of the books, and that appellant had no duty to perform in the premises; and it is followed by the statement that "it was the duty of said Merick Reynolds, under his contract with the said corporation plaintiff, and as manager thereof, to see that said bookkeepers kept correct and accurate sets of books, and that correct monthly statements" were sent to the main office; that he "willfully failed and neglected to perform his duty in this regard"; that false statements were sent by him, and that the falsifications of the books were made with his knowledge, consent, and acquiescence. Of course, what the facts were, depends upon the evidence, which is not before us.

A good deal is said in the briefs about a certain tender alleged to have been made by appellants, but, without determining the questions whether the situation was such as to make a tender available at all, or whether it was properly made and kept good, it is sufficient to say that it was of a sum far less than the amount found due. We think that the denials in the answer to the cross complaint are sufficient, particularly in the absence of any showing that the case was not tried upon the theory of the sufficiency of such denials.

It is not feasible, within a reasonable space, to follow further the discussions of counsel. We see no valid reason for disturbing the judgment on this appeal. The judgment is affirmed.

We concur: TEMPLE, J., HENSHAW, J.

111 Cal. 648

PEOPLE v. OLDHAM. (Cr. 90.)

(Supreme Court of California. March 21, 1896.)

ROBBERY—ALLEGATION AND PROOF—EVIDENCE OF OWNERSHIP—STATEMENTS OF ACCOMPLICE—CURING ERROR—INSTRUCTIONS.

1. On an information charging the property stolen to be that of a corporation doing business in the state, and organized under the laws of another state, evidence of a de facto corporation doing business in the state is sufficient.

2. On a prosecution for robbery, possession of the property by the complaining witness, or his agent, at the time it was stolen, is presumptive evidence of ownership.

3. Statements by an alleged accomplice,

made after the crime was committed, and in defendant's absence, are not admissible against the latter for any purpose.

4. Error in admitting, under objection and exception, statements made by an alleged accomplice, after the crime was committed, and in defendant's absence, is not cured by instructing the jury, after the case is argued, to disregard such evidence in making up their verdict.

5. Error in admitting statements made by an alleged accomplice after the commission of the robbery, and not in defendant's presence, is not cured by the accomplice testifying to the same facts on the stand.

6. On a trial for robbing a stage coach in transit, there was no error in admitting evidence that defendant previously borrowed a saddle, and attempted to buy cartridges for his gun.

7. An instruction which intimates that, if the jury believe the testimony of a witness willfully false in any particular, they must, as a matter of law, reject all his testimony, is erroneous.

Department 1. Appeal from superior court, Mendocino county.

David Oldham was convicted of robbery, and appeals. Reversed.

Seawell & Pemberton, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. The defendant was convicted of the crime of robbery, and appeals from the judgment and order denying his motion for a new trial. Upon a certain afternoon the stage traveling from Ukiah to the coast was stopped by one Hilton, a highwayman, and possibly another, and Wells, Fargo & Co.'s boxes, containing about $1,000, were taken. It is conceded that the defendant was not present at the robbery, but it is claimed that, though miles distant at the time, still he connived, abetted, aided, and encouraged the commission of the offense, and that therefore, under the Penal Code of this state, he is equally guilty as a principal.

1. The information charged the property stolen to have been the property of Wells, Fargo & Co., a corporation organized under the laws of the territory of Colorado, and doing business in the state of California. At the trial it was proven that Wells, Fargo & Co. was a corporation de facto, doing business in this state. It is now insisted that there was a failure of proof in not establishing the corporation to have been organized under the laws of the territory of Colorado. Counsel concede that if no such allegation had been laid in the information, the proof would have been unnecessary, but, the fact being so stated, it became material, made so by the pleader, and should have been established as any other material fact in the case. Such contention has support (see State v. Newland, 7 Iowa, 242); but this court has never followed the doctrine there outlined. In People v. Ah Sam, 41 Cal. 651, the identical question here presented was before the court, and it was held that evidence of a de facto corporation was sufficient to support the charge as here laid. The same principle was also involved, and finds full support, in People v. Frank, 28 Cal. 519, and People v. Hughes, 29 Cal. 260. The evidence we find in the record as to the de facto character of this corporation, the nature of the business in which it was engaged, etc., is not at all clear and conclusive; and, as the case must be returned to the lower court for a new trial, the introduction of some additional evidence upon these points would be time well spent.

2. It is claimed that there is no evidence showing the ownership of the money stolen to have been in Wells, Fargo & Co. This contention is not well founded. The evidence indicates the money to have been in the hands of one Hart, as the agent and servant of Wells, Fargo & Co., at Ukiah, and, as such agent and servant, he gave it into the possession of the stage driver, to be carried by him to certain points upon the road, and while so in transit it was stolen. The lawful possession of the money by Hart was the possession of Wells, Fargo & Co., and likewise the actual lawful possession of it by the driver of the stage was the possession of the company. In the absence of evidence to the contrary, in larceny or robbery, possession of the stolen property is sufficient evidence of ownership. The criminal law of this state is not favorably disposed in allowing criminals to escape upon technicalities of this character; and, as supporting the principle here declared, we cite People v. Nelson, 56 Cal. 77; People v. Davis, 97 Cal. 194, 31 Pac. 1109.

3. It is conceded that one George Hilton was the acting, participating robber. At the trial he took the witness stand, and so stated, giving all the details bearing upon the perpetration of the crime, and directly charging the defendant as a particeps criminis. It is now claimed by the prosecution that the defendant Oldham, though several miles distant at the immediate time of the robbery, was a co-conspirator, and aided and encouraged the commission of the crime, and that Hilton's testimony in this regard is true. Hilton was arrested, some seven days after the robbery, in an adjoining county. The officer arresting him testified as a witness at the trial to statements made by Hilton when arrested, pertaining to the commission of the offense and Oldham's connection therewith. Another witness (Stanley) testified to statements made by Hilton while in jail, after his arrest, and in the absence of the defendant. The statements made by Hilton at this time amounted to a confession, and included all the details of the robbery. All this evidence was admitted under objection of defendant's counsel, and, we are entirely clear, was erroneously admitted before the jury. Evidence of the statements of a co-conspirator, made during the life of the conspiracy, are admissible against the other conspirator; but, after the crime has been committed, the conspiracy is an accomplished fact. It is a thing of the past, and such statements of a co-conspirator stand in no different relation to the law, and are no more admissible against a defendant, than

though he were a stranger to the whole transaction, for they are the purest hearsay. This court said, in People v. Moore, 45 Cal. 19: "It was never competent to use as evidence against one on trial for an alleged crime the statements of an accomplice not given as testimony in the case, nor made in the presence of defendant, nor during the pendency of the criminal enterprise and in furtherance of its objects. To hold such testimony admissible would be to ignore the rules of evidence, settled and everywhere recognized from the earliest times." The same doctrine is also reiterated in People v. Dilwood, 94 Cal. 89, 29 Pac. 420. It seems that the trial court admitted some of this objectionable evidence upon the ground that the statements were proper as proving the commission of the robbery by Hilton, but that cannot be so. As against the defendant, the actual commission of the robbery by Hilton could not be proven by his extrajudicial confessions; certainly not, in a case like this, where they were made without his presence and hearing. If Hilton had refused to take the stand and testify, it would not be contended for a moment that his confessions could have been used against this defendant for the purpose of proving the robbery, or for any other purpose.

It is insisted that the foregoing error of the court was cured when the witness Hilton took the stand, and gave to the jury substantially the same statements and confessions he had prior to that time made to the officers. We cannot say that the jury attached no importance to these statements of Hilton, made shortly after the commission of the crime, nor that the verdict would have been the same if they had been rejected by the court. It is further insisted that the error of the court was cured by the following instruction given to the jury: "I charge you that no statements, or admissions, or confessions (other than his own sworn testimony in court), made by the alleged accomplice, Hilton, after the commission of the offense charged, and not in the presence of the defendant, should be considered by you as evidence in this case against this defendant, as tending to connect him with the offense." Judges are not justified by the law in admitting evidence before the jury, under objection and exception, and then, after the case has been argued by counsel, instruct the jury that such evidence should not be considered by them in making up their verdict. Such a course, if practiced, certainly would be out of the ordinary, and not fair to a defendant. This is the fair interpretation of the instruction; and if the judge also intimated, by this particular charge to the jury, that the admissions and confessions of Hilton, not under oath, and made subsequent to the commission of the robbery, and without the presence of the defendant, were admissible in this case for the purpose of proving a robbery, then, as already suggested, the instruction was clearly erroneous from that standpoint.

4. We think the evidence of the various witnesses offered by the people, as to the borrowing of a saddle, the hauling of the blacksmith tools, and the attempt to purchase cartridges for the gun, was proper and relevant. Of course, the reason why the dealer refused to sell to defendant cartridges was wholly immaterial.

5. The judge gave the jury the following instruction: "If you believe that any witness has willfully testified falsely to a material fact in this case, you should distrust his evidence. Yea, I will go further, and, as a matter of law, will state to you that, if you believe any witness has willfully and intentionally testified falsely to any material fact, you may discard his evidence entirely, and give it no consideration except to reject it. I don't tell you to do this. It is a matter resting in your sound discretion; and I will say that it is your duty, as a matter of law, acting as jurors." This instruction is not clear, but, upon the contrary, somewhat involved. If by the final clause thereof the judge meant to say that, if the jury believe a witness to be willfully false in one portion of his testimony, it is their duty, as a matter of law, to reject all his testimony, then the instruction is not legally sound. It draws the line too strictly, and is opposed to the principles declared in People v. Sprague, 53 Cal. 491, and People v. Treadwell, 69 Cal. 226, 10 Pac. 502.

6. The instruction of the court as to what would be sufficient evidence of corroboration of Hilton's testimony was not justified by any evidence found in this record. We find nothing there, other than Hilton's testimony that defendant promised to establish an alibi for him, if arrested for the commission of the robbery. The other matters appearing in the record, to which counsel for appellant make objection, probably, will not arise upon a second trial of the case, and for that reason we refrain from passing upon them. It is ordered that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; HARRISON, J.

111 Cal. 616

PEOPLE v. CONKLING. (Cr. 60.)

(Supreme Court of California. March 21, 1896.)

Homicide—Evidence—Collateral Issues—Self-Defense—Objection to Evidence—Harmless Error — Instruction — Misconduct of Jurors.

1. In a prosecution for a homicide in a difficulty between deceased and defendant arising from defendant's attempt to pass over a road over which he claimed the right to pass, which right was disputed by deceased, evidence in regard to the status of the road should be kept within narrow limits.

2. When one person, without legal right, claims or denies to another the right to pass over land, neither is justified in killing the other to prevent the assertion by such other of his alleged right.

3. When a person is attempting to pass over the land of another without legal right, and intends to do so at all hazards,—such other person also intending to prevent his passage at all hazards,—either person is entitled to take the life of the other in self-defense, he himself having been guilty of no overt act to bring on an affray.

4. In a trial for murder, an objection to the introduction in evidence of clothes worn by deceased when killed, after evidence that they were the clothes then worn, on the ground that no predicate was laid therefor, is too general, and fails to raise the objection that they were inadmissible on the ground that there was no evidence to show that they were in the same condition as when worn by deceased.

5. A witness for the state, who was the first to find deceased's body, testified that a stone was lying near deceased's hand, and denied having made a statement to third persons that the stone was in his hand. There was no evidence that the stone was in deceased's hand after his death. *Held*, that the exclusion of testimony to impeach the witness—to show that he did make such statement—is not prejudicial,—since, as it was inadmissible to prove that the stone was in deceased's hand, its only effect would be to eliminate the testimony as to the position of the stone near deceased's hand, which was favorable to defendant.

6. The homicide having taken place in defendant's attempt to pass over a road over which deceased denied his right to pass, an instruction that if the necessity for the killing arose by the fault of defendant, or if it was brought on by his misconduct, he cannot set up the defense of self-defense, is erroneous, as tending to impress the jury with the belief that defendant's attempt to pass over the road was such misconduct as to deprive him of the right of self-defense.

7. That defendant began the affray does not absolutely deprive him of the right of self-defense.

8. In a trial for murder, misconduct of jurors, in experimenting on their own account with a rifle similar to the one with which defendant killed accused, to see how far powder marks would be carried upon clothing by the fire, is ground for reversal.

Department 1. Appeal from superior court, San Benito county; N. A. Dorn, Judge.

Francis M. Conkling was convicted of murder, and appeals. Reversed.

G. B. Montgomery, and S. F. Geil, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. The appellant has been convicted of murder in the first degree, and sentenced to imprisonment for life. He made a motion for a new trial, which was denied, and now appeals from the judgment and order denying such motion.

Deceased was in the possession of a certain tract of land, as a renter. A road passed over this land, which defendant and residents of the neighborhood were accustomed to travel, going to and from the post office and trading station. Deceased placed a fence across this road for the purpose of stopping travel thereon. Upon a certain Friday, defendant met the deceased, his brother, and the owner of the land, at the point of obstruction, and after heated language, threats, etc., passing between the parties, the defendant was prevented from continuing his journey, and was forced to retrace his steps. A day or two later he bought a rifle, and within a day or two thereafter, not in the presence of deceased, he went and tore down the fence erected across the road. Subsequently, and with but a day or two intervening, he passed over the road, and across the deceased's land, presumably unobserved, upon his way to the post office. In the afternoon, upon his homeward journey, he approached the point where the road had been obstructed by the fence, having his rifle with him in his buggy. Deceased being at the point of obstruction, trouble arose between them, and defendant shot and killed the deceased with his rifle. There were no eyewitnesses to the tragedy, other than defendant and the dead man.

There was considerable evidence introduced at the trial as to the ownership of the land over which this road passed, and as to deceased's rights to the road under his lease. Counsel for defendant attempted to show that the road was a valid, legal road, by user and prescription, but this evidence was not admitted. It is possible that the jury, by reason of the evidence that was placed before them upon these questions, were confused to some degree in arriving at a determination as to the exact bearing this class of evidence had upon the merits of the case. But a new trial must be ordered for other reasons, and it becomes unnecessary to look at these matters in detail. Upon a second trial of the case, we think it very proper for the court to keep within narrow limits any investigation as to the title to the land, or the status of this road. These questions are purely collateral to the issue on trial, and the jurors' minds should not be led away from the main question under investigation. For a clear understanding of the evidence bearing upon the homicide, the jury should have been enlightened upon these collateral questions to the extent of showing generally that deceased was in possession of the land as a lessee, that he obstructed the road leading over the land for the purpose of preventing travel thereon, and that defendant claimed that the road was such a road as that he had a right to travel over it, and the deceased had no right to prevent him from so doing. This was far enough for the evidence to go in this direction. It showed the facts leading up to the homicide, and was all that was necessary for the jury to know in order to fully comprehend the case in its important essentials. There is no question of defense of property or habitation here, which would justify the deceased in killing the defendant, nor any question of deceased's preventing defendant from exercising a right which would, in law, justify defendant in killing the deceased. Conceding defendant had the legal right to travel the road, he was not justified in killing deceased in order that he might exercise that right; and, conceding defendant had no right to travel the road, deceased was not justified in killing him to prevent him from traveling it. Defendant admitted the killing, and justified upon the plea of self-defense, and that was the question in the case. The relative rights of the parties, as to the road, were not an issue before the jury, for they shed no light upon the solution of the question as to what actually occurred at the immediate time of the killing.

If it be assumed that, at the time of the killing, deceased was at the opening in the fence, for the purpose of preventing the defendant, at all hazards, from going through, and if it also be assumed that defendant was there, intending to pass through at all hazards, still the question of self-defense is presented to the jury, regardless of the respective rights of the parties to the road. Under such circumstances, the man who began the deadly affray—that is, who, by some overt act, caused the other, as a reasonable man, to believe that he was in great danger of loss of life or limb—placed himself without the protection of the law, and must take the consequences, whether those consequences were his death upon the ground, or the penalty imposed after trial by judge and jury.

During the course of the trial the prosecution offered in evidence a vest and two shirts which were worn by deceased at the time he was killed. The defendant objected to this evidence on the ground that the proper predicate had not been laid for its introduction. At that time evidence had been introduced showing these garments to have been those worn by the deceased at the time he was killed, and, under such circumstances, we consider the objection of the defendant anything but plain and explicit. Counsel now insist that the objection went to the point that the clothes, when offered in evidence, were not shown to be in the same condition as when taken from the body. It was but fair to the court and to the people that this objection should have been framed in more direct and explicit language. It was too indefinite to give the court any information as to the point now raised by counsel. While it is the rule that evidence of this character, in order to justify its admission before the jury, should be shown to be in the same condition when offered as when taken from the body, especially as to the particular point towards which the evidence is directed, yet this objection was too broad and general and vague to justify a review here of the ruling made by the trial court. Upon first thought, the conclusion would be arrived at that the objection went to a failure of the identification of the clothing, but it seems that such was not its purpose; and, indeed, upon an examination of the lexicographers, the word "predicate" would seem to be of doubtful application, even when used in that sense. A similar question was presented to this court in People v. O'Brien, 78 Cal. 44, 20 Pac. 359, and it was held that the objection to the evidence offered was so broad that the court's ruling would not be considered.

Howard Hardwick, a younger brother of deceased, was first at the scene of the homicide. He was called as a witness by the defense, and testified that when he viewed the body he observed a rock, about the size of a goose egg, three feet from deceased's left hand. Defendant's counsel then asked him: "Q. Did you on the 1st of March, 1895, at your father's house, tell Virgil Conkling and Mrs. German that the deceased had a rock in his left hand, and that a hatchet was right close to his right hand, or near his body? A. No, sir; I never told him that. I might have told them the hatchet was there. Q. Did you ever tell them that a rock was in either hand of the deceased? A. No, sir." Virgil Conkling was then called, and asked: "Q. Did Howard Hardwick at that time inform you and your mother that the deceased had a rock in his left hand, and that the hatchet was near his right hand?" An objection was sustained to this question. The evidence of Conkling, if admissible at all, was admissible for the single purpose of impeaching the witness Hardwick by showing his contradictory statements, as allowed by sections 2049 and 2052 of the Code of Civil Procedure. It was clearly not admissible as proving a fact, for it was hearsay of the plainest character. As far as the question pertained to the hatchet, the objection was properly sustained, for Hardwick himself testified that he might have told Virgil Conkling that the hatchet was there. Hence there was nothing to contradict in this regard, and Conkling's evidence, as to that point, was clearly objectionable. But let us see as to the rock. Hardwick testified that he found the rock three feet from deceased's left hand. It was then proposed to impeach him by showing that he told Conkling it was in his left hand. The question now presents itself, why should Conkling's evidence have been admitted? How could it have legally served the interests of the defendant offering it? As we have seen, it was clearly improper for the purpose of proving as a fact that the dead man held a rock in his left hand; and, if admitted to impeach Hardwick as to the fact that a rock was lying three feet from his left hand, then, Hardwick being impeached, the rock is removed from the case, and the defendant has been injured by impeaching his own witness, rather than benefited. For, as far as his interests were concerned, it was better to have a rock within three feet of the hand of the dead man than to have had no rock there at all. In other words, the proposition simply comes to this: The evidence of Hardwick as to the rock was not prejudicial to defendant's case, and it is only where the evidence produced by counsel results in injury to his own cause that the aforesaid sections of the Code as to impeachment of a witness by contradictory statements may be invoked. See People v. Mitchell, 94 Cal. 556, 29 Pac. 1106; People v. Jacobs, 49 Cal. 384.

The court instructed the jury upon the law of the case as follows: "The law provides a remedy for a person unlawfully obstructed in the use of his property, or unlawfully prevented from the free enjoyment thereof, and does not justify such person in assaulting or killing the one so obstructing its use or preventing its enjoyment, for that reason alone. and if you believe from the evidence, beyond a reasonable doubt, that the defendant killed the deceased, then, to render such killing justifiable, it must appear that the defendant was wholly without any fault imputable to him by law, in bringing about the commencement of the difficulty in which the mortal wound was given; and, while it is true that an honest apprehension of danger to life or limb may justify a man for taking the life of another, yet that apprehension must arise out of a reasonable cause. But a cause which originates in the fault of the person himself in a quarrel which he has provoked, or in a danger which he has voluntarily brought upon himself by his own misconduct, cannot be considered reasonable, or sufficient in law to support a well-grounded apprehension of imminent danger to his person. Error of apprehension the law overlooks, when a man is called upon to act on appearances, but it does not overlook dishonesty of apprehension. Hence, a real or apparent necessity brought about by the design, contrivance, or fault of the defendant, cannot be availed of as a defense for the commission of a crime or a homicide." We think this instruction was a trespass upon the rights of the defendant, as not containing a sound exposition of the law. There was no evidence in the case that the defendant was the first assailant, and then withdrew, or attempted in good faith to withdraw, from the affray before he fired the fatal shot. In fact, defendant's own testimony is to the contrary. For this reason the instruction, regardless of the soundness of the law covered by it, would seem to be without the facts, and not pertinent to the issues under investigation; and upon a second trial of this case, the evidence being the same, we think the court could well refuse an application for the giving of the principle. But here we cannot say that no injury resulted to defendant from this charge, for it is broad in its language, and covers much ground. It says, in effect, that, if the necessity for the killing arose by the fault of defendant, then the killing was not done in self-defense; and, again, it says, if the danger which surrounded defendant was one brought upon himself by his own misconduct, he cannot defend himself against it. Aside from any question as to the immediate cause which at the time of the killing precipitated the affray, this language of the instruction is broad enough to justify the jury in believing that it was such a fault or misconduct upon the part of the defendant, in attempting to travel this road under existing circumstances, as to deprive him of the right of self-defense, if attacked by deceased at the point where the road was obstructed. Such, certainly, is not the law, and neither court nor counsel for the people would so contend. Taking the instruction as a whole, the principle there declared has some support in the law, and authority may be found for it in a few of the earlier decisions of this court. But the great weight of authority looks the other way, and section 197 of the Penal Code declares a contrary doctrine. This rigid doctrine, broadly stated by Sergeant Hawkins, is, "No man shall justify the killing of another by pretense of necessity, unless he were himself wholly without fault in bringing that necessity upon himself." 1 Hawk. P. C. 82, 83. The same principle is thus stated in another form, "Neither does it lie in the mouth of a party first making a felonious attack upon another, without any lawful provocation, to urge, even in alleviation, this plea of necessity in self-defense, though perhaps it existed in fact." 1 East, P. C. p. 278. But such law is directly opposed by Lord Hale, in his Pleas of the Crown (pages 479, 480), and is also contrary to the whole weight of modern authority. See Stoffer v. State, 15 Ohio St. 47. By the extreme doctrine we have cited, and which is followed in the instruction of the judge in this case, the party first at fault, the one beginning the affray, absolutely forfeits to the other his right to live,—to the extent, at least, of the difficulty which he has created. Having committed the first wrongful act, the plea of self-defense is foreclosed to him, and his life is the penalty, no matter what turn the affray may subsequently take. This doctrine would seem to be utterly inconsistent with the whole theory of self-defense, and gives a party assailed the absolute right to avenge his own wrongs. It authorizes the party first assailed to kill his adversary when he is in no danger, and to defend himself when no defense is necessary. Killing under such circumstances is not done in self-defense, for the necessity to kill is not present, but it is simply wreaking vengeance in satisfaction of a prior wrong; and, in law, the commission of one crime can never justify the commission of another. The true principle is well stated in Horrigan & Thompson's Cases of Self-Defense (page 233): "We are thus brought to the conclusion that where a person has been feloniously assailed, and the felon has desisted from his attempt and taken to flight, the right to pursue for the purpose of private defense ceases as soon as, in the reasonable belief of the assailed, the danger has ceased to be immediate and impending." In the consideration of this question this court, in a few early cases, has wandered from the true path, to wit: People v. Lamb, 17 Cal. 323; People v. Travis, 56 Cal. 254; and People v. Westlake, 62 Cal. 306. It will be observed that the doctrine declared in the Westlake Case failed to receive the sanction of a majority of the court. As stating the true rule we cite People v. Simons, 60 Cal. 72; People v. Wong Ah Teak, 63 Cal. 544; People v. Bush, 65 Cal. 129, 3 Pac. 590; People v. Gonzales, 71 Cal. 569, 12 Pac. 783. And, as discussing the entire question, we refer to

People v. Button, 106 Cal. 628, 39 Pac. 1073. See, also, People v. Hecker (Cal.) 42 Pac. 307.

The distance between the deceased and defendant at the time the fatal shot was fired was a vital issue in the case. The clothing worn by the deceased was in evidence, and, when exhibited to the jury, showed no powder marks. When the defendant's motion for a new trial came before the court, he offered the affidavits of certain parties to the effect that, during the progress of the trial, two of the jurors borrowed a rifle similar to that with which the deceased was killed, bought some cotton drilling, retired to the outskirts of the city, and there made experiments, by firing the rifle, for the purpose of determining at what distance powder marks would be carried by the fire. The evidence upon this question disclosed by the affidavits is circumstantial, but, we think, amply sufficient to establish the fact that these things were done by the two jurors. Especially is this so when we pause to consider that those jurors have not denied the fact by counter affidavits. They were evidently honest, and desirous of getting at the truth of the matter; but they were too zealous, and their misconduct in this particular demands a retrial of the case. Jurors cannot be permitted to investigate the case outside the courtroom. They must decide the guilt or the innocence of the defendant upon the evidence introduced at the trial. It is impossible for this court to say that this outside investigation did not affect the result, as to the character of the verdict rendered; for, when misconduct of jurors is shown, it is presumed to be injurious to defendant, unless the contrary appears. People v. Stokes, 103 Cal. 193, 37 Pac. 207.

We find nothing further in the record demanding our consideration. For the foregoing reasons the judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; HARRISON, J.

(112 Cal. 4)

HAIGHT v. TRYON. (S. F. 245.)[1]

(Supreme Court of California. March 23, 1896.)

APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW—SPECIFICATIONS OF ERROR—SUFFICIENCY.

1. The refusal of the court to find on certain issues cannot be reviewed on appeal where appellant does not include such refusal as one of the grounds on which a new trial is asked.

2. Specifications of error based on the insufficiency of the evidence to sustain findings must specify wherein the evidence is insufficient.

Department 1. Appeal from superior court, Del Norte county.

Action by Daniel Haight against Dennis Tryon for a partnership accounting. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

A. J. Bledsoe, for appellant. L. F. Cooper, for respondent.

VAN FLEET, J. Action for a partnership accounting, in which findings and judgment were in favor of defendant. Plaintiff appeals from the judgment and an order denying him a new trial.

1. Plaintiff asked the court below to find upon certain issues which he contended were presented by the pleadings, and which he deemed material. His request was refused, and he took an exception, which he now seeks to have reviewed as an error of law. No such practice is recognized by our present method of procedure provided by the Code. Lamb v. Harbaugh, 105 Cal. 680, 692, 39 Pac. 56. It is the duty of the court to find upon all the material issues, regardless of any request of the parties, and a failure in that respect is ground for a new trial to the party aggrieved as "a decision against law." Knight v. Roche, 56 Cal. 17; Spotts v. Hanley, 85 Cal. 168, 24 Pac. 738. In this case, however, plaintiff did not include that as one of the grounds upon which a new trial was asked, and the error, therefore, if such there be, does not arise upon the record.

2. It is claimed that the evidence does not support the findings in several particulars, but this objection we are likewise precluded from reviewing for want of any sufficient specification. The form of the specifications is exemplified by the following: "To findings, 2, 3, 4, 5, 6, and 7 of the court the plaintiff then and there duly excepted upon the ground that the evidence is insufficient to justify the finding, in this: The evidence clearly shows that the total amount contributed to the partnership by Dennis Tryon was the sum of $3,684, and the total amount contributed to the partnership by Daniel Haight was the sum of $3,151.55." This is in no essential a sufficient specification of the particulars to enable us to review the evidence. Spotts v. Hanley, supra. Speaking in that case of specifications in no material respect different from the one above quoted, it is said: "Just such specifications were condemned in Parker v. Reay, 76 Cal. 105, 18 Pac. 124, approving Eddelbuttel v. Durrell, 55 Cal. 279, in which last it is said, speaking of section 659 of the Code of Civil Procedure: 'The purpose of the statute is apparent. It was to direct the attention of the court and counsel to the particulars relied on by the moving party, to the end that the evidence bearing on the specifications of error might be inserted in the statement and considered by the court.'" The other attempted specifications are equally vicious and devoid of a single requisite. None of them purport to state wherein the evidence is insufficient, but contain simply general statements of what it shows. As suggested by Mr. Hayne: "It is not necessary that the specifications should state what the evidence does show. Such a statement is insufficient if standing alone, and surplusage if joined to

[1] Rehearing denied.

a proper specification." Haynes, New Trials & App. 432; Dawson v. Schloss, 93 Cal. 200, 29 Pac. 31; Kumle v. Grand Lodge (Cal.) 42 Pac. 634.

The other points require no special notice. They involve no error, and the judgment and order must be affirmed. It is so ordered.

We concur: HARRISON, J.; GAROUTTE, J.

(111 Cal. 639)

GOULD v. EATON et al. (L. A. 23.)[1]

(Supreme Court of California. March 21, 1896.)

PERCOLATING WATERS—TITLE.

Percolating waters belong absolutely to the owner of the soil, and his title thereto is not affected by the fact that an impervious strata beneath, and on which the porous strata containing the water rests in close contact, diverts the course of percolation, to and over adjoining land, into a natural stream.

Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by one Gould against one Eaton and others to enjoin the diversion of surface springs and percolating waters supplying a natural stream. From a judgment granting relief only as to the springs, plaintiff appeals. Affirmed.

R. B. Canfield, for appellant. Wright & Day and B. F. Thomas, for respondents.

HARRISON, J. The Cold Spring branch of Montecito creek has its rise in the Santa Inez Mountains, and flows in a southerly direction through a cañon on the southerly slope of said mountains. These mountains, in the neighborhood of said stream, are composed chiefly of parallel strata of sandstone, extending across the cañon, and separated by seams parallel with the strata, filled with clay which is impervious to water. This sandstone is porous, and fissured with seams and cracks, both parallel with the strata and transversely thereto. The trend of the strata is nearly east and west, and nearly at right angles with the general course of the cañon and of the stream; and the dip of the strata is towards the north, and at an angle of about 80 degrees. The stream has a fall of about 400 feet to the mile, and its natural supply is the rain which falls upon the adjacent mountains, and descends into the sandstone, percolating through it, and passing along the seams and cracks thereof in the direction of the trend of the strata. The plaintiff is the owner of a tract of land through which it flows, and from which his land derives a benefit. In October, 1892, the owner of the tract of land extending on both sides of the stream, above that of the plaintiff granted to the defendants the right to enter thereon and excavate a tunnel for developing water; and in pursuance thereof the defendants commenced the construction of a tunnel at a point about 30 feet west of the stream, and at an elevation of about 4 feet above its level, and continued the construction of said tunnel in a northerly direction for about 600 feet. The tunnel was constructed so as to be, throughout the greater part of its length, below the level of the stream, and so that its depth below the level of the stream increased gradually towards the head or northern end, where it was about 50 feet below the level of the stream. At a point about 300 feet from the mouth of the tunnel there is a bold outcropping of one of the strata of said sandstone, and for a space of 30 yards along the cañon, extending from near the foot of the western slope of the mountains to the margin of the stream, a distance of about 100 feet, the water, prior to the construction of the tunnel, percolating through this stratum, moistened the ground, and sustained thereon a growth of ferns. Within this growth of ferns there existed, prior to the construction of the tunnel, certain small springs, the waters of which came to the surface in such quantities as to be visible, and, percolating through said ferns, seeped into the stream, along the western bank thereof, but did not form a defined channel or current. The tunnel was constructed a short distance west of this growth of ferns and the locality of these springs, and also about 40 feet below the level of the same; and its effect has been to intercept and divert into and through said tunnel the waters that had previously supplied said springs, and to cause the same, and the seepage therefrom into the stream, to become wholly dried up. The porous character of the sandstone formation which crosses the cañon permits water from the ground neighboring to and overlying said tunnel, and water from the channel of said stream, to drain into the tunnel. The court finds that the intention of the defendants in running said tunnel was to intercept and divert into said tunnel the subterranean waters stored in and percolating through said sandstone, and passing along the seams and cracks thereof, and particularly to intersect the aforesaid stratum of sandstone, and to intercept and divert into the tunnel the water percolating and passing through and along said stratum and the seams and cracks thereof, but that they did not intend to divert from their natural course any waters flowing from said springs, or to divert from said stream any water naturally flowing in the channel thereof, and that the said small springs, and the waters percolating or seeping therefrom, are the only tributaries of said stream affected in any way by the construction of said tunnel.

The plaintiff brought the present action to restrain the defendants from diverting the waters of the stream by means of said tunnel, and from preventing the water which would issue from the mouth of the tunnel from flowing back into the channel of the stream. The court found that at the time of the trial of the action there was a flow of water from the tunnel, at its mouth, of 3.92 inches, measured under a 4-inch pressure, and that of this amount 1.43 inches was,

[1] Rehearing denied.

and, under the conditions then existing, would be, obstructed and diverted, by reason of the tunnel, from the natural course of the waters flowing in said stream; that, except as to said 1.43 inches, the whole of the flow of water from said tunnel had been developed and gathered from the subterranean waters percolating in the sandstone of the adjacent mountains, and passing along the seams and cracks thereof, and did not come from the channel of said stream. Judgment was thereupon rendered, giving to the plaintiff the relief asked by him, to the extent of 1.43 inches. From this judgment, in so far as, by its terms, the defendants are permitted to appropriate and divert the waters flowing from the tunnel in excess of 1.43 inches, the plaintiff has appealed. The appeal is presented here upon the judgment roll alone, without any bill of exceptions.

The rule is well established that the principles of law which govern the right to waters flowing upon the surface of the earth are inapplicable to waters which are beneath its surface and percolate through the soil. The water which is held by the soil is a portion of the soil itself, and belongs to the owner of the land, as fully as any other ingredient of the land. Hanson v. McCue, 42 Cal. 303; Railroad Co. v. Dufour, 95 Cal. 615, 30 Pac. 783. This rule is not changed by the character of the material through which the water percolates,—whether it be loose sand, or a more compact sandstone. So long as the water is in a condition of filtration or percolation, it is a part of the soil, and subject to the sole dominion of the proprietor of the land in which it is found. The appellant does not dispute this proposition of law, but contends that it is inapplicable to the present case, inasmuch as it appears from the findings of fact herein that by reason of the seam of clay which separated the strata of sandstone, and which is impervious to water, the waters, which had, up to that point, been in a state of percolation through the sandstone, ceased to be in percolation, and thereafter passed along the seam in the direction of the creek; that this constituted a defined stream of water beneath the surface, and is to be governed by the same laws as govern streams upon the surface of the earth. This conclusion, however, necessitates the inference of a fact from the findings which has not been made by the court, and which will have the effect to defeat the judgment which the court has rendered. The inference of one fact from others, unless such fact is a necessary conclusion from those others, must be made by the trial court; and, if the facts that it has found are such as might authorize different inferences therefrom, it will be assumed that the inference made by the trial court was one that will uphold, rather than defeat, its judgment. Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742. The court has not found that there is any flow or stream of water at the seam of the stratum, nor do the findings which it has made authorize such a conclusion. As it must be assumed that the stratum of sandstone is uniformly porous, and extends close to the seam which limits it, it must follow that the water within that stratum is in a state of percolation until it is arrested by the seam, and is thereafter, by reason of gravitation, diverted towards the channel of the creek. The mere diversion of its direction does not, however, change its character from percolating water to a flowing stream. So long as it is within the sandstone, although the lower part of the stratum may be more highly charged with the water than the upper part, it merely percolates through the sandstone until it is freed at the outcropping of the stratum where it borders upon the stream. It is frequently the case that the course of percolating waters is in some definite direction, but the owner of the land in which they are found has the exclusive dominion over them, and does not violate the rights of another by appropriating them to his own use, even though the effect be to divert their course from adjacent lands, or to destroy the advantages therefrom previously enjoyed by an adjacent proprietor. The judgment is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

(111 Cal. 668)

SLOANE et al. v. SOUTHERN CAL. RY. CO. (L. A. 48.)[1]

(Supreme Court of California. March 23, 1896.)

CARRIERS—EJECTMENT OF PASSENGERS—DAMAGES—PROXIMATE CAUSE—QUESTION FOR JURY—TECHNICAL ERRORS—PLEADINGS—DENIAL ON INFORMATION AND BELIEF.

1. Where a conductor takes up a passenger's ticket without giving him any check or other evidence of his right to ride, whereby he is expelled by another conductor after changing cars, his right of action will not be limited to the breach of the company's contract, though no force was used in his expulsion, but will include all damages sustained through the company's violation of the duties it assumed in entering into such contract.

2. Where the humiliation resulting from plaintiff's wrongful expulsion from defendant's car produced a recurrence of nervous paroxysms to which she had previously been subject, such injury is a legitimate element of damages, whether plaintiff's susceptibility to nervous disturbance was known to defendant or not.

3. Whether the humiliation consequent on plaintiff's wrongful expulsion from defendant's car was the proximate cause of her subsequent nervous paroxysms is a question for the jury.

4. Whether plaintiff exercised reasonable prudence in undertaking to walk from the station at which she was ejected from defendant's train to a place three miles distant, where a relative lived, instead of waiting several hours for a train, was properly left to the jury.

5. After a cause has been tried on its merits, the judgment will not be reversed, for error in striking out or refusing to strike out a portion of a pleading, if the party against whom the ruling was made was not prejudiced thereby.

6. A denial of an allegation in the complaint for want of sufficient information and belief is

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[1] Rehearing denied.

properly stricken out, if the matter is presumptively within the knowledge of defendant.

7. A corporation cannot deny for want of sufficient information and belief, if the matters alleged are presumptively within the knowledge of any of its officers, though the officer verifying the answer is himself without any information or belief on the subject.

8. A conductor who has taken up a passenger's ticket en route is chargeable with extreme care in seeing that the passenger is provided with the means of continuing his journey.

9. In an action for the wrongful expulsion of a female passenger, no violence was shown, and there was little evidence of rudeness on the conductor's part; and it appeared that, after plaintiff had walked about a mile towards a town where she had friends, she was taken up by a passing vehicle, and carried the rest of the way, suffering no direct physical injury from her walk. *Held*, that a verdict for $1,400 was excessive.

Department 1. Appeal from superior court, Riverside county.

Action by Annie L. Sloane and another against the Southern California Railway Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. On condition that plaintiff remit a part of the amount recovered, the order and judgment are affirmed.

W. J. Hunsaker, for appellant. Sweet, Sloane & Kirby and Works & Works, for respondents.

HARRISON, J. The plaintiff Annie L. Sloane purchased a ticket, April 8, 1894, from the agent of the defendant, at North Pomona, for passage from that place to San Diego, and on the same day took passage upon the regular passenger train of the defendant. Before reaching San Bernardino the conductor of the train took up her ticket, without giving her any check or other evidence of her right to be carried to San Diego, and on arriving at San Bernardino she was required to change cars, and enter another train of cars of the defendant. After entering this train of cars the conductor in charge thereof demanded of her her ticket, and upon her stating to him that she had given it to the conductor of the other train, and the circumstances therewith, she was informed by him that she must either pay her fare or leave the train. She had no money with her, and when the train reached East Riverside she left the car. After getting off the train, she started to walk back as far as Colton upon the railroad track, a distance of about three miles, but, after walking a portion of the way, secured a seat in a passing vehicle, and was carried to Colton, where she spent the night with her sister-in-law. On the next day, having borrowed some money with which to purchase another ticket, she resumed her passage, and was carried to San Diego. The present action was brought to recover damages sustained by reason of the wrongful acts of the defendant's agents. The cause was tried by a jury, and a verdict rendered in favor of the plaintiffs for the sum of $1,400. From the judgment entered thereon, and an order denying a new trial, the defendant has appealed.

It is contended by the appellant that, as the plaintiff left the car at East Riverside in accordance with the previous directions of the conductor, and no personal violence was used or displayed towards her, her only right of action is for a breach of the defendant's contract to carry her to San Diego, and that the extent of her recovery therefor is the price paid for the second ticket, and a reasonable compensation for the loss of time sustained by her. The plaintiff's right of action against the defendant is not, however, limited to the breach of its contract to carry her to San Diego, but includes full redress for the wrongs sustained by her by reason of the defendant's violation of the obligations which it assumed in entering into such contract. If she was wrongfully prevented by the defendant from completing the passage to San Diego for which it had contracted with her, she could either bring an action simply for the breach of this contract, or she could sue it in tort, for its violation of the duty, as a common carrier, which it assumed upon entering into such contract. Jones v. The Cortez, 17 Cal. 487; Head v. Railroad Co., 79 Ga. 358, 7 S. E. 217; Carsten v. Railroad Co., 44 Minn. 454, 47 N. W. 49. The complaint in the present case is not merely for the breach of the contract, nor is it merely for the wrong committed in excluding her from the car, but it is to recover the damages sustained by her by reason of the wrongful acts of the defendant committed in the violation of its contract. It is in the nature of an action on the case, arising out of the conduct of the defendant in wrongfully depriving her of her ticket, and thereafter, by reason of such wrongful act, excluding her from its car, and refusing to carry out its contract. Although her action is for the tort resulting from the defendant's conduct, the wrong which produced that result was twofold,—depriving her of the evidence of its contract to carry her to San Diego, and afterwards excluding her from its car for failure to produce the evidence of which it had wrongfully deprived her. For the purpose of giving her this right of action, it is immaterial that these different acts were by different agents of the defendant. If the conductor who took up the ticket had himself, at a subsequent point in the trip, excluded her for failure to exhibit it, the liability of the defendant would not be questioned. Its liability is the same, notwithstanding, for its own convenience, it has intrusted the management of its train to different conductors. Muckle v. Railroad Co., 79 Hun, 32, 29 N. Y. Supp. 732. The plaintiff was not called upon to question the right of the first conductor in taking up her ticket, and it was the duty of the defendant to see that she was not thereby deprived of her right to a passage upon its cars.

In her testimony regarding her exclusion from the cars, the plaintiff recounted the interview between her and the conductor, and the manner in which she was directed to leave the car, and it was claimed at the trial that she had been thereby subjected to humiliation and indignity, for which she was entitled to redress. Counsel for the appellant does not question, as a proposition of law, that, if the conductor was insulting and violent in removing her, such treatment forms an element of damage to be recovered by her; but he maintains that the evidence fails to show such conduct. The evidence was, however, before the jury, and they were properly instructed in reference thereto; and, although it might be urged upon them that this evidence was insufficient to establish such conduct, we cannot say, as a matter of law, that it was not proper to submit the question to their judgment.

Evidence was given at the trial tending to show that Mrs. Sloane had been previously subject to insomnia, and also to nervous shocks and paroxysms, and that, owing to her physical condition, she was subject to a recurrence of these shocks or nervous disorder if placed under any great mental excitement; and that, by reason of the excitement caused by her exclusion from the car, there had been a recurrence of insomnia and of these paroxysms. The court instructed the jury that, if they found for the plaintiffs, "in assessing damages, if it appears from the evidence that the plaintiff Annie L. Sloane was wrongfully deprived of her right to ride on defendant's cars, and expelled therefrom in a manner and under circumstances calculated to inflict, and which did inflict, feelings of indignity and insult, the jury is authorized to consider, under the evidence, the injured feelings of the plaintiff, the indignity endured, her mental suffering, the humiliation and wounded pride which one in her condition of life and standing in the community would experience, together with any bodily harm or suffering occasioned, and to award such an amount for damages as will compensate her for such humiliation, suffering, and other detriment." The jury were not specially instructed with reference to any damages that might have been sustained by reason of the recurrence of this disturbance of the nervous system, but it is reasonable to suppose that the above evidence was offered by the plaintiffs for the purpose of recovering damages for the injury that might be thus established, and that, under that portion of the above instruction in which the jury were authorized in assessing damages to consider "any bodily harm or suffering occasioned" by the expulsion of Mrs. Sloane from the cars, it was intended that they should consider this evidence, and the injury which it established. The defendant objected to the introduction of the evidence, and excepted to the instruction, and insists that under no circumstances could the jury consider this effect upon the plaintiff as an element of damage for which the defendant is liable; that the court should not have directed the jury to consider any mental suffering experienced by her.

Counsel for the appellant has discussed, in his brief, the want of liability on the part of the defendant for any damages for mental suffering, and has cited many authorities in support of the proposition that mere mental anxiety, unaccompanied with bodily injury or apprehended peril, does not afford a right of action. To the extent that the term "mental suffering" is included in the above instruction, this proposition is inapplicable. The term, as there used, is to be construed with reference to the context in which it occurs. The "mental suffering," there named, is not the mental anguish or pain referred to in the above proposition cited by the appellant, but is the mental experience which is concomitant with the insult, indignity, and humiliation named in the instruction. It would be a contradiction of terms to hold that the individual whose pride had been humiliated, or whose dignity had been insulted, had no mental suffering in connection therewith, or that this humiliation and insult did not of themselves constitute mental suffering; that he could have redress for the injured pride, but not for the mental suffering it produced. Although mental suffering alone will not support an action, yet it constitutes an aggravation of damages when it naturally ensues from the act complained of. 3 Suth. Dam. § 1245.

The real question presented by the objections and exception of the appellant is whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind.

This subject received a very careful and elaborate consideration in the case of Bell v. Railway Co., L. R. 26 Ir. 428. Mrs. Bell was a passenger upon one of the defendant's trains, and by reason of the defendant's negligence in the management of its train suffered great fright, in consequence of which her health was seriously impaired. She had previously been a strong, healthy woman, but it was shown that, after this occurrence, she suffered from fright and nervous shock, and was troubled with insomnia, and that her health was seriously impaired. The jury were instructed that if, in their opinion, great fright was a reasonable and natural consequence of the circumstances in which the defendant by its negligence had placed her, and that she was actually put in fright by those circumstances, and if the injury to her health was, in their opinion, the reasonable and natural consequence of such great fright, and was actually occasioned thereby, the plaintiff was entitled to recover damages for such injury. It was objected to this instruction that, unless the fright was accompanied by physical injury, even though there might be a nervous shock occasioned by the fright, such damages would be too remote. In holding that this objection was not well founded, and that the nervous shock was to be considered as a bodily injury, the court held that, if such bodily injury might be a natural consequence of fright, it was an element of damage for which a recovery might be had, and, referring to the contention of the defendant, said: "It is admitted that, as the negligence caused fright, if the fright contemporaneously caused physical injury, the damage would not be too remote. The distinction insisted upon is one of time only. The proposition is that, although, if an act of negligence produces such an effect upon particular structures of the body as at the moment to afford palpable evidence of physical injury, the relation of proximate cause and effect exists between such negligence and the injury, yet such relation cannot in law exist in the case of a similar act producing upon the same structures an effect which at a subsequent time—say a week, a fortnight, or a month—must result without any intervening cause in the same physical injury. As well might it be said that a death caused by poison is not to be attributed to the person who administered it, because the mortal effect is not produced contemporaneously with its administration." At the close of its opinion, Lord Chief Baron Palles says: "In conclusion, I am of the opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down as a matter of law that, if negligence cause fright, and such fright in its turn so affect such structures as to cause injury to health, such injury cannot be a consequence which, in the ordinary course of things, would flow from the negligence, unless such injury accompanied such negligence in point of time." This case is quoted at great length and with approval in the eighth edition of Mr. Sedgwick's treatise on Damages, at section 860. Mr. Beven, in the recent edition of his work on Negligence (volume 1, pp. 77-81), also comments upon it with great approval. In Purcell v. Railroad Co., 48 Minn. 134, 50 N. W. 1034, the defendant so negligently managed one of its cars that a collision with an approaching cable car seemed imminent, and was so nearly caused that the attendant confusion of ringing alarm bells and of passengers rushing out produced in the plaintiff, who was a passenger on the car, a sudden fright, which threw her into convulsions, and, she being then pregnant, caused in her a miscarriage, and subsequent illness. The court held that the defendant's negligence was the proximate cause of the plaintiff's injury, and that it was liable therefor, even though the immediate result of the negligence was only fright, saying: "A mental shock or disturbance sometimes causes injury or illness of body, especially of the nervous system." See, also, Canning v. Inhabitants of Williamstown, 1 Cush. 451; Seger v. Town of Barkhamsted, 22 Conn. 290; Car Co. v. Dupre, 4 C. C. A. 540, 54 Fed. 646; Stutz v. Railroad Co., 73 Wis. 147, 40 N. W. 653; Razzo v. Varni, 81 Cal. 289, 22 Pac. 848. "It is a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even though the harm done consists mainly of nervous shock." Warren v. Railroad Co., 163 Mass. 484, 40 N. E. 895.

The mental condition which superinduced the bodily harm in the foregoing cases was fright, but the character of the mental excitation by which the injury to the body is produced is immaterial. If it can be established that the bodily harm is the direct result of the condition, without any intervening cause, it must be held that the act which caused the condition set in motion the agencies by which the injury was produced, and is the proximate cause of such injury. Whether the indignity and humiliation suffered by Mrs. Sloane caused the nervous paroxysm, and the injury to her health from which she subsequently suffered, was a question of fact, to be determined by the jury. There was evidence before them tending to establish such fact, and if they were satisfied, from that evidence, that these results were directly traceable to that cause, and that her expulsion from the car had produced in her such a disturbance of her nervous system as resulted in these paroxysms, they were authorized to include in their verdict whatever damage she had thus sustained. Whether the defendant or its agents knew of her susceptibility to nervous disturbance was immaterial. She had the same rights as any other person who might become a passenger on its road, and was entitled to as high degree of care on its part. It was not necessary that this injury should have been anticipated in order to entitle her to a recovery therefor. Civ. Code, § 3333. If the facts under which she was excluded from the car would be an act of negligence on the part of the defendant as to any and all persons, whoever might sustain injury by such act would be entitled to recover to the full extent of his injury, irrespective of his previous physical condition or susceptibility to harm. In Railroad Co. v. Kemp, 61 Md. 74, 619, the plaintiff was injured upon a car of the defendant, and thereafter a cancer developed itself upon her breast at the place where she had been hurt. Testimony was given to the effect that such hurt was sufficient to cause the development of the cancer, and that, in the opinion of the experts, they would attribute it to that cause. It was shown that, previous to the accident she had been in apparently good health and condition. The court held that it was for the jury to determine, from the evidence, whether the cancer did result from the injury, and, if so, that the defendant was liable, even though it had no reason to anticipate such a result. "It is not for the defendants to say that, because they did not or could not in fact anticipate such a result of their negligent act, they must therefore be exonerated from liability for such consequences as ensued. They must be taken to know and to contemplate all the natural and proximate consequences, not only that certainly would, but that probably might, flow from their wrongful act." See, also, Fell v. Railroad Co., 44 Fed. 253.

The court properly left to the jury to determine whether Mrs. Sloane exercised reasonable prudence in undertaking the walk from East Riverside to Colton, and, if so, that the injury sustained by her was a proper element of damage to be recovered. It could not say, as matter of law, or instruct the jury, that under the evidence before them, such walk was or was not necessary, or whether the route selected by her was the most feasible; nor would it have been justified in directing them not to allow compensation for any injury sustained by the walk, upon the ground that, if she had waited a few hours, she could have gone upon the cars. Malone v. Railroad Co., 152 Pa. St. 390, 25 Atl. 638.

The refusal of the court to strike out certain portions of the complaint as irrelevant is not a ground for reversal of the judgment. The matter embraced therein was relevant to the plaintiffs' right of recovery, and they were justified in setting forth in their complaint the several acts of the defendant which constituted the wrong for which they sought redress. The defendant does not claim to have been prejudiced by any of the probative matters contained in these allegations, and, even if this matter might have been properly struck out by the court, after the cause has been tried upon its merits the judgment will not be reversed for such technical error.

The demurrer to the complaint was properly overruled. The cause of action set forth therein is neither ambiguous nor uncertain. It clearly states a single ground of recovery, viz. the unlawful violation by the defendant of the obligation it had assumed to carry Mrs. Sloane to San Diego; and, although the damages caused to her by this violation of its obligation were made up of the injuries to her person, as well as the money paid by her as the consideration of this obligation, they all resulted from the wrong committed by the defendant. It was necessary that she should point out the particulars in which she had sustained injuries from the defendant,—the humiliation, injuries to her health, etc.,—in order that evidence thereof might be given at the trial, and also that the defendant might be prepared to meet such evidence; but it was not necessary that she should designate the particular amount of damage which she had sustained by reason of the indignity that she had been compelled to undergo, distinct from the amount sustained from the injury to her health. These elements of damage were not capable of computation, nor would evidence of such amount have been admissible. This amount was to be determined by the jury, in the exercise of an intelligent discretion.

Neither does the action of the court in striking out a portion of the defendant's answer justify a reversal of the judgment. The denial of an allegation in the complaint for want of sufficient information and belief to enable the defendant to answer the same justifies the court in disregarding or striking out such denial, if the matter is presumptively within the knowledge of the defendant; and, although a corporation does not itself have any knowledge of the matters alleged, but is compelled to act through its officers, whose information may be derived from others, yet it cannot place its denials upon its want of information and belief, if the matters alleged were presumptively within the knowledge of any of its officers, even though the officer verifying the answer was himself without any information or belief upon the subject. In the present case it, moreover, clearly appears that the defendant was not prejudiced by the action of the court. In a separate defense to the action, the defendant directly alleged many of the facts which, in the portion of the answer thus struck out, it had denied for want of information and belief; and, although an admission in one defense is not available as against a denial in another, it is competent for the court to consider such admission for the purpose of determining whether the answer containing the denial is sham or evasive. After the ruling of the court, the defendant amended its answer by directly denying the matters alleged in one of the paragraphs which the court held had been insufficiently denied, and at the trial it stipulated to the truth of the matters that had been denied by it in another of the paragraphs which was stricken out.

The defendant was, therefore, not precluded from defending the action in any particular upon which it relied. After a cause has been tried upon its merits, a ruling of the court either in striking out, or in refusing to strike out, a portion of a pleading, will not justify a reversal of the judgment, if it appears that the party against whom the ruling was made has not been prejudiced thereby, and has been able to present to the court his entire cause of action or defense. Mere technical error, unaccompanied by injury, will be disregarded. Code Civ. Proc. § 475.

The court did not err in its instructions to the jury respecting the measure of care which a railroad company must exercise towards its passengers. Rorer, R. R. p. 951; Railroad Co. v. Homer, 73 Ga. 251. The passenger is not required to question the action of the conductor in taking up his ticket, but has to assume that his conduct in taking or withholding the ticket is in accordance with the rules of the company. It is therefore incumbent upon the conductor to exercise more than ordinary care in seeing that, after he has taken the ticket from the passenger, the latter shall be provided with the means of continuing his journey. It is not error to hold that this requires extreme care and diligence. We are of the opinion, however, that the damages allowed by the jury were excessive, and not justified by the evidence. They were properly told that they could not award the plaintiff exemplary damages, but only such as would be a full and fair compensation to her for the injury and detriment she had suffered as the proximate results of the defendant's wrongful acts. The testimony tending to show that the conductor was rude and insulting in directing her to leave the train at East Riverside is quite meager, and consists more of her statement of its character than of the language used by him. The jury were instructed that, in estimating the amount of damages she could recover by reason of the humiliation in being excluded from the car, they were not at liberty to consider her peculiar nervous temperament, but to allow only such damages as would have resulted to a person of ordinary or usual temperament. So, too, the evidence concerning the effect of this expulsion from the car upon her nervous condition consists more of general statements than of details, and it does not appear that this effect was of more than brief duration. She does not claim to have sustained any direct physical injury by reason of the walk to Colton. She testifies, as do also her husband and Dr. Averill, that, except for her nervous condition, she was in fair health, and that she was abundantly able to take a walk of two or three miles; and it is not suggested that the walk had any effect upon her nervous condition, or that she suffered any direct inconvenience therefrom after her return to San Diego. The walk itself was not attended with any unusual inconvenience. It was upon the railroad track, in a level country, on an afternoon in April. The distance is not given, but, after going about a mile, or as far as the railroad bridge, she was taken into a passing vehicle, and carried to Colton. While the amount of damages that may be awarded in a case like the present is in the discretion of the jury, it must be a reasonable and not an unlimited, discretion, and must be exercised intelligently and in harmony with the testimony before them. We think that the jury in the present case must have been influenced by other considerations than the testimony before them in arriving at the amount of their verdict.

The judgment and order denying a new trial are reversed, unless the plaintiffs shall, within 30 days after the filing of the remittitur in the superior court, file with the clerk and give to the defendant a stipulation remitting from the judgment the sum of $1,000. If such stipulation be so filed and delivered, the superior court is directed to amend the judgment in conformity therewith, and thereupon the judgment and order shall stand affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

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111 Cal. 662

COSS et al. v. McDONOUGH. (S. F. 221.)

(Supreme Court of California. March 23, 1896.)

MECHANICS' LIENS—ELEVATOR PART OF BUILDING—SUBCONTRACTOR'S LIEN—COMPLAINT—OBJECTIONS TO, ON APPEAL.

1. Where the original plans for a large building provided for an elevator, and the contract for the construction of the elevator was let when contracts for other work were let, the elevator was a substantial part of the building, and the building not completed, so that limitations for filing mechanics' liens would run, until it was finished.

2. The objection that the complaint insufficiently alleges some of the necessary requisites of the claim of lien cannot be urged for the first time on appeal, where the claim of lien was not on the trial objected to as being insufficient in these respects.

3. Under Code Civ. Proc. § 1184, which authorizes a subcontractor, where the original construction contract is void, to enforce his lien directly against the owner on an implied contract, without reference to the construction contract, a subcontractor can enforce his lien under contract with the owner, where both the construction contract and his own contract with the original contractor, on which his claim of lien was based, were void.

4. The fact that a subcontractor is entitled, where his contract with the original contractor is void, to enforce his claim of lien against the owner, does not render him, as to the owner, an original contractor.

Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Three separate actions by Thomas Coss and two others, respectively, against Joseph McDonough, to foreclose mechanics' liens, consolidated. From a judgment for plaintiffs, defendant appeals. Affirmed.

Freeman & Bates, for appellants. Geo. C. Sargent, J. H. Lucas, and Wickliffe Matthews, for respondents.

GAROUTTE, J. This appeal involves the correctness of a judgment in three consolidated actions for the foreclosure of liens against the property of the defendant McDonough for materials furnished and labor performed in the construction of a building upon certain property of his, situate in the city of Oakland, and described in the complaints. Defendant appeals from the judgment.

It is first insisted that some of the claims of lien were prematurely filed, and that others were filed too late. The court found as a fact that the building was completed April 10, 1893, and, if that finding has support in the evidence, then all the claims of lien were filed within 30 days thereafter. The building to be erected was of large size, costing a quarter of a million dollars, and different contracts were let by the owner for the construction of various portions of it, and among these contracts let was one for the construction of an elevator. The trial court held that the elevator was an essential and necessary part of the building, and held that the completion of the building dated from the completion of the elevator, the work upon this elevator being the last work done. While there may have been a little work done on the elevator upon the 11th and 12th days of April, it must of necessity have been of trifling character, and the finding of the court as to the date of completion will not be disturbed for that reason. For, as said in Mills Co. v. Kremer, 94 Cal. 208, 29 Pac. 633: "Whether the items of work which were done after the date at which the appellant claimed the building was completed were a 'trivial imperfection' was also a matter of fact to be determined by the court." Again, we have no doubt of the soundness of the trial court's views in holding that the elevator was a substantial and necessary part of the building, and until the elevator was constructed and placed in position it could not be said that the building was completed. An elevator was called for by the original plans and specifications. A contract was let for its construction at the same time that other contracts were let. It was attached to the building, and formed an integral part thereof. The fact that the building might have been used without it, and that it was a convenience merely, is immaterial. That is not the question. Conceding an elevator in this character of building to be a mere convenience,—which would seem not to be the fact,—still conveniences are a material part of the building, when provided for by the plans and specifications; and, when so provided for, the building is not completed until the demands of the plans and specifications in this regard have been satisfied.

Appellant now makes objection to the sufficiency of the complaint, and the allegations of the claim of lien of respondent Coss as to the description of the land to be charged with the lien. But appellant offered no demurrer to the complaint at any time; neither did he object to the sufficiency of the claim of lien in this regard when offered in evidence at the trial in the lower court. And upon an examination of both the claim of lien and the complaint based thereon we find nothing of sufficient importance omitted therefrom to authorize this court in the first instance to interfere. The objections are too technical to be raised in this court for the first time. As a fair illustration, it is claimed that the complaint should have stated that the claim of lien contained a "description of the property sufficient for identification." As a matter of fact, the claim of lien contained a description of the real property, and the complaint so alleged the fact. Nothing more is demanded by the statute.

At the trial appellant moved for a nonsuit against the respondent Grubb, because his claim of lien did not state the terms, time given, and conditions of his contract, and because there was no money due by the terms of his contract; and the motion was granted as to the first count of his complaint. His complaint was alleged in two counts: First, that he was a subcontractor of one Andrews; and, second, that he furnished the materials and performed the labor at the personal instance and request of appellant McDonough. His recovery of a judgment is based upon the second count, the court having held the contract between McDonough and Andrews to be void. It is now contended that a fatal variance exists between the claim of lien and the count in the complaint upon which recovery was had. It is insisted the claim of lien having set up a contract between respondent Grubb and the original contractor, Andrews, no recovery could be had upon a complaint setting out a contract with defendant McDonough, the owner. We think this contention unsound. That a complaint against the owner of the building may be brought under section 1184 of the Code of Civil Procedure upon a claim of lien setting up a contract with an alleged original contractor, is expressly held in Lumber Co. v. Gottschalk, 81 Cal. 646, 22 Pac. 860, and the principle is also fully supported in Yancy v. Morton, 94 Cal. 558, 29 Pac. 1111. We do not think there is anything in the point that respondent Grubb was an original contractor. It is held to the contrary in Davis v. McDonough, 42 Pac. 450. Neither was the verification of the claim of lien premature. For the foregoing reasons the judgment is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

(5 Cal. Unrep. 303)

In re THOMAS. (S. F. 91.)[1]

(Supreme Court of California. March 21, 1896.)

VOLUNTARY INSOLVENCY—STATUTE—PETITION UNDER FOR DISCHARGE.

Under Insolvent Act 1880 (Append. Code Civ. Proc.) § 2, which provides that one owing over $300 may file a petition for discharge from his debts in a county where he has resided the six months preceding the filing, and provides that, in the petition, the petitioner shall "set forth his place of residence," a petition need not allege that the petitioner resided in the county where the petition was filed the six months preceding the filing thereof.

Department 1. Appeal from superior court, Alameda county; A. L. Frick, Judge.

Petition by Richard P. Thomas to be declared an insolvent under act for relief of insolvent debtors. From an order adjudging the petitioner an insolvent, one of his creditors appeals. Affirmed.

Stateler, Pierson & Mitchell and R. A. Friedrich, for appellant. Thos. C. Kierulff, for respondent insolvent. A. W. Thompson. for respondent assignee.

PER CURIAM. This is an appeal by a creditor from an order adjudicating one Thomas an insolvent debtor. It is insisted that the court had no jurisdiction to make the order of adjudication, by reason of a want of sufficient averment of facts in the petition of the insolvent. Insolvent Act, § 2 (Append. Code Civ. Proc.), provides: "An insolvent debtor, owing debts exceeding in amount the sum of three hundred dollars, may apply by petition to the superior court of the county or city and county in which he has resided for six months next preceding the filing of his petition to be discharged from his debts and liabilities." It is now claimed that the petition only showed that the insolvent had resided in the county for six months next preceding his signing and verifying the petition. The latter portion of section 2 sets forth the particular matters which must be alleged by the petition of the insolvent, and that provision says he must "set forth his place of residence." There is no requirement that he must state in his petition that he has resided in the county where the petition is filed six months next preceding the filing thereof, and we hold that an averment to that effect is not required. Subsequently to the adjudication, if creditors desire to contest that question of fact, the road is plain to them. A statement in the petition to that effect would not be conclusive upon the creditors, for they could attack its truth at a subsequent stage of the proceedings; and it is the fact of an immediate preceding residence of six months in the county where the petition is filed, and not the allegation to that effect, that is jurisdictional. We see no substantial merit in this appeal. For the foregoing reasons, the order appealed from is affirmed.

(111 Cal. 646)

TROMANS v. MAHLMAN et ux. (S. F. 92.)

(Supreme Court of California. March 21, 1896.)

HOMESTEAD—INTENTION—CONFLICTING EVIDENCE—REVIEW.

1. The statement of the declarant that at the time of filing her declaration of homestead she actually occupied the premises, with the intention to reside thereon, was not conclusive, where other facts to which she testified were inconsistent with such intention.

2. A finding of the trial court on conflicting evidence is conclusive on appeal.

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Joseph Tromans against Henry Mahlman and wife for possession of a house and lot claimed by defendants as a homestead. From an order denying a new trial, plaintiff appeals. Affirmed.

For facts, see report on former trial. 27 Pac. 1094.

R. Percy Wright, for appellant. Metcalf & Metcalf, for respondents.

HARRISON, J. The facts in this case are set forth in the opinion given upon a former appeal. 92 Cal. 1, 27 Pac. 1094, and 28 Pac. 579. It was then held that the evidence was insufficient to show an actual residence upon the premises at the time of filing the declaration of homestead, and, consequently, that the premises were not impressed with the attributes of a homestead; and the case was remanded for a new trial. Upon that trial, from which the present appeal is taken, the evidence before the court was substantially the same as upon the former trial, and the decision of the court thereon in favor of the plaintiff was, by necessary implication, a decision that the evidence did not show such actual residence on the premises; and, under the decision of this court upon the former appeal, the superior court was fully justified in making this finding. The only respect in which it is claimed by the appellant that the evidence herein differed from that at the former trial to such an extent as to authorize a different conclusion is that Mrs. Mahlman testified that at the time she went to the premises, on the 21st of August, 1883, it was her intention to remain there and occupy the house continuously, but that, by reason of supervening circumstances she was compelled to return to San Francisco the next day after the declaration of homestead was filed. Whether she did in fact reside on the premises at the time the declaration was filed was a question of fact, to be determined by the court from the evidence before it. The physical fact of actual occupancy, as well as the intention with which she occupied the house, were both elements to be considered in determining actual residence; and the court was not bound to accept her statement that she intended to reside thereon as conclusive, if other facts to which she testified were inconsistent with such intention. Whatever inconsistency there was between these facts and her statement of her intention presented merely a conflict of evidence, on which the decision of the trial court was final. Its decision, upon this conflict of evidence, that she did not reside there, is conclusive upon this court. The order is affirmed.

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[1] Rehearing denied.

We concur: GAROUTTE, J.; VAN FLEET, J.

5 Cal. Unrep. 304

SUSSKIND v. HALL et al. (L. A. 33.)

(Supreme Court of California. March 23, 1896.)

ATTACHMENT—MINGLING OF GOODS—ILLEGAL SEIZURE—NOTICE BY CLAIMANT.

1. The fact that goods of an attachment defendant are in the possession of a third person, who has mingled them with his own goods, and refuses to point them out, but claims ownership of all, does not warrant the seizure of goods, his title to which is unquestioned, and which are readily distinguishable from those of the attachment defendant.

2. A notice to an officer of a claim of ownership of attached property is not vitiated by the statement therein that the claimant is the owner of all the property "except a portion owned by" another, who is not a party to the action.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Henry Susskind against J. C. Cline as sheriff, A. I. Hall, assignee, intervener. Judgment for the intervener, and plaintiff appeals. Reversed.

Wells & Lee and Calvin Edgerton, for appellant. Graff & Latham, for respondents.

BELCHER, C. In 1892, Mrs. L. M. Wagner was engaged in the jewelry business in the city of Los Angeles, the business being chiefly managed by her husband, J. B. Wagner. Her store was at No. 125 South Spring street, and in it she had been accustomed to keep a large stock of goods, consisting, among other things, of diamonds, watches, and jewelry. On September 28, 1892, she filed in the superior court of Los Angeles county her voluntary petition in insolvency, and was thereupon adjudged to be an insolvent debtor. Thereafter A. I. Hall was duly elected and qualified as assignee of the estate of the insolvent, and on November 2, 1892, the clerk of the court, by an instrument in writing, assigned and conveyed to him all the estate, real and personal, of the debtor. The assignee at once took possession of all the goods and property in said store, and held possession thereof till November 16, 1892, when, under an order of the court, he sold the same at public auction to Henry Susskind, the plaintiff herein, he being the highest and best bidder, for the sum of $7,100. The property sold consisted of a great variety of articles, including the fixtures and a safe, of which a list or inventory is presented, covering about 33 pages of the transcript. The purchase price was paid and the sale was reported to and confirmed by the court. Susskind immediately took possession of the property purchased, obtained a new lease of the store, and thereupon commenced and thereafter continued the business of selling such goods and of buying and selling other goods of a similar character, until July 26, 1893. On the last-named day all the goods and property then in the store were seized and taken possession of by J. C. Cline, the sheriff of Los Angeles county, as the property of L. M. Wagner, the insolvent, under a writ of attachment issued in an action commenced by M. Wunsch et al. against her in the superior court of that county. Susskind on the same day notified the sheriff that the property taken was his, and demanded a return thereof, but his demand was refused. He thereupon commenced this action to recover the possession of said property or the value thereof, alleged to be $20,000, and damages.

The property sought to be recovered is described in the complaint as "a stock of jewelry consisting generally of various articles of gold and silver and plated jewelry, watches, chains, ornaments, also a lot of silverware and plated silverware, lot of fixtures, one safe, lot of diamonds and other precious gems, lot of money, lot of jeweler's tools and implements, shelving, counters, clocks, all situate and contained in that certain store and premises in the city of Los Angeles known and designated by city number 125 South Spring street." The sheriff answered, denying, for want of information or belief upon the subject sufficient to enable him to answer the allegations of the complaint, that on the 26th day of July, 1893, or at any other time, plaintiff was the owner, or in possession, or entitled to the possession of the goods and chattels described in his complaint, or that he, the defendant, wrongfully took the said goods and chattels from the possession of the plaintiff, or unlawfully withheld the same from the plaintiff; and alleging that he took the said property under and by virtue of a writ of attachment, as hereinbefore stated. On the same day this answer was filed, A. I. Hall, the assignee of the insolvent's estate, asked and was permitted to intervene in the action. In his complaint in intervention he set up the facts of the insolvency of Mrs. Wagner, her voluntary petition in insolvency, his election and qualification as assignee, the assignment of the estate to him by the clerk of the court, and his taking possession, as such assignee, of all the property of the estate that he was then able to find, his settlement of the estate, and final discharge, as such assignee, on May 24, 1893, and the vacation and setting aside of that discharge by an order of the court on September 1, 1893. He then alleged: "That the said Henry Susskind, before the said discharge of said intervener as such assignee, conspired with said insolvent and J. B. Wagner, her husband, to secrete and conceal a portion of said insolvent's estate, consisting of diamonds, watches, and jewelry, to prevent the same from coming into the possession of said intervener as such assignee, a particular description of which property so concealed is unknown to said intervener, but is known to the plaintiff, Henry Susskind; and said insolvent did secrete and conceal said property; and Henry Susskind afterwards received and took possession of said concealed property, knowing that it was a part of said insolvent's estate at the time of filing her petition in insolvency, and that the same had not been delivered by said insolvent to her said assignee. That the said intervener did not know that said property, or any part thereof, had been concealed, or that said defendant had taken possession thereof, or had disposed of any part thereof, until after the discharge of the intervener as assignee of said insolvent's estate. That the property was taken by the sheriff under a writ of attachment, as before stated, and was still held by him, a schedule of the property taken being appended. That the said stock so taken by virtue of said writ was a part of the estate of said insolvent debtor concealed and withheld by her from said assignee. That said Henry Susskind, for the purpose of defrauding said estate, is wrongfully claiming to be the owner of and entitled to the possession of said property so taken and held by said J. C. Cline as sheriff, but said Henry Susskind has no right, title, or interest therein." And the prayer was that the intervener, as assignee of the insolvent's estate, have judgment for the possession of said property. The plaintiff answered the complaint in intervention, denying all of its material averments.

The case was tried without a jury, and, among other things, the court found: "That prior to the filing of said insolvent's petition in insolvency a portion of said insolvent's estate, consisting of diamonds, watches, and jewelry, was secreted so as to prevent the same from coming into the possession of said intervener as such assignee, and to prevent the same from being distributed among said insolvent's creditors by such intervener as such assignee. That the plaintiff, after the secreting and concealing of said goods, and knowing that said goods had been secreted and concealed, and for the purpose of preventing the same from coming into the possession of said assignee, received and took possession of said concealed property, and, after selling a portion thereof, retained possession of the remainder thereof" until July 26, 1893, "when the said property was taken by the defendant as the sheriff of said county, by virtue of said writ of attachment, at which time they were so mixed and confused by said plaintiff with other goods that they were not distinguishable from them; and plaintiff neglected and refused to point out and distinguish in said stock taken by said sheriff by virtue of said writ of attachment the goods owned by him prior to said confusion and mixing therewith of said diamonds, watches, and jewelry concealed and secreted by said insolvent, and also failed and neglected and refused to point out and distinguish the said watches, diamonds, and jewelry so secreted and concealed by said insolvent, and mixed and confused by him with said other goods. That plaintiff, in taking and retaining possession of said stock of diamonds, watches, and jewelry, was acting with said insolvent in the secreting, concealing, and withholding said diamonds, watches, and jewelry, for the purpose of defrauding said estate, and preventing the said property from coming into the hands of said intervener, and from being distributed among the creditors of said insolvent. That plaintiff was not, at the time of the taking by the defendant of said diamonds, watches, jewelry, and fixtures, the owner of, or entitled to the possession of, the property described in his complaint or in his notice, and is not now the owner thereof, or entitled to the possession thereof." It was ordered "that judgment be entered herein in favor of the intervener for the possession of the property described in plaintiff's complaint, and in favor of defendant against plaintiff for his costs." Judgment was accordingly so entered, from which, and from an order denying his motion for a new trial, plaintiff appeals.

The findings above quoted are assailed by the appellant as not justified by the evidence, and numerous rulings of the court upon the admission of evidence are specified, and urged as errors in law which call for a reversal. The statement on motion for new trial, as found in the transcript, consists of about 400 printed pages. To state the evidence intelligibly, and to review the rulings complained of, would require a very extended opinion, and, in view of the conclusion reached upon another point, we have deemed it unnecessary to attempt to do so. It is undoubtedly well-settled law that if two owners of goods or chattels of a similar character mix and intermingle them together in such a manner that they are not distinguishable, and if, under a writ of attachment or execution against one of the owners, all of the goods or chattels so mingled are taken by the sheriff as his property, the burden is upon the other owner to point out and designate to the sheriff the particular goods or chattels which are his, and until he does so he cannot maintain an action against the officer to recover the portion which he claims. Wellington v. Sedgwick, 12 Cal. 469; Wade, Attachm. § 134. But this rule does not apply if the goods or chattels are plainly and easily distinguishable. Queen v. Wernwag, 97 N. C. 383, 2 S. E. 657. For example: If A. had a band of sheep, and also horses or mules in the same pasture, and if with his consent B. had been permitted to mix and intermingle his own sheep with A.'s, so that they were not distinguishable, and if then, under a writ of attachment against B., the sheriff should seize all the sheep and horses or mules as the property of the latter, there could be no pretense that the rule as to confusion of goods would have any application except as to the sheep. And in such a case, if A. should bring an action against the sheriff to recover possession of all the property seized, he could not be defeated as to the horses or mules because he did not, before commencing suit, point out to the sheriff the particular sheep which were his. Here it appears that the plaintiff purchased at the assignee's sale and paid for a large stock of goods, consisting of a great variety of articles, and no question is made as to his title to all the goods so purchased. He afterwards continued the business, and purchased and paid for other goods. At the time of the attachment the stock of goods in his store was of the value of $20,000, as the court found. Of these goods many articles, as shown by the schedule—a large majority in number—were as distinguishable from diamonds, watches, and jewelry as would be a horse from a sheep. For instance, there were show cases on counters, wall cases, mirrors, desks, tables, chairs, and stools, clocks, opera and field glasses, silverware, table and tea spoons, knives and forks, a letter press, a stepladder, a safe, gold-headed canes, a sack of gold coin containing $840, etc. Now, conceding that, with the knowledge and consent of the plaintiff, and for the purpose stated, there had been brought into his store, and mingled with his goods of a like character, so that they could not be distinguished, diamonds, watches, and jewelry which still belonged to the estate of the insolvent,—a fact which plaintiff positively denied,—still the sheriff was not authorized to seize all the other goods which were distinguishable, and in doing so he was clearly a trespasser. The notice to the sheriff was sufficient to meet the requirements of sections 549, 689, Code Civ. Proc., as amended in 1891. It stated that the plaintiff claimed and was the owner of all the property levied upon, "except a portion owned by Geo. L. Bannister," but that exception did not vitiate it. There is no question here as to the portion owned by Bannister. It follows that the court clearly erred in adjudging that the intervener, as assignee of the insolvent, was entitled to the possession of all the property described in the plaintiff's complaint; and the judgment and order appealed from should therefore be reversed, and the cause remanded for a new trial.

We concur: BRITT, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

112 Cal. 42

ACKLEY v. BLACK HAWK GRAVEL MIN. CO. et al. (No. 18,435.)

(Supreme Court of California. March 24, 1896.)

LIEN FOR WAGES—EMPLOYES OF CORPORATIONS—ATTORNEY'S FEES.

1. Act March 31, 1891 (St. 1891, p. 195) §§ 1, 2, require every corporation to pay its mechanics and laborers the wages earned by and due them weekly or monthly, and provide that a failure to do so entitles each of such mechanics and laborers to a lien on its property for such wages. *Held* that, in an action to establish such lien, plaintiff must allege and prove that the wages for which it is sought were payable weekly or monthly.

2. Act March 31, 1891 (St. 1891, p. 195) §§ 1, 2, require every corporation to pay its mechanics and laborers the wages earned by and due them weekly or monthly, and provide that a failure to do so shall entitle them to a lien for such wages, and that in an action to recover the amount of such wages, or to enforce such lien, plaintiff shall be entitled to reasonable attorney's fees. *Held*, that where plaintiff in such action only shows himself entitled to a judgment for his wages, but not that they were payable weekly or monthly, it is error to allow attorney's fees.

Commissioners' decision. Department 2. Appeal from superior court, Sierra county; Stanley A. Smith, Judge.

Action by David Ackley against the Black Hawk Gravel-Mining Company (a corporation) and others to establish and enforce a lien for wages alleged to be due plaintiff. From a judgment for plaintiff, defendants appeal. Modified.

Frank R. Wehe, for appellants. F. D. Soward, for respondent.

SEARLS, C. This is an action to recover from the corporation defendant for work, labor, and services performed by plaintiff for said defendant, and to have the value thereof declared a lien upon the property of said defendant, under and pursuant to an act of the legislature of the state of California approved March 31, 1891, entitled, "An act to provide for the payment of the wages of mechanics and laborers employed by corporations." St. 1891, p. 195. The other defendants are made parties, and averred to have, or claim to have, some interest in the property of the corporation, or lien thereon, etc. Plaintiff had judgment against the corporation for $397 for wages, a counsel fee of $100, and costs taxed at $27.35, making a total of $524.35, which was declared to be a valid lien upon the property of the corporation defendant described therein, and superior and paramount to any lien or interest of the other defendants, and decreeing the property so subject to said lien to be sold in satisfaction thereof. Defendants appeal from the judgment, and the cause comes up on the judgment roll, without a statement or bill of exceptions.

The statute in question is brief, and we quote it in full. It is as follows:

"Section 1. Every corporation doing business in this state shall pay the mechanics and laborers employed by it the wages earned by and due them weekly or monthly, on such day in each week or month as shall be selected by said corporation.

"Sec 2. A violation of the provisions of section one of this act shall entitle each of the said mechanics and laborers to a lien on all the property of said corporation for the amount of their wages, which lien shall take preference over all other liens, except duly recorded mortgages or deeds of trust; and in any action to recover the amount of such wages, or to enforce said lien, the plaintiff shall be entitled to a reasonable attorney's fee, to be fixed by the court, and which shall form part of the judgment in said action, and shall also be entitled to an attachment against said property."

Various points are made by appellant in favor of reversal, one only of which need be noticed. The complaint is for work, labor, and services performed by plaintiff for the corporation defendant, and, so far as essential to the point in hand, is as follows: "That between the 1st day of May, 1892, and the 1st day of May, 1894, plaintiff performed twenty-four months' services for defendant, Black Hawk Gravel-Mining Company, as watchman of its property, known as the 'Jenkins Ranch Property,' hereinafter described, which said services were performed by plaintiff for said defendant corporation at its request; that said services were reasonably worth $2,190; that no part thereof has been paid." The findings are in almost the exact language of the complaint, except that the court finds the value of the services were $480, and that $83 has been paid on account thereof. There is no allegation or finding that plaintiff was employed by the week or month, or that his wages were "due weekly or monthly." In Keener v. Irrigation Co. (decided by department 1 of this court, Dec. 31, 1895) 43 Pac. 14, this same statute was under review, and the court, speaking through Harrison, J., said: "By the terms of the first section of this act, it does not apply to all corporations, but only to those who, while doing business in this state, employ laborers and mechanics by the week or month, whose wages, under the terms of their employment, are payable weekly or monthly. It does not purport to impose upon those corporations any duty or liability towards all the mechanics or laborers whom it may employ, or to create a right in favor of those of its employés whose wages are not earned or payable by the week or by the month. As the remedy sought to be enforced herein exists only by virtue of the statute, it was incumbent upon the plaintiff to bring himself within the terms of the statute, and to show that the wages earned by him were 'due weekly or monthly.' His complaint is, however, defective in this respect, and contains no allegation concerning the times at which the wages were payable, or that he was employed at weekly or monthly wages; and, from the allegations in reference thereto, it would seem that there was no agreement upon this point." Following the case above quoted, we add: As the plaintiff is not entitled to avail himself of the provisions of the act of 1891, that provision of the judgment allowing him a counsel fee was unauthorized. We recommend that the judgment in favor of the plaintiff for the sum of $397, as wages and costs, be affirmed, and that that portion of the judgment awarding counsel fees, and declaring that plaintiff is entitled to a lien upon the property of the corporation defendant, and directing a sale of such property, be reversed, and that appellant recover its costs on this appeal.

We concur: BELCHER, C.; BRITT, C

PER CURIAM. For the reasons given in the foregoing opinion the judgment in favor of the plaintiff for the sum of $397, as wages and costs, is affirmed, and that portion of the judgment awarding counsel fees, and declaring that plaintiff is entitled to a lien upon the property of the corporation defendant, and directing a sale of such property, is reversed, and it is ordered that appellant recover its costs on this appeal.

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112 Cal. 91

DAM v. ZINK. (No. 1,625.)

(Supreme Court of California. March 24, 1896.)

QUIETING TITLE—FINDINGS—SUFFICIENCY.

In an action to quiet title to land, the complaint merely alleging that defendant claims to hold a judgment lien against the land, but that the claim is without any foundation or right, a finding that the judgment, though recorded, is not, and never has been, a lien on the land, is sufficient to sustain a judgment quieting plaintiff's title, without finding the reason why the judgment is not a lien, as that the land is plaintiff's homestead.

Department 2. Appeal from superior court, Yuba county; E. A. Davis, Judge.

Action by Charlotte G. Dam against Elizabeth Zink and others. There was a judgment for plaintiff, and defendant Zink appeals. Affirmed.

Forbes & Dinsmore, for appellant. W. T. Phipps, for respondent.

McFARLAND, J. This is an appeal by Elizabeth Zink, defendant, upon the judgment roll (which includes findings) from the judgment in favor of plaintiff in an action to quiet title to a tract of land in Yuba county. The only question raised is as to the sufficiency of the findings to support the judgment. In the complaint, after the usual averments of ownership of the land by plaintiff, it is averred that the defendants (of whom there were several) claim some interest in the land, but that said claim was without any right, and, further, that the defendants Elizabeth Zink and Jacob Zink "claim to hold a judgment lien against the said real property, but which claim is without any foundation or right." All the other defendants filed disclaimers, and Elizabeth Zink answered, setting up that, before the commencement of this action, she had recovered a judgment in the superior court of said Yuba county against the said plaintiff and one Benjamin F. Dam for several hundred dollars; that said judgment was regularly docketed and recorded in the judgment book of said court; that no part of the same has ever been paid; and that by virtue of said judgment, recovered and docketed as aforesaid, she "has held, and does hold, a judgment lien against the said real property." And she denies "that her said claim, or any part or portion thereof, is without any foundation or right." The court found (1) that the plaintiff, at the commencement of the action, was the owner in fee, etc., of the land described in the complaint, with the exception of some designated parcels thereof; (2) that all the defendants except Elizabeth Zink had disclaimed any interest in the land; (3) that Elizabeth Zink has "no right, title, interest, claim or lien of, in or to or against, any of the land or premises so as aforesaid now owned and possessed by plaintiff." The court found, also, that the appellant had recovered a judgment against the respondent and Benjamin F. Dam, as averred in the answer, and that the same had been docketed as therein averred, but further found that the said judgment "is not now, and never has been, a lien against the said land and premises so as aforesaid now owned and possessed by plaintiff."

It is contended by appellant that as, under section 671 of the Code of Civil Procedure, a docketed judgment becomes a lien upon all the real property of the judgment debtor in the county, the finding of the court that there was no such lien in the case at bar is an erroneous conclusion of law drawn by the court from the facts found. But, if facts are stated in the findings in the same way in which they are stated in the pleadings, they are sufficient. As is said in Hayne on New Trials and Appeals, the only purpose of the findings is to answer the questions put by the pleadings. Hayne, New Trials & App. pp. 723, 724, and cases cited. The issue made by the pleadings as to the asserted judgment lien is whether or not said judgment constitutes a lien, and the finding that it is not a lien is responsive to the averments and denials of the pleadings with respect to that subject, and is therefore sufficient. Carey v. Brown, 58 Cal. 184; Pralus v. Mining Co., 35 Cal. 34; Frazier v. Crowell, 52 Cal. 401; Smith v. Acker, Id. 217; Daly v. Sorocco, 80 Cal. 367, 22 Pac. 211, and cases there cited. The findings were as broad and specific as the averments of the pleading. It does not follow that, because appellant had a docketed judgment, such judgment was necessarily a lien. For instance, if the land were exempt from execution, it would not come within the provisions of said section 671 of the Code; and, if the land here involved was a homestead, and therefore exempt from execution (as is stated in respondent's brief), it was not necessary for the court to state that fact as a reason for finding the issue as to the lien against the appellant. The ultimate facts were sufficiently found. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

112 Cal. 14

In re PINA'S ESTATE. (S. F. 280.)

(Supreme Court of California. March 24, 1896.)

EXECUTORS AND ADMINISTRATORS — APPOINTMENT —WHEN NECESSARY.

On an application for letters of administration of the estate of a decedent, it is not within the province of the court to determine the question of the title to real property, as between the estate and persons claiming adversely to it; but if it appears that decedent left any estate, and the same has not been administered, letters should be granted.

Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Application of one Carrillo for letters of administration with the will annexed, in the matter of the estate of Antonio Pina. The application was contested by the public administrator, who asked that letters be granted to him. Both applications were denied by the court below, and Carrillo appealed. Reversed and new trial ordered.

George Pearce, for appellant. C. L. Pond, Moreland & Norton, A. B. Ware, and Thos. Rutledge, for respondents.

VAN FLEET, J. The deceased died testate in the county of Sonoma, leaving estate therein. His will was duly admitted to probate, and letters testamentary issued to the person named therein as executor. Subsequently the executor resigned his trust without having closed the administration of the estate, and thereafter, in 1891, an administrator with the will annexed was appointed and qualified. In March, 1895, while the administration was still incomplete, the bondsmen of the administrator withdrew from his bond, and on the 26th of that month his letters were revoked for failure to file a new bond. Thereupon, in April, 1895, the appellant, Carrillo, claiming as the nominee of the next of kin entitled to administration, applied to be appointed administrator of the estate. His application was contested by the public administrator, who asked that letters be issued to himself. Certain other parties seem to have opposed the appointment of any administrator of the estate, but upon what ground, or with what right, does not clearly appear. At the hearing there was evidence tending to show that there was property of said estate—an interest in certain real property coming to deceased under a patent from the United States government—which had not been administered, and that the administration of the estate had never been concluded, by decree of distribution or otherwise. Notwithstanding this showing, the court below denied and dismissed the petition of said Carrillo, and also that of the public administrator, upon the ground, as stated in its order, that it appeared that there were no creditors of said estate, and no property thereof, and hence no necessity for an administrator. From this order, Carrillo appeals.

We think the action of the lower court was justified by neither the facts nor the law. There was no evidence whatever to sustain the finding, if it may be so regarded, recited in the order that there was no property of the estate. The evidence, as stated, clearly tended to establish the existence of property of the estate; and that it had ever been fully administered was not even pretended. The court seems to have acted largely upon some general statements that the heirs of the deceased had parted with their interest in the property of the estate; but not only was there no competent evidence of that fact (assuming that such question was material, or could be litigated on an application for letters), but there was no evidence to show who the supposed heirs really were. We know of no such authorized method, under the law, of dispensing with the usual and ordinary administration of an estate of a deceased person, or of thus determining the question of title to real property, as between an estate and persons claiming adversely to it. Under the facts appearing, it was the duty of the court to proceed and appoint an administrator with the will annexed, to complete the administration. Code Civ. Proc., § 1426. Whether the appellant is entitled to be so appointed, the court did not, by reason of the erroneous view taken by it, proceed far enough to determine, but dismissed the application upon the grounds stated, without hearing the evidence as to appellant's right to administer. The latter was entitled to have his application determined upon its merits, and, for the failure of the court to so determine it, the order must be reversed.

We have not acted upon the suggestion made by counsel appearing amicus curiæ, for a diminution of the record, for the reason, in the first place, that we do not deem the matters suggested material; and, in the next place, we do not recognize any right in counsel appearing as an amicus curiæ to interfere with or control the condition of the record in such an instance. They have not the rights in that regard of an adversary in the litigation. Nor are the liberties of counsel thus appearing at all enlarged in this instance because the court below assumed to appoint them as amici curiæ to represent it on the appeal. The court is not a party to the appeal, and we know of no authority for the making of such appointment in any case. To the extent to which they are entitled to be heard, they have the same rights without such appointment as with it. The order, so far as it affects the appellant, Carrillo, is reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; GAROUTTE, J.

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112 Cal. 53

SAN DIEGO, O. T. & P. B. R. CO. v. PACIFIC BEACH CO. (L. A. 52.)

(Supreme Court of California. March 24, 1896.)

CORPORATIONS—CONTRACTS—RATIFICATION.

1. That a majority of the directors in one corporation were also directors of another corporation does not render a contract between the two corporations, entered into through the directors, absolutely void.

2. A land company, engaged in platting and selling land, contracted with a railway company to pay it a certain sum in installments, in consideration that the railway company should run a certain number of trains daily for two years to the land company's land. The contract was executed on the part of the railway company, and several of the installments paid by the land company. At a stockholders' meeting of the land company, the contract was affirmed by a majority of the stockholders. *Held*, that the land company, even though it could have avoided the contract in the first instance, could not defeat a recovery of the unpaid installments on the ground that, at the execution of the contract, the two corporations had directors in common.

Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the San Diego, Old Town & Pacific Beach Railroad Company, a corporation, against the Pacific Beach Company, a corporation. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

McDonald & McDonald, for appellant. Gibson & Titus, for respondent.

McFARLAND, J. This is an action upon two promissory notes made by defendant to plaintiff,—one for $15,000, and the other for $1,500; the latter being for interest due upon said first-named note. Judgment went for plaintiff, from which, and from an order denying a new trial, defendant appeals.

Each of the parties is a corporation. The respondent owns and operates a railroad from a certain point in the city of San Diego to another point in said city, about 10 miles distant, known as "Pacific Beach"; and it is the only railroad running to the latter point. The appellant is a real-estate company owning a large tract of land at said Pacific Beach, and engaged in subdividing, improving, and selling said land by lots and blocks. In July, 1888, the two corporations entered into a written contract, by which respondent covenanted that, in consideration of certain sums of money to be paid it by appellant, it would operate its road between said points for two years; that, during said time, it would run at least four trains daily, at such times as appellant should direct, the appellant to have the right to change its directions; that it would charge for passenger fare not exceeding 25 cents for each round trip, and sell to residents at Pacific Beach commutation tickets for a sum not exceeding $4.50 per month; and it bound itself to appellant in the sum of $35,000, and pledged all its property as security for the obligation, to comply with all its covenants, and agreed that, in case of its failure to so comply for five days, the said sum of money should be paid to appellant as liquidated damages. In consideration of these covenants appellant gave its three promissory notes to respondent,—one for $5,000, due in six months, one for $15,000, due in one year, and the third for $15,000, due in two years. Respondent complied with all its said covenants, and operated its road in accordance with said contract during the two years. The appellant paid the two first notes in full, and paid the interest on the third ($15,000) note up to July 10, 1891; the last installment of said interest having been paid by the $1,500 note here sued on. Afterwards appellant refused to make any further payment, and this suit is upon the second $15,000 note, and the said $1,500 given for interest, as aforesaid.

The main contention of appellant for a reversal arises out of these facts: The respondent had five directors, and the appellant nine; and at the time the contract was made four of the directors of the appellant were also directors of the respondent, and it is also claimed that, before the completion of the contract, a fifth director of appellant—D. C. Reed—became a director of respondent. A majority of the directors of both corporations were also stockholders in both, and the contention of appellant is that, because there were common directors of the two corporations as aforesaid, therefore the contract was absolutely void, and incapable of ratification. Respondent contends that, upon these facts, the contract was, at the most, only voidable, and that the appellant ratified it. Appellant also contends that, even though ratification were possible, there was none. In this case there is no actual fraud, either alleged or found; and this distinguishes it from many of the cases cited by appellant. The contract seems to have been a fair, open one, and carried into effect before the eyes of all persons interested. Neither is there any question of ultra vires; and this also distinguishes the case from cases cited by appellant. The court found that appellant's charter expressly gave it the power to make such a contract. See, also, on this point, Vandall v. Dock Co., 40 Cal. 83. The contention, therefore, at this point of the case, is that the mere fact that there were common directors, as above stated, of the two corporations at the time of the contract, makes it absolutely void; and this contention cannot be maintained.

Where two corporations, through their boards of directors, make a contract with each other, the directors who are common to both are not within the rigid rule of the cases which hold that one who acts in a fiduciary capacity cannot deal with himself in his individual capacity, and that any contract thus made will be declared void, without any examination into its fairness, or the benefits derived from it to the cestui que trust. Two corporations have the right, within the scope of their chartered powers, to deal with each other; and this right is certainly not destroyed or paralyzed by the fact that some, or a majority, of the directors are common to both. Of course, if such directors should wrongfully and willfully use their powers to the prejudice of one of the corporations, their action, if not acquiesced in, and if contested at the proper time, could be avoided, as in any other case of actual fraud. But such common directors owe the same fidelity to both corporations, and there is no presumption that they will deal unfairly with either. Therefore, their acts as such common directors are not void. There are abundant authorities to this proposition, but it is hardly necessary to refer to any other than that of Pauly v. Pauly, decided by this court (107 Cal. 8, 40 Pac. 29), and the cases there cited. In that case the court, in its opinion, says: "The stumbling block in this case, however, seems to have been the double relation of agency of Collins, Dare, and Harvermale, being at the same time officers and directors in both corporations," —and quotes approvingly from Mining Co. v. Senter, 26 Mich. 73, and Leavenworth Co. Com'rs v. Chicago, R. I. & P. Ry. Co., 134 U. S. 688, 10 Sup. Ct. 708, which cases strongly declare the rule above stated. The conclusion reached is correctly condensed in the syllabus, as follows: "The fact that some of the directors of the bank were also directors of the cable company does not prevent them from being distinct corporations, who have the right to contract with each other in their corporate capacities; and, if the relation of the parties has not been abused, it constitutes no bar to a recovery of moneys advanced by the bank and used for the benefit of the cable company." We will notice one or two other recent authorities to the same point. In Coe v. Railway Co., 52 Fed. 543, Judge Pardee says: "That the East & West Railroad Company could lawfully contract with the Cherokee Iron Works, although all the stockholders of the one were also stockholders of the other, in the absence of fraud and misrepresentation, is indisputable; nor would the fact that the two corporations had substantially the same directors, who were the active agents negotiating the contract, render it void,—at worst, only voidable, but subject to ratification." In Jesup v. Railroad Co., 43 Fed. 483, the validity of a lease between two corporations in which there were common directors was involved; and Justice Harlan held (we quote, for brevity, from the syllabus, which is correct) as follows: "The contract by which the Dubuque Company leased the Cedar Falls road would not have been void, even if the majority of the directors of that company had been personally interested in the Cedar Falls Company. It would have been simply voidable at the election of the Dubuque Company, or, in a proper case, at the suit of its stockholders; and that election must have been exercised, or the suit brought, within such time as was reasonable, taking into consideration all the facts and circumstances of the case."

In the notes to section 658, Cook, Stock, Stockh. & Corp. Law (3d Ed.), there are many cases cited on the subject. They are not all in perfect harmony, but they abundantly warrant the statement in the text that "this class of contracts certainly are not void." See, also, Booth v. Robinson, 55 Md. 419; Kitchen v. Railroad Co., 69 Mo. 224. The decisions of this court and of other courts, cited by appellant, are mostly in cases where trustees attempted to contract about the trust property directly with themselves, for their individual benefit, and not cases where corporations dealt with each other through common directors; or in cases of ultra vires in the strict sense; or in cases where actual fraud was the ground of the alleged invalidity of the contract. For instance, Graves v. Mining Co., 81 Cal. 303, 22 Pac. 665, is greatly relied on by appellant; but in that case the directors of a single corporation had undertaken to vote themselves money,—partly for salary prohibited by the by-laws,—and to execute in the name of the corporation a note and mortgage for a large amount of money to themselves as individuals. This was an entirely different state of facts from those in the case at bar. Moreover, that case was decided upon the grounds of actual fraud and a failure to prove ratification,—the court saying, "The fairness, honesty, and good faith of the transaction under consideration are further impeached by the testimony," etc.; and the court say, even in that extreme case, "It is not intended to decide however, that these directors may not have recovered from the corporation the value of money or property honestly advanced by them, and which had been used by and for the benefit of the corporation in carrying on its business, or the value of services rendered by them outside of the duties of their office, in a proper case and upon a proper showing." It is true that the opinion there holds—no doubt, correctly—that directors of corporations are trustees within the meaning of sections 2228–2230 of the Civil Code; but those sections, so often invoked by appellant, are mere statements of the fundamental principle of the law of trusts that a trustee cannot deal with the trust property for his own individual benefit, and that principle obtained in all the jurisdictions where the decisions about common directors hereinbefore cited were rendered. It is unnecessary to notice each of the other cases cited by appellant. It is sufficient to say that each case, in some of the features above indicated, differs essentially from the case at bar.

The contract, therefore, was not void; and assuming that it was voidable, and might have been avoided by the appellant at the proper time and in the proper manner, it is clear that it was not so avoided, but that it was ratified. In the first place, there was no attempt to avoid it, nor any intimation of such intention, until long after the time mentioned in the contract had expired, and respondent had performed all its covenants therein provided, until long after appellant had received all the benefits coming to it from respondent's performance, and until long after it had become impossible to restore anything to respondent, or to put it, in whole or in part, in statu quo. And during this time appellant without objection paid, from time to time, the greater part of the principal and a large part of the interest which by the contract it had promised to pay; thus inducing respondent to perform the whole of its part of the contract in confidence that appellant would do the same. This, we think, under the circumstances of this case, constitutes ratification by acquiescence; for the rule is that a party cannot repudiate the burdens of a contract while enjoying its benefits. Underhill v. Improvement Co., 93 Cal. 312, 28 Pac. 1049. There is some question as to the sufficiency of the findings on this point, although, in our judgment, they sufficiently state the facts constituting such acquiescence. The court, however, also found that, at three different meetings of the stockholders of appellant, at two of which over two-thirds of the stockholders were represented, and at the other over a majority, the action of the directors in making the contract in question was ratified, approved, and confirmed; and the evidence supports this finding. At the regular annual meeting on August 29, 1888, six weeks after the making of the contract, at which more than two-thirds of the stockholders were represented, all the previous acts of the board were expressly ratified. At the regular annual meeting on August 29, 1889, at which more than two-thirds were represented, the reports of the secretary and treasurer, showing the existence of the $15,000 note sued on, were read and approved, and all the proceedings of the preceding year were unanimously approved; and at a regular adjourned meeting, on September 5, 1889, at which a majority of the stock was represented, the same thing was shown by the reports of said two officers, and the action of the board again unanimously approved. It is admitted that there was also another annual meeting of the stockholders in August, 1890, at which all former actions of the directors were approved. These acts constituted a ratification of the contract in question. Underhill v. Improvement Co., 93 Cal. 313, 28 Pac. 1049.

The contention of appellant that the contract could not be ratified except by the unanimous consent of all the stockholders cannot be maintained. That principle does not apply to acts which might have been authorized by a majority in the first instance. "The corporation may, however, ratify an unauthorized transaction of its agents; and this may be done either by the unanimous acquiescence of the shareholders, or by a vote of the majority if the transaction is of such a character that the majority might have authorized it at the outset." 1 Mor. Priv. Corp. (2d Ed.) § 525, and the cases there cited. The rule is that the majority governs, and every stockholder contracts that such shall be the rule. Civ. Code, § 312; 1 Mor. Priv. Corp. § 474.

There is nothing in the contention that the ratifications were made without knowledge of what they meant. In the first place, this is not an action by individual stockholders to set aside a contract made by the corporation. The point is made by the corporation itself, in a defense in which it seeks to violate its own obligation; and it would be absurd to say that it did not know what it was doing. But, if we assume that in this action the corporation could shield itself between the ignorance of a few of its stockholders, it is clear that the latter knew, or ought to have known, the nature of the contract and the circumstances attending it. The respondent ran its railroad through the premises of appellant upon land purchased for that purpose by the former from the latter, there was a continuous operation of the road according to the contract, and a continuous payment from time to time by appellant of large sums of money under the contract, and the relations of the two corporations were of an intimate character. And, as was said in Blen v. Mining Co., 20 Cal. 613, 614: "The natural presumption is that it was fully considered, and the particulars inquired into and explained, and the idea that this was not done is certainly at variance with the usual mode of conducting business." And, again: "A ratification supposes a knowledge of the thing ratified," and "there is no evidence of any mistake in this case." Moreover, at the meeting of the stockholders at which the contract was first ratified, the minutes of the meeting of the board of directors of appellant at which the contract was made were read; and they showed that Gassen, who was a director of appellant, was also director, president, and general manager of the respondent, and presented the table of trains, and acted for the respondent. Furthermore, as was said in Underhill v. Improvement Co., supra, quoting from Morawetz: "Nor can the shareholders of a corporation avoid responsibility for the unauthorized acts of their agents by abstaining from inquiring into the affairs of the company, or by absenting themselves from the company's meetings, and at the same time reap the benefits of their acts in case of success." It is significant that in the case at bar there was no attempt to show a want of knowledge of any of the stockholders of any circumstance connected with the contract which is now sought to be repudiated.

With respect to the discussion by appellant of the value of the consideration for which it entered into the contract, it is sufficient to say that the wisdom or good policy of that contract is not a matter for decision here. The facts found show what the consideration was. In considering this case, we have assumed, without deciding, that the contract involved was one which the appellant, if there had been no acquiescence or express ratification, might by prompt action have avoided. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(115 Cal. 143)

TAYLOR v. HILL, Sheriff, et al. (L. A. 60.) [1]

(Supreme Court of California. March 24, 1896.)

NEW TRIAL—APPEAL—COMPLAINT—REVIEW—NOTICE TO ATTORNEY FOR INFANT — ASSIGNMENT BY INFANT OF WAGES—EXECUTION—CLAIM FOR WAGES—NOTICE—WAIVER.

1. The sufficiency of the complaint is not subject to review on appeal from an order denying a new trial.

2. An attorney employed by a guardian ad litem to prosecute an action for his ward may accept notice of a claim for wages accruing against the judgment debtor, within 60 days preceding levy of execution which Code Civ. Proc. § 1206, requires the claimant to give the judgment creditor before execution sale, in order to entitle him to have his claim preferred as therein provided.

3. Code Civ. Proc. § 1206, provides that a claim for wages accruing against a judgment debtor within 60 days preceding levy of execution shall be a preferred claim, provided notice is given to the judgment creditor and debtor by the claimant before execution sale, and it is undisputed, and, if disputed, is established by an action brought within 10 days. *Held*, that a judgment creditor, by answering in an action to enforce a claim disputed by him, waived notice.

4. In an action on a partnership debt, a debt due by the plaintiff to one of the partners individually cannot be pleaded in set-off.

5. Where a father, as authorized by Civ. Code, § 211, has relinquished to his son the right to control him and to receive his earnings, a debt due the son for wages is under his control, within Civ. Code, § 33, prohibiting contracts by minors under 18 years of age relating to personalty unless it is under their "control."

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by George Taylor against B. P. Hill, sheriff, and T. West, Jr. Plaintiff had judgment, and from an order denying a new trial, defendants appeal. Affirmed.

V. E. Shaw, for appellants. Colyer & Colyer and D. L. Murdock, for respondent.

VAN CLIEF, C. This action was brought under section 1206 of the Code of Civil Procedure to compel the defendant Hill, sheriff, to apply proceeds of a sale of property on execution to the payment of the claims of plaintiff and his assignors for labor performed for the judgment debtors within 60 days next preceding the levying of the execution. The execution on which the sheriff sold the property was issued on a judgment for $5,000 in favor of T. West, Jr., an infant aged seven years, and against J. D. Palmer and W. H. Palmer, copartners, of the firm name of Palmer & Co. The judgment was obtained on February 21, 1894, and the execution was issued and levied on all the property of Palmer & Co. on February 23, 1894. Before the sale of the property by the sheriff, to wit, on March 24, 1894, the plaintiff herein and four others, claiming that Palmer & Co. were indebted to them severally for labor performed by each of them within 60 days next preceding February 23, 1894, notified the sheriff and the judgment creditor of their several claims and the amount thereof, and demanded that said claims be first paid from the proceeds of the sale of the property levied on, according to section 1206 of the Code of Civil Procedure. Said claims were disputed by the judgment creditor, and thereupon each of the other claimants assigned his claim to plaintiff, who in due time commenced this action. The court found said claims to be valid claims against Palmer & Co. to the amount of $334.09 for labor performed within 60 days next preceding the day on which the execution was levied, and that the sheriff had in his hands $675 of the proceeds of the sale of said property, and thereupon ordered and adjudged that the sheriff pay to plaintiff, from said proceeds of sale, the said sum of $334.09, and costs, taxed at $26.60. Defendants bring this appeal from an order denying their motion for a new trial, but have not appealed from the judgment.

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[1] Rehearing granted.

1. The principal point urged by appellants is that the complaint does not state a cause of action because it is not therein alleged that either the plaintiff or any one of his assignors gave notice of his claim to the judgment debtors, Palmer & Co. They contend that, although the statute does not expressly require such notice to the judgment debtor, it does so by implication. Upon this point it is necessary to say, only, that no question as to the sufficiency of the complaint can be considered on appeal from an order denying a new trial. Spanagel v. Dellinger, 38 Cal. 278; Brison v. Brison, 90 Cal. 323, 27 Pac. 186.

2. It is contended that the finding by the court that due notice of the several claims of plaintiff and his assignors was served upon the judgment creditor is not justified by the evidence. The judgment creditor being an infant, his father (Tom West) was appointed his guardian ad litem for the purposes of the action in which he recovered the said judgment for $5,000 against Palmer & Co. The guardian ad litem employed an attorney at law, E. W. Britt, Esq., to commence and conduct that action. The complaint in that action was signed: "Tom West, Guardian ad Litem. E. W. Britt, Attorney for Guardian ad Litem." And a demurrer to the answer of the defendants therein was signed: "E. W. Britt, Attorney for Plaintiff." On behalf of defendants herein, Mr. Britt testified, in substance, that he was employed by the guardian ad litem to commence and prosecute the action of T. West, Jr., v. Palmer & Co.; that he, as attorney at law, conducted the proceedings in that action, and was the only attorney that appeared therein for either T. West, Jr., or the guardian ad litem; that, in his absence, his clerk signed his name to the demurrer to the answer in that action, and also to written admissions of service of notices of the several claims and demands of plaintiff herein and his assignors against Palmer & Co. as "attorney for plaintiff" in that action; and that his clerk had authority from him to accept service of papers for all parties whom he represented as attorney. The judgment creditor having disputed the claims of plaintiff and his assignors against Palmer & Co. as aforesaid, he, with the sheriff, jointly answered plaintiff's complaint in this action, their answer being introduced by the following language: "Come now B. P. Hill, as sheriff, by his attorney, and T. West, Jr., by Ruth West, his guardian, and answer the plaintiff's complaint herein as follows." This answer is signed: "E. W. Britt, Attorney for Defendants." Upon the pleadings and evidence as above stated, appellant contends that Mr. Britt was not authorized to admit service of the notices for the infant judgment creditor as he did, and, therefore, that said notices to him are not such notice "to the creditor" as required by section 1206 of the Code of Civil Procedure; and, for this reason alone, it is claimed that the finding of due notice to the creditor is not justified by the evidence.

I think the notices were properly served on Mr. Britt. Undoubtedly the guardian ad litem had authority to employ a professional attorney at law to commence the action and conduct the proceedings therein on the part of the infant. Cole v. Superior Court, 63 Cal. 86; People v. New York Common Pleas, 11 Wend. 166. And it was held, in the case of Carter v. Mining Co., 83 Cal. 222, 23 Pac. 317, that in cases under section 1206, Code Civ. Proc., the notice of plaintiff's claim was properly served on the attorney for judgment creditor. The court said: "The attorney for the plaintiffs in an action is their agent for all its purposes, and on him all the papers made by defendants and counterclaimants are to be served. He may direct the sheriff as to what property he shall seize, and may receive and receipt for any money realized from a sale thereof."

See, also, Schouler, Dom. Rel. § 346. No authority has been cited, and I have found none, to the effect that the authority and duties of an attorney, employed by a guardian ad litem to conduct the proceedings in an action by or against an infant, are more restricted than in any other case. After diligent search, I have been able to find only one case in which it was questioned that the authority of an attorney employed to prosecute or defend an action for an infant was the same as in other cases, namely, People v. New York Common Pleas, supra, which was a suit by the infant, Baker, commenced by Hitchcock as prochein ami (equivalent to guardian ad litem). After the suit had been commenced and certain proceedings taken therein by Hitchcock, J. Blunt was retained as attorney for plaintiff, and filed a replication to one of the pleas of defendants and a demurrer to the other, and served them on defendants' attorneys, with notice of a rule requiring defendants to join in demurrer. The replication and demurrer were signed, "J. Blunt, Atty. and of Counsel," and the notice was signed, "J. Blunt, Atty." Afterwards the default of the defendants for not joining in demurrer was entered. The rule for the default and the rule to join in demurrer were entered in the common rule book in the name of "J. Blunt, Atty. for Plt." The court of common pleas set aside the default with costs, holding that all the proceedings on the part of the plaintiff by and in the name of Blunt as attorney were irregular. An alternative mandamus from the supreme court requiring the common pleas to vacate the order setting aside the default was made peremptory. Savage, C. J., said: "The rule that a plaintiff who appears first by prochein ami shall not afterwards appear by attorney relates to the appearance on the record. * * * The question, then, is, may an attorney who conducts the proceedings do so in his own name, or is he obliged to sign the name of the prochein ami to his notices, and use the name of the prochein ami in entering rules as if he were attorney? I am of opinion he is not bound to do so, but may conduct the proceedings in his own name." If the attorney, Blunt, had authority to conduct the proceedings and give notices pertaining thereto in his own name, he must have had authority to accept and admit service of like notices from defendants.

I think, however, the point under consideration may be disposed of in respondent's favor upon the ground that the issue to which the finding in question responds is wholly immaterial, for the reason that the infant creditor, by his guardian and attorney, appeared and answered plaintiff's complaint in this action, and thereby waived prior notice of plaintiff's claim or demand; and this view of the matter also answers the argument of appellant based on the assumption that this is a distinct original action, and is not in the nature of an intervention in the action of West v. Palmer. By their voluntary appearance and answer the defendants submitted themselves to the jurisdiction of the court. Their denial in their answer that notice of plaintiff's claims was served on the judgment debtor raised an immaterial issue, and whether or not the finding of the court upon that issue is justified by the evidence is of no legal consequence. Randall v. Falkner, 41 Cal. 242; Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121.

3. The court found that Palmer & Co. were indebted to Oscar Palmer, Allen Coburn, and Scott Palmer, three of plaintiff's assignors, as follows: To Oscar Palmer, $59.71; to Allen Coburn, $54.48; and to Scott Palmer, $62.60. It is contended that, as to the first two, the finding is not justified by the evidence, because the evidence showed that Oscar Palmer and Allen Coburn were each indebted to J. D. Palmer individually in the sum of about $20 for board, which should have been, but was not, deducted by the court from the indebtedness of J. D. Palmer & Co. to them. It seems too clear to admit of argument that the deduction or set-off claimed was properly refused. As to Scott Palmer, it appeared that he was a son of J. D. Palmer, and under 18 years of age; and it is contended (1) that his earnings belonged to his father, and (2) that, even if the father had relinquished to his minor son the right of controlling him and the right of receiving his earnings, pursuant to section 211 of the Civil Code, yet the son could not have assigned to the plaintiff the debt due him from Palmer & Co. because such debt, though his personal property, was "not in his immediate possession or control," in the sense of section 33 of the Civil Code. The evidence tended to prove that the father had relinquished to the son the right to control him and the right to receive his earnings, and justified the findings to this effect; and I think the debt due him for his labor was under his control, in the sense of section 33 of the Civil Code, and was therefore assignable by him. See Schouler, Dom. Rel. §§ 267, 268.

4. It is claimed that the findings that Palmer & Co. had been adjudged insolvent, and that the defendant sheriff was their assignee at the time notice of the claims of plaintiff and his assignors were served on him, are not justified by the evidence. If, however, the foregoing opinion is correct, these findings are wholly immaterial. I think the order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(112 Cal. 1)

BRITTAN v. OAKLAND BANK OF SAVINGS. (S. F. 211.)[1]

(Supreme Court of California. March 23, 1896.)

PLEADING — WAIVER OF OBJECTIONS — APPEAL — REVIEW.

1. Error, if any, in striking out a portion of a complaint, and in sustaining a demurrer to it, is waived by the filing of an amended complaint.

2. Where averments stricken out of a complaint have relation only to defendants who ceased to be parties by the filing of a substituted complaint which operated as a discontinuance of the action against them, plaintiff, in order to have the order of the court striking out such averments reviewed, must include them in the complaint on which the action is tried.

3. The action of the court in overruling a demurrer to a special defense will not be reviewed on appeal, where it does not appear that the judgment, in any respect, depends on such defense, or that defendants offered any evidence at the trial in support of it.

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by one Brittan against the Oakland Bank of Savings. From a judgment entered on a verdict of a jury in favor of defendant, plaintiff appeals on the judgment roll. Affirmed.

James L. Crittenden, for appellant. Dunne & McPike and J. C. Martin, for respondent.

HARRISON, J. After a demurrer to the original complaint had been sustained by the court, the plaintiff filed an amended complaint. Upon the motion of the defendant the court struck out certain portions of this amended complaint on the ground that they were irrelevant and redundant. Thereafter the plaintiff filed a second amended complaint, to which the defendant answered, and subsequently, having obtained an order substituting the appellant for the original plaintiff in the action, filed a third amended and supplemental complaint, to which the defendant filed its answer, denying many of the allegations in the complaint. Subsequently the defendant filed certain amendments to its answer, and set up a separate and special defense. The plaintiff demurred to this special defense, and, his demurrer having been overruled, the cause was tried by a jury, who rendered a verdict in favor of the defendant. From the judgment entered thereon the present appeal is taken upon the judgment roll alone. It contains a bill of exceptions relative to the order striking out certain portions of the first amended complaint, but there is no bill of exceptions relating to the trial, or showing the evidence upon which the verdict was rendered. The appellant, in his brief, seeks a review by this court of the order sustaining the demurrer to the original complaint, the order striking out certain portions of the first amended complaint, and the order overruling his demurrer to the special defense in the answer.

1. The amended complaint, which was filed after the demurrer to the original complaint had been sustained, superseded the original complaint; and the error, if any, committed in sustaining the demurrer, was thereby waived. Gale v. Water Co., 14 Cal. 25; Ganceart v. Henry, 98 Cal. 281, 33 Pac. 92. For the same reason the subsequent filing of another amended complaint, upon which the cause was tried, whereby the cause of action was substantially varied, waived any error committed in striking out portions of the complaint which was thus amended. The grounds upon which these portions were struck out of the complaint was that they were irrelevant and redundant, and the appellant has not pointed out any respect in which they are relevant to his cause of action. The third amended complaint, upon which the cause was tried, was in favor of the substituted plaintiff, and, as it was against respondent alone, operated as a discontinuance of the action against the other defendants. Many of the averments that had been struck out had relation to only those defendants who had thus ceased to be parties to the action, and other portions were in fact included in this third amended complaint. If the plaintiff had desired to have the correctness of this order reviewed, he should have included those averments in the complaint upon which the action was tried, so that their relevancy to the cause of action which he finally presented for trial might be determined.

2. The appellant asks a reversal of the judgment upon the ground that the court erred in overruling his demurrer to the special defense alleged in the answer. It does not appear, however, that the judgment, in any respect, depends upon this defense, or that the defendants offered any evidence at the trial in support thereof. Upon an appeal from a judgment, only such errors can be reviewed as have conduced to the judgment. It is incumbent upon the appellant to show that the judgment appealed from has resulted from some error committed by the trial court, and, as every presumption is in favor of the correctness of the judgment, the burden is upon the appellant to make the error apparent. In an action tried by a jury a judgment rendered in accordance with its verdict will be sustained, unless it is made to appear that the verdict was the result of some error at the trial, or that the cause was submitted to the jury for trial by reason of some error of the court. When an appeal is heard upon the judgment roll alone, containing a verdict for the defendant, and in which there is no bill of exceptions, we will assume, if necessary to sustain the judgment, that the plaintiff failed to introduce any evidence in support of his cause of action. In the present case all the material allegations of the complaint were denied in the answer, and it is consistent with the judgment to as-

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[1] Rehearing denied.

sume that at the trial the defendant withdrew its special defense from consideration by the jury. There is no presumption that any evidence was offered by the defendant in support of this defense. "Where there are two presumptions, both equally reasonable, arising upon the face of the record, this court is bound to adopt that which will maintain the judgment of the court below." Whipley v. Flower, 6 Cal. 630.

It was suggested at the argument that, unless the action of the court in overruling the demurrer can be reviewed upon an appeal from the judgment, there is no opportunity to review it. If, however, the judgment does not depend upon the defense to which the demurrer was interposed, the sufficiency of such defense becomes a mere moot question, which it would not be proper for us to determine; and, if it does depend upon such defense, that fact must be made to appear upon the record. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(112 Cal. 38)

O'CONOR v. WITHERBY. (L. A. 12.)

(Supreme Court of California. March 24, 1896.)

ATTACHMENT AFFIDAVIT—SUFFICIENCY.

An attachment affidavit which alleges that the payment of the indebtedness has not been secured by any mortgage or lien upon real or personal property is sufficient, without adding the other statutory clause, "or any pledge of personal property," since the declaration of affiant that he has no lien negatives the possibility of his having a pledge.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Attachment proceedings by Andrew J. O'Conor, receiver of the Consolidated National Bank of San Diego, against O. S. Witherby. From orders refusing to dissolve the attachment or to retax costs, defendant appeals. Affirmed.

E. Parker, W. T. McNeally, and Trippet, Boone & Neale, for appellant. V. E. Shaw and E. W. Britt, for respondent.

HAYNES, C. Appeal from an order denying defendant's motion to dissolve an attachment, and from an order refusing to retax the costs of said attachment. Appellant's only contention is that the affidavit for attachment is defective and insufficient in the following particulars: (1) That it does not show that the defendant was indebted to the plaintiff; (2) that it does not specify the amount of such indebtedness; (3) that the amount of plaintiff's demand in said writ is not stated in conformity to the complaint; (4) that it does not specify the amount of such indebtedness over and above all legal set-offs and counterclaims; (5) that it does not state that the payment of said alleged indebtedness has not been secured by any mortgage or lien upon personal property, or any pledge of personal property. All of these objections, except the last, were considered, and decided adversely to appellant, in the case of O'Conor v. Roark, 108 Cal. 173, 41 Pac. 465; the affidavit in that case being the same as the one before us, so far as the first four objections are concerned. Those points need not, therefore, be considered. So far as appellant's fifth point is concerned, the language of the affidavit is as follows: "That the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge upon personal property." The statute uses the word "of" instead of "upon." It is said that a pledge "upon" personal property is meaningless. The intention of affiant, however, is plain, and it might properly be held a mere clerical error, which would not affect its sufficiency. If that clause of the affidavit had been omitted, we should be compelled to hold that it was sufficient. The declaration that he has no lien upon personal property negatives all possibility of his having a pledge; for, if he had a pledge of personal property, he must have had a lien upon it. It was expressly so decided in Glidden v. Whittier, 46 Fed. 437, under the statute of Idaho, which contains precisely the same requirement. In that case the last clause was entirely omitted. The affidavit for attachment being sufficient, the motion to retax the costs was properly denied. The orders appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the orders appealed from are affirmed.

(112 Cal. 27)

LITTLE v. CALDWELL. (Sac. 23.)[1]

(Supreme Court of California. March 24, 1896.)

PARTNERSHIP—ACCOUNTING BY SURVIVOR.

A law firm agreed, in writing, to conduct certain litigations for 15 per cent. of the amount recovered. The contract was afterwards modified by parol so that a part of the expenses were to be paid by their client. After the death of one of such firm the survivor and such client agreed that such survivor should prosecute at his own cost all further litigation, and, in the event of final success, receive 45 per cent., "which amount is in addition to the amount of said estate agreed to be paid" to such firm. Deceased's widow and son, as heirs, afterwards executed to such survivor an assignment of their rights in such contract, in consideration of the promise by him that in the event of success he "would do what was right" by them. He was afterwards successful in the litigation. *Held*, in an action by deceased's widow against such survivor for an accounting, that a judgment in her favor for one-half of the compensation originally agreed upon was proper.

[1] Rehearing denied.

Department 2. Appeal from superior court, Nevada county; Charles W. Slack, Judge.

Action by M. E. Little against John Caldwell, partner of her deceased husband, for an accounting. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

A. D. Mason and F. J. Dennis, for appellant. J. M. Walling, for respondent.

HENSHAW, J. Appeals from the judgment and order denying a new trial. This cause was previously before the court upon appeal from the judgment after demurrer sustained to plaintiff's complaint. It will be found reported in 101 Cal., at page 553, 36 Pac. 107. The opinion there set forth renders unnecessary any extended statement of facts. By the original contract the firm of Caldwell & Little was to conduct the litigation to a final determination, paying all the expenses thereof, and, in the event of success was to receive 15 per cent. of the estate that would fall to their clients. This contract was in writing. Thereafter the firm refused to defray the expenses of litigation, and a parol modification of the contract was agreed to, whereby the clients were to pay $500 for such purpose. Of this sum they paid $200. The firm then proceeded with the litigation, but, before further court proceedings were had, Little died. Caldwell then, without the knowledge of this plaintiff, entered in his own name into a contract with the clients, whereunder he was to prosecute at his own cost all further litigation, and, in the event of final success, was to receive "forty-five per cent. of the amount of said estate which may be decreed to them, * * * which amount is in addition to the amount of said estate agreed to be paid by them to Caldwell & Little by written agreement dated January 30, 1889." Subsequently this plaintiff and her son, as heirs of Little, deceased, executed to defendant an assignment of all their rights in the Caldwell & Little contract, the assignment reciting a consideration of one dollar, and expressing the unwillingness of assignors to bear any of the expense of the litigation. The true consideration for the execution of this instrument was the promise of defendant to plaintiff that he (defendant), in the event of success, "would do what was right by the plaintiff." Defendant carried the litigation to a successful issue, and received therefor the sum of $12,618.50, being the 60 per cent. of the contract. One-half of one-fourth thereof, or one-half of the 15 per cent. of the original contract, amounting to $3,154.60, the court found to be due plaintiff, and rendered judgment accordingly.

The foregoing is a substantial summarization of the findings. We think that the court was justified in holding that the contracts were not separate, distinct, and independent agreements, each in turn made after agreed abandonment or rescission of the earlier contract. The later contracts were but modifications of the original. The consideration moving from the attorneys, that they were to prosecute to a conclusion the litigation in question, always remained. The terms of their compensation and risk in so doing alone were varied. And herein two circumstances are significant, and were doubtless considered so by the trial judge: First. That the last written contract entered into by Caldwell, the surviving partner, does not stipulate for a flat consideration of 60 per cent., as would have been natural had the original contract been rescinded and abandoned, but provides for the payment of 45 per cent. "in addition to the amount agreed to be paid to Caldwell & Little by written agreement," etc. There is here a distinct recognition that the original contract is vital and operative. Second. If the original contract and its parol modification made during Little's life had been abrogated and rescinded, it would have been meaningless for defendant to have asked and obtained an assignment to himself of all of plaintiff's rights thereunder. The fact that the assignment was executed to and received by defendant at his request amounts wellnigh to a demonstration that at that time one of the parties to the original 15 per cent. contract, defendant himself, believed that it was still in force. The findings being justified in this regard, and the further finding as to the true consideration for the assignment having been determined, upon a conflict of evidence, in favor of plaintiff, leaves little to be said. The facts found correspond so closely with those averred in the complaint, and discussed in the opinion in volume 101 of the Reports, that the law there laid down has become the law of the case. It matters not, therefore, whether plaintiff's interest was assignable or not. The instrument purported to be an assignment, not a release. If an assignment was permissible, then defendant must be held for the consideration which the court found induced its making. If the interest was not assignable, then, as in the former opinion set forth, defendant is responsible as surviving partner. Under either construction the judgment was for an amount due. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.

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112 Cal. 143

BILBY v. McKENZIE (McBEAN, Intervener. Sac. 97).

(Supreme Court of California. March 25, 1896.)

MUNICIPAL CORPORATIONS—PAYMENT OF CLAIMS.

Money in the sewer fund of a city for a certain year cannot be used, after the expiration of such year, in paying claims for a subsequent year, while suit is pending against the city to recover on a claim against such fund, arising in such prior year, on a contract which the city had for previous years recognized as valid.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Mandamus proceedings by M. Bilby against M. H. McKenzie, defendant, and A. McBean, intervener. From a judgment for plaintiff on demurrer, defendant and intervener appeal. Judgment against defendant reversed, and against intervener affirmed.

E. D. Edwards and W. C. Graves, for appellants. L. W. Moultrie, for respondent.

HENSHAW, J. Plaintiff commenced proceedings in mandamus against defendant, McKenzie, treasurer of the city of Fresno, to compel the payment of certain warrants issued for work performed upon the sewers of the city in the month of May, 1895. The claims represented by the warrants had been duly allowed and ordered paid by the board of trustees, and warrants therefor had been properly drawn upon the treasurer. It was alleged that there was in the sewer fund of the city, and not otherwise appropriated, a sum largely in excess of the amount of the warrants. Defendant McKenzie, in his return and answer, showed that the city of Fresno had entered into a contract with Alexander McBean whereby McBean agreed to take care and dispose of the sewage of the city for a period of five years for the sum of $4,900 per annum, payable quarterly. This contract had been performed by McBean, and the city had, from year to year, assessed and levied a tax for the sewer fund sufficient to pay McBean's demands, and for the purpose of paying the same, and had in fact devoted the money to these payments until the year 1893. In that year, though McBean had fulfilled the terms of his contract, and though there was in the sewer fund sufficient unappropriated moneys wherewith to pay his claims, the city refused payment, asserting that the contract was void, and that it was no longer bound by it. McBean then instituted suit against the city, which action was pending and undetermined. Defendant further alleged that the moneys which were in the sewer fund, and which were claimed to be available for the payment of plaintiff's claims, were moneys thus collected and set over to the sewer fund for the payment of the claims of McBean for the year 1893, and were sufficient only for that purpose; that by reason of the pending litigation between McBean and the city, to which he had been made a party defendant, he could not and should not be compelled to pay plaintiff's claims out of the revenues of the year 1893 until the claim of McBean upon the revenues of that year had been finally adjudicated. McBean was allowed to intervene and set up the same facts asking payment to himself of the moneys in the sewer fund. Plaintiff interposed general demurrers to the answer and complaint in intervention. They were sustained, and defendant and intervener appealed.

The demurrer to defendant's answer was improperly sustained. The moneys in the sewer fund for the fiscal year 1893 could be used for no other purpose than the payment of the legitimate claims of that year, until they had, one and all, been met and extinguished. Thereafter any excess over could be carried into the sewer fund of the following year, or transferred from the sewer fund to the general fund, and from the latter expended or appropriated to meet deficiencies in other funds. But, until all just demands upon the sewer fund for the year 1893 had been met and paid, the integrity of the fund could not be impaired. The fact that the moneys remained in the treasury in 1895 did not make them a part of the fund of 1895. They were still a part of the fund of 1893. As the revenues of a given year, and those only, may be devoted to the payment of claims arising in that year, it would be the height of injustice to suffer a rightful claimant to be robbed of his due by a technical transfer of the moneys of a fund of the year in which the demand accrued into the fund of a later year, before adjustment and settlement of all demands. Whether McBean's claim was valid or not, it was sufficient for the treasurer and the municipal authorities to know and to show, as they did, that it had previously been recognized as valid, and was being pressed in the courts in good faith. Under these circumstances the moneys in the sewer fund for the fiscal year 1893, to the amount of McBean's claim, were not available to pay claims arising in 1895, and the treasurer's showing was a sufficient defense to the action. The demurrer to McBean's complaint in intervention was properly sustained. It amounted to nothing more than an attempt to retry issues determined adversely to him in his action against the city and the treasurer to compel payment under his contract. That action is now pending before this court upon appeal, and presents propositions entirely independent of those brought up in this appeal. They are reserved for a separate consideration. The judgment against defendant, McKenzie, is reversed, with directions to the trial court to overrule the demurrer to his answer. The judgment against the intervener, McBean, is affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.

111 Cal. 655

PEOPLE v. HOWLAND. (Cr. 116.)

(Supreme Court of California. March 23, 1896.)

PERJURY — REQUISITES OF COMPLAINT — INFORMATION—MUST FOLLOW COMPLAINT.

1. A complaint for perjury, which charges the making of a false oath to a criminal complaint, but fails to aver that such complaint contained a charge of which the court before whom it was filed had jurisdiction, does not charge an offense.

2. An information cannot go beyond the charge made in the complaint, and to which the defendant has been held to answer; and where a complaint fails to charge an offense, no valid information can be based upon it.

Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

H. E. Howland was convicted of perjury, and appeals. Reversed.

Tanner & Taft, Goodrich & Garrison, H. E. Monroe, and John H. Dickinson, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

VAN FLEET, J. Defendant was convicted of perjury in the superior court of the county of Los Angeles, and appeals from the judgment and an order denying him a new trial. Upon his arraignment, defendant moved to set aside the information upon the ground that he had not been legally committed by a magistrate. The motion was denied, and its denial is the basis of one of the exceptions upon which defendant relies for a reversal of the judgment. The complaint lodged with the magistrate, upon which the prosecution is founded, attempted to charge defendant with having on October 25, 1894, at the city of Pasadena, in said county, committed perjury before one J. G. Rossiter, the recorder of said city, in falsely swearing to a criminal complaint charging one Howard with a misdemeanor in disturbing a religious meeting. The material part of the complaint, after alleging the taking of the oath, the official character of the officer before whom the same was taken, and his competency to administer such oath, is "that said defendant did then and there willfully, and contrary to said oath, state as true that this affiant did on the 7th day of October, 1894, disturb and disquiet an assemblage of people met for religious worship, by noisy, rude, and indecent behavior," etc.; the truth of the statement being then negatived. Upon this complaint, defendant was examined, and held to answer for the crime of perjury; and thereupon the district attorney filed the information in question, charging defendant with such offense.

It is urged on behalf of defendant that this complaint did not charge a public offense, and did not, for that reason, constitute a legal basis for a prosecution against defendant, or upon which he could be competently held to answer. The particular objection pointed out as rendering the complaint deficient is its failure to show that the recorder before whom the alleged false oath was taken had any jurisdiction of the subject-matter of the action in which the false oath was taken; that is, that while the averments of the complaint show that the alleged false oath was taken in a criminal prosecution against said Howard, before the recorder of said city, for an alleged misdemeanor, it is not alleged, directly or otherwise, that the said misdemeanor so falsely charged was committed within the city of Pasadena, and so within the jurisdiction of said recorder. And it is claimed that, unless it affirmatively appear that the false oath was taken in a case whereof the recorder had jurisdiction, the matters sworn to are not material, and do not constitute perjury. That the complaint in question is lacking in the particular specified is patently manifest. It charges the defendant with falsely stating that Howard "did on the 7th day of October, 1894, disturb and disquiet an assemblage of people met for religious worship"; but it does not show that such alleged misdemeanor was one of which the recorder had jurisdiction to inquire, since it is nowhere alleged that the same was committed within the city of Pasadena. One of the primary essentials of the crime of perjury is that the false oath must be material or of consequence in the matter or proceeding in which it is taken (Pen. Code, § 118); and it is well established that the matter or thing sworn or testified will not be held so material where the officer or tribunal before whom the oath is taken had not jurisdiction of the subject-matter of the oath, notwithstanding there may have been general authority to administer oaths in like cases, if within the jurisdiction. 2 Bish. Cr. Law, §§ 1020–1028; 2 Bish. Cr. Proc. § 905; Stedman's Case, 1 Cro. Eliz. 137; Wyld v. Cookman, 2 Cro. Eliz. 492; State v. Jackson, 36 Ohio St. 281; State v. Peters, 57 Vt. 86; U. S. v. Curtis, 107 U. S. 671, 2 Sup. Ct. 507; Jackson v. Humphrey, 1 Johns. 497. And it is equally well settled that the facts showing such jurisdiction must be affirmatively alleged. 2 Bish. Cr. Proc. § 905; Stedman's Case, supra; Hitesman v. State, 48 Ind. 473. Says Mr. Bishop in the section above cited, "Since to render a false swearing perjury, there must be an issue or inquiry before some tribunal or person competent in law to act therein, this must be alleged, and in a way to show jurisdiction." It is quite obvious that the complaint in question must, within the test of these principles, be held bad, since everything charged therein might be indisputably true, and yet perjury be not shown.

It remains to be determined whether the fact that the complaint upon which a defendant is arrested and committed states no offense against him is so fatal to the regularity of the proceeding as to require the information based thereon, itself sufficient in form, to be set aside upon the ground that he has never been legally held to answer. Some of the earlier cases arising under the provision of our present constitution providing for prosecutions by information seem to treat the sufficiency of the complaint before the magistrate as largely an immaterial or nonessential factor in determining the regularity of the proceeding for a commitment (see People v. Velarde, 59 Cal. 457; People v. Wheeler, 65 Cal. 77, 2 Pac. 892; People v. Staples, 91 Cal. 23, 27 Pac. 523), although none of those cases, we think, go to the extent of holding that the complaint need not state an offense. But in the recent case of People v. Christian, 101 Cal. 471, 35 Pac. 1043, where the latest expression of the court upon the subject is to be found, all the earlier cases are fully reviewed, and the reasoning and conclusion in that case would seem to impart more dignity and importance to the office of that pleading in criminal prosecutions than heretofore accorded it. In that case the defendant was charged with an assault with a deadly weapon upon one George Magin, and was held to answer therefor. The district attorney filed an information charging him with such an assault upon one George "Massino." It was held that the information must be set aside; the court, after stating the facts showing that defendant had been brought before the magistrate to defend himself against a charge of assaulting Magin, saying: "Under those circumstances, and under a complaint charging that offense, he could not be called upon to defend himself for assaulting one Massino, for there was no complaint on file upon which to base an examination of that character." And, after reviewing the cases upon the subject, it is said: "It may be laid down as an unquestioned proposition that the district attorney has no authority to disregard the commitment, and cull from the evidence taken at the preliminary examination some real or imaginary offense not included in the complaint upon which the defendant was charged and examined. * * * The district attorney is not only required to file the information for some offense included in the allegations of the complaint, but the magistrate likewise only has the power to commit for some offense included therein." The principles to be deduced from this case are that the complaint lodged with the magistrate constitutes the groundwork of the whole superstructure to be thereafter built thereon, and draws the lines which must circumscribe the limits the prosecution can take. The defendant, in other words, may be competently informed against and tried for any offense charged in the complaint, or included therein, but beyond that limitation the prosecution cannot go. And this doctrine would seem to be in accord with the spirit and intent of the statute interpreting the purpose of the constitution. As remarked in People v. Christian, supra: "If such were not the true rule, the whole procedure as to preliminary examinations would be absurd, and as to the defendant a mockery. Where a defendant is brought before a magistrate, charged with having committed a public offense, he must be informed of the charge against him, and advised as to his right to the aid of counsel in every stage of the proceeding. He is entitled to a certain time to prepare his defense. These provisions of the statute clearly contemplate that he shall be required to defend himself against the crime with which he is charged, and no other crime. He has not been notified of any other charge, and consequently is not prepared to defend himself against another charge. There is no provision of the statute by which a defendant may take advantage of the admission of immaterial or incompetent evidence by the magistrate. Hence all manner of crimes may be proven against him, and thus the district attorney would have the privilege of selecting the most heinous on which to frame his information. Such is not the law, and whenever a defendant is informed against for an offense different from that charged in the complaint upon which he was examined, or not included therein, he has had no examination for that offense, and is entitled to have the information set aside upon the ground that he has not been legally committed." From these principles it would seem to follow as a necessary corollary that, if the complaint is the measure of the people's rights in proceeding against a defendant in any case, such complaint must charge him with a public offense. If the commitment and information cannot go beyond the complaint, and the latter fails to state any crime, the logic is irresistible that the defendant has not been legally held to answer for an offense. And this must be true. It cannot be that it was ever contemplated, either by the framers of the constitution, or the legislature proceeding under that instrument, that a citizen can be arrested, and put to the indignity and public shame of detention and examination upon a criminal charge, to say nothing of the inconvenience and pecuniary detriment incurred thereby, without a formal complaint, which charges, at least in substantial effect, some offense known to the law; for, if the complaint need not state an offense, it would subserve no useful purpose, since a pleading which does not state a cause of action is, in legal contemplation, no pleading. That such was not the purpose or intent of the legislature is evident from section 806 of the Penal Code, which provides that "the complaint is the allegation in writing, made to a court or magistrate, that a person has been guilty of some designated offense." Of course, such complaint need not necessarily charge the offense with all the technical nicety of an indictment or information, but that it must state the essential elements of the crime to a common certainty we have no doubt. In this requirement the complaint before us fails, as has been pointed out; and it follows, within the principles above stated, that the district attorney was not authorized to present, as he did, an information which traveled outside the complaint for facts upon which the charge therein stated is based. It results from these views that defendant was not legally committed, and the court should have granted his motion to set aside the information. This conclusion renders it unnecessary to notice the other questions raised. The judgment and order are reversed and the court below is directed to set aside the information.

We concur: **GAROUTTE, J.**; **HARRISON, J.**

(112 Cal. 101)

DE LA MONTANYA v. DE LA MONTANYA. (No. 15,996.)[1]

(Supreme Court of California. March 24, 1896.)

DIVORCE—JURISDICTION—ALIMONY—CUSTODY OF CHILDREN—RELIEF FROM VOID JUDGMENT—APPEALABLE ORDER.

1. In awarding a divorce on substituted service, where defendant and the minor children, though domiciled in the state, are living elsewhere, and defendant makes no appearance, the court has no jurisdiction to allow alimony.

2. Nor has it power to award the custody of the children to plaintiff. Beatty, C. J., and McFarland and Van Fleet, JJ., dissenting.

3. Where a divorce has been granted without personal service on defendant, who was not in the state when suit was brought, and made no appearance, a motion to vacate that part of the judgment allowing alimony will lie; and defendant need not seek relief under Code Civ. Proc. § 473, by offering to appear and plead to the merits.

4. Where a divorce has been granted without personal service on defendant, who was not in the state when suit was brought, and made no appearance, an order denying a motion to set aside that part of the judgment awarding alimony is appealable.

In bank. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Lorraine W. De La Montanya against James De La Montanya for a divorce. Judgment was rendered for plaintiff, defendant making no appearance; and from an order denying a motion to vacate that portion of the judgment which awarded plaintiff alimony, and the custody of the minor children, defendant appeals. Reversed.

Dorn & Dorn, for appellant. Garber, Boalt & Bishop, for respondent.

TEMPLE, J. This is an action to obtain a divorce, in which the plaintiff also asked for the exclusive custody and control of two children, the issue of the marriage, and also for permanent alimony, as well as for a suitable allowance to enable her to prosecute this action. The defendant and the children, who were, of course, infants, were absent from the state when the suit was commenced, and have ever since remained absent. No personal service of the summons was had on the defendant, and he did not appear in the action. An attempt was made to serve the summons by publication. It is claimed that the service was void because not made as required by the laws of this state, but I shall assume that such attempt at a constructive service was in accordance with the statute in every respect. The defendant was born, and during his whole life had lived, in this state. He left the state on the 20th day of November, 1893, with two children of plaintiff and defendant, proceeding to New York, and on the 9th day of December, 1893, left New York for Paris, France, where he arrived with his children on the 19th day of December. January 4, 1894, he made application to the ministry of justice of France for express permission to be domiciled in France. Such permission was granted on the 14th day of July, 1894. Since December 19, 1893, defendant has resided in France with his children, and neither he nor either of the children have since been within this state. This suit was commenced two days after the departure of the defendant from the state, and it is claimed that defendant left the state and took the children for the express purpose of evading the jurisdiction of the courts of this state. As stated, the defendant did not appear in said action, and, the publication of summons having been made, in due time the default of the defendant was entered, and the court proceeded to hear the cause; and on the 16th day of May, 1894, judgment was rendered against defendant, wherein it was adjudged (1) that the marriage be dissolved; (2) that the exclusive custody, care, and control and education of the children be awarded to plaintiff; and (3) that plaintiff "shall have the right, at such time in the future as she shall be advised, to apply to the court for such suitable allowance and sum to be paid her by said defendant for her support during her life, and such further sums as may be necessary in order to enable her to make proper compensation to her attorneys and counsel in said action, and to enforce this decree and judgment." On the 7th day of September, 1894, on due notice, the defendant moved the court for an order (1) vacating the judgment in so far as the same relates to alimony, or any provision for the support of plaintiff, or for the support of the children of plaintiff and defendant; (2) vacating the judgment so far as it relates to the care, custody, and control of the children; (3) vacating the judgment so far as it relates to alimony, or allowance for the support of plaintiff or the children,—and for an order striking out from the judgment all the provisions relating to or providing for alimony, or support for the plaintiff or the minor children of plaintiff and defendant, or awarding or providing for the custody, care, or control of the said two minor children. The motion was based upon the claim that the court had no jurisdiction over the subject-matter of this action, in so far as it relates to the matters, subjects, and things hereinbefore specified, and had no jurisdiction or power or authority to make any order or judgment in relation to the subject-matters and things aforesaid, and had no jurisdiction over the person of the defendant sufficient to enable, authorize, or empower it to make any order, judgment, or provision in relation to said subject-matters and things, and that said defendant was at the time of the commencement of this action, and ever since has been, and now is, without the jurisdiction of the said court, and without the territorial limits of the state of California, and has never been served with process herein personally, and no service of process has been had herein to enable the court to make any order, judgment, or provision in regard to the subjects, matters, and things aforesaid, and that said infant children of plaintiff and defendant were not at the time of the commencement of this action, and never since have been, and are not now, within the state of California. In support of the motion, various affidavits were read, showing the above facts and others.

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[1] Rehearing denied.

Appellant here bases his claim for reversal upon three grounds: First, that the proof of publication shows that constructive service has never been had according to the statutes of this state, and that, therefore, the judgment is wholly void; second, the defendant and children were at the time of the attempted service of summons domiciled in France, and therefore the court had no jurisdiction to award the custody of the children to plaintiff, or to provide for alimony; and, third, that the mere fact that the defendant and children were without the territorial limits of California when the action was commenced deprives the court of jurisdiction, even admitting that defendant and the children are domiciled in California, and the constructive service of summons was in all respects regular. Respondent admits the facts in regard to the departure of defendant from the state with the children, but claims that, as matter of law and fact, it appears that the domicile of the defendant and children is, and has always been, in California; and she contends that, such being the case, the court acquired jurisdiction, not only to grant the divorce to her, but to enter a judgment in personam against the defendant, valid at least in California. She also contends that the judgment awarding to plaintiff the custody of the children is in rem; that it is valid, because it is a mere incident to the divorce; and that, upon a dissolution of the marriage, it was necessary to provide for the children. Furthermore, she insists that there is no judgment for alimony, or for an allowance of any kind.

Conceding that the defendant and the children are all domiciled in California, although in fact absent from the state at the time of the commencement of the action and since, and that the constructive service of summons was sufficient to give the court jurisdiction to grant the divorce, did the court have the power to award to plaintiff the exclusive custody of the children, and to allow alimony? I have concluded that it had no such power. Some cases are cited which seem to hold that a personal judgment obtained by constructive service of the summons is valid within the state, although the defendant may have been in fact absent from the state at the time of such service. As to most of these cases, it may be said that such statements are entirely obiter, the question before the court being as to the extraterritorial effect of such judgment. In such cases the argument is, in general, that, conceding the validity of the judgment within the state where rendered, another state will not recognize its validity, because it will not permit the process of another state to be served within its territory, so as to compel one resident there, or in fact being there, to answer a writ issued by the courts of such foreign state. It is a sort of an invasion of a state to serve a foreign writ there at all. The logic would require the courts to go further, and hold that such judgment is wholly void. Constructive service upon a party who is within the state does not raise the question. The question there is simply whether a defendant had such reasonable opportunity to be heard as will constitute due process. The leading case upon subjects of this character is Pennoyer v. Neff, 95 U. S. 714. Counsel for respondent contends that it is not there held that jurisdiction to enter a personal judgment cannot be obtained over one domiciled in the state by constructive service, when such defendant is absent from the state at the time of the attempted service, but only that such service is not good against a defendant who is not only without the state, but is actually domiciled elsewhere. Domicile has never, so far as I am aware, been made the test of jurisdiction to render a personal judgment. The question there is always whether there has been due process, —whether the defendant has had a reasonable opportunity to be heard. Substituted service may be valid upon those within the state when the same service would be void as to those without the state. As to those within the state, the question would be whether it has afforded a defendant a reasonable opportunity to be heard. But the process cannot go beyond the state, and compel any person in another state to resort to the state where the action is pending, there to make his defense. No service will be recognized, made there, whether actual or constructive. It is as much an invasion of a foreign jurisdiction to serve a citizen of the state in which the action was brought, temporarily resident there, as it would be to summon from its borders a citizen of such foreign state. If such things could be done, who would determine where the domicile of a particular person really was? Domicile often depends upon secret intention. It would be a most unsatisfactory test. I am aware that it is often said by courts and law writers that domicile is the test of jurisdiction in divorce. This doctrine was built up mainly, if not entirely, to prevent parties really residing in a state from going to another for the purpose of getting a divorce. So far, its effect has been beneficent; but it is obvious, after all, that what in these cases is called domicile is not domicile. As between states, it would be no test at all, unless it is domicile as defined in international law. To concede that each state may give a different definition, or to speak of domicile for the purposes of divorce, as is often done, is to concede that the test is not domicile. These writers and the courts say the test is "actual, bona fide domicile." Since every person always has a domicile, and can have but one, how does "actual and bona fide domicile" differ from "domicile"? It is meant, I presume, that domicile and actual residence must coincide. Where, then, is the jurisdiction in those cases where they do not? One may be domiciled in California who never was within the state, and never had thought of going there. Or he may be domiciled therein years after he has left without the intention of returning. Persons have in California exercised for years all the rights of citizens, and even held high office, who, according to Phillimore, Jacobs, Dicy, and other writers on the law of domicile, never had a domicile here, because they at all times had a fixed and definite intention of returning to their domicile of origin. Had the wife of such a person obtained a divorce while he was here exercising the rights of a citizen of the state, would the courts of any state declare such a decree void upon proof of the existence of such intention? If not, then domicile is not the test of jurisdiction, even as to the status of the litigants, and certainly not in personal actions. Jurisdiction is derived from the constitution and laws creating the court, and I know of no limitation in the constitution of the United States upon the power of a state to give to its courts jurisdiction over all persons found within its borders. Certainly it has not imposed any such limitation as the test of domicile. Domicile is the test of personal rights in regard to inheritance, but, unless made so by local law, is not important as affecting the relation of the individual to the government. The relation of the individual to the government depends upon actual presence within the territorial limits of a country, and upon citizenship or allegiance.

But I cannot understand Pennoyer v. Neff as counsel do. It is true that, in the case in which the judgment there under consideration was rendered, the defendant was said to have been a nonresident, and presumably was domiciled abroad, but that circumstance seems to have been treated as one immaterial in the discussion. The judgment there was personal, and jurisdiction was obtained, if at all, by constructive service of summons. I use the term "constructive service" for convenience, although it does not constitute service at all when the defendant is without the state. No property had been attached. The conclusion is based upon a proposition of international law laid down at the outset: "No state can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Law, c. 2; Wheat. Int. Law, pt. 2, c. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity, and that no tribunal established by it can extend its process beyond that territory so as to subject persons or property to its decisions." The idea seems to be that the state has no jurisdiction over either persons or property not within its territory, and that to allow it to summon one from another state is an encroachment upon the independence of such state. The judge then cites the case of Cooper v. Reynolds, 10 Wall. 308. In that case Justice Miller was considering a judgment obtained by W. G. Brownlow against Reynolds and others for false imprisonment. Brownlow made affidavit to the effect that the defendants had fled from the state, or so absconded or concealed themselves that the ordinary process of law could not reach them. Thereupon, under the statutes of Tennessee, the plaintiff caused an attachment to be issued, and due publication to be made. Default was entered, and a judgment, personal in form, against defendants. The land attached was sold, and the case before the court was ejectment, brought by the original owner against the purchaser under the judgment, who had taken possession. The question was as to the validity and effect of the judgment. The court proceeded to state that the proceeding, in case the defendant did not appear, was strictly in rem; that, if he appeared, it then became in personam. It was there said: "That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions: First, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in the suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit." After making a quotation which includes the above, Judge Field proceeds: "The fact that the defendants in that case had fled from the state, or had concealed themselves so as not to be reached by the ordinary process of the court, and were nonresidents, was not made a point in the decision. The opinion treated them as being without the territorial jurisdiction of the court; and the grounds of the extent of its authority over persons and property thus situated were considered, when they were not brought within its jurisdiction by personal service or voluntary appearance." The judge then proceeds to add that to the doctrine stated in the citation all the judges of the court agree. I understand this to be a deliberate statement to the effect that domicile and residence, or both, are immaterial, as, indeed, they must be, if, as appears all through the opinion, the basis of the doctrine is that process cannot run beyond the limits of the state. I might make further quotations from this opinion, but it is too familiar to the profession to require it. An impartial consideration of the opinion will, I think, convince any one that it holds that process cannot be served upon any one without the state. And the same doctrine is announced in Galpin v. Page, 18 Wall. 350, where it is said: "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant against whom a personal judgment or decree is rendered was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process,—that he never appeared in the action,—the presumption of jurisdiction over his person ceases." From this, and other like expressions in other cases, it is manifest that domicile or even residence in a state, cuts no figure at all. The idea that domicile determines jurisdiction in divorce rests upon the assumption that status depends upon domicile, and is of interest there only. Judge Field could not have had this in mind in Pennoyer v. Neff, and therefore, when he speaks of "absent defendants," he cannot mean those not domiciled within the state, but must have meant simply those physically absent, and upon whom, therefore, personal service of process could not be made. But it is claimed that the doctrine of Pennoyer v. Neff was explained in Machine Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92, in accordance with the views of respondent. I cannot find anything in that case upon the subject. The judgment there under consideration was a judgment by confession entered by a prothonotary in a court of Pennsylvania, in pursuance, as it was claimed, of a bond and warrant of attorney executed by John Benge, who was then a resident and citizen of Maryland. The warrant of attorney authorized any attorney of any court of record to confess judgment against him. The statute of Pennsylvania authorized the prothonotary of any court of record in the state to enter judgment upon such an instrument. An attempt was made to execute this judgment in Maryland. It was claimed that the judgment was void, not being entered in pursuance of the power, and that defendant not having been served with process, and not having appeared, the judgment was without jurisdiction and void. The numerous cases cited by the chief justice were used to show that such a judgment would be held invalid without the state where rendered, and not to show that it should be held valid within the state; and I think the question whether such a judgment would be valid within the state where rendered was not before the court in any of the cited cases. But, in discussing the question as to whether the judgment would be valid in another state, it was assumed that it might be valid within the state where rendered. That was the very question in Pennoyer v. Neff. A personal judgment upon constructive service had been rendered against a nonresident, and property in Oregon sold under execution to satisfy it. The question was as to the validity of the judgment within the state where rendered.

It is contended also by the respondent that the decree is valid as to children and alimony, although the service was constructive, and the court could not render a personal judgment because these are incidents to the divorce. Conceding that they are incidents to the cause of action for a divorce, the result would not follow. In proceedings in rem, where there is no jurisdiction of the person, no such result has ever been recognized. In Cooper v. Reynolds, supra, it was said that costs cannot be recovered from any other property of the defendant. There is, in reality, no defendant save the res. So here it cannot properly be said there was a defendant. In the proceeding the court had before it only the status of the plaintiff. The summons was not really a writ to bring the defendant into court, but merely a notice prescribed by the statute in the interests of fairness, and to rebut the idea that the proceeding was secret. 2 Bish. Mar. & Div. § 159. It brought the res into court, and not the defendant. The adjudication must be confined to that status. It is said that the relation of the parents to the children, and their relation to each other in regard to the children, is a status. If so, it would not help the respondent, for no such status was before the court. But the very meaning of the word "status," both derivative and as defined in legal proceedings, forbids that it should be applied to a mere relation. "Status" implies relations, undoubtedly, but it is not a mere relation. But the authorities are all one way on this subject. If the children are within the jurisdiction, and the defendant is personally served with summons, and perhaps if he is not, the court may award the custody of the children to one of them. It is a mode of appointing a guardian, which is always a matter of local control, regardless of the legal domicile of the children, if domicile and residence do not coincide. It seems to have been held that, when the defendant appears and makes issue upon the point, the court may determine that one spouse is a suitable person to have the custody and control of the children, and that the other is not. People v. Allen, 40 Hun, 611. An appeal was taken from the order made in that case, which was a proceeding in habeas corpus, to the court of appeals. There the appeal was discharged because it appeared that the lower court, "in view of all the existing facts relating to the welfare and interests of the infants, exercised its discretion in awarding to the mother the custody of the children, and, in so doing it, gave to the Illinois decree, not the force of an estoppel, or the conclusive effect sometimes due to a judgment, but simply regarded it as a fact or circumstance bearing upon the discretion to be exercised, without dictating or controlling it." This seems to hold that, without the state, such a finding would have no binding force. But where, as in this case, no personal judgment could be entered, there can be no question. Van Fleet, Coll. Attack, §§ 389, 391, and authorities cited. And Judge Cooley, in his Constitutional Limitations (6th Ed., p. 499), says: "The publication which is permitted by the statute is sufficient to justify a decree in these cases changing the status of the complaining party, and thereby terminating the marriage; and it might be sufficient also to empower the court to pass upon the question of the custody and control of the children of the marriage, if they were then within its jurisdiction. But a decree on this subject would only be absolutely binding on the parties while the children remained within the jurisdiction. If they acquire a domicile in another state or country, the judicial tribunals of that state or country would have authority to determine the question of their guardianship there. But in divorce cases, no more than in any other, can the court make a decree for the payment of money by a defendant not served with process, and not appearing in the case, which shall be binding upon him personally. It must follow, in such a case, that the wife, when complainant, cannot obtain a valid decree for alimony, nor a valid judgment for costs. * * * The remedy of the complainant must generally, in these cases, be confined to a dissolution of the marriage, with the incident benfits springing therefrom, and to an order for the custody of the children, if within the state." See, also, Freem. Judgm. §§ 584, 585; Brown, Jur. §§ 6, 8, 78, 79. The doctrine is very clearly stated in Woodworth v. Spring, 4 Allen, 321: "Every sovereignty exercises the right of determining the status or condition of persons found within its jurisdiction. The laws of a foreign state cannot be permitted to intervene to affect the personal rights or privileges even of their own citizens, while they are residing on the territory and within the jurisdiction of an independent government."

Respondent contends that there is no judgment for alimony. If so, it is not apparent how plaintiff would be injured by striking from the decree the clause complained of. I think the decree, if valid, settles the right of plaintiff to alimony for her support during life, and, as the court had no jurisdiction to provide for alimony, that part of the decree should be stricken out.

Respondent contends that a motion to vacate the judgment in this case could only be maintained under section 473 of the Code of Civil Procedure. The point of the contention, as I understand it, is that defendant should come in and submit himself to the jurisdiction of the court, show a meritorious defense, and ask leave to have his defense considered. It is obvious, of course, that defendant cannot do this; for he cannot show that the judgment was taken against him by his inadvertence, mistake, or excusable neglect. The argument, therefore, is that no such motion will lie. No authority for such a proposition is cited, unless Jacks v. Baldez, 97 Cal. 91, 31 Pac. 899, may be claimed to have that effect. In that case, however, the motion was to vacate a judgment rendered because a demurrer was sustained to a complaint, and the plaintiff failed to amend within the time allowed. The motion was made 11 months after the entry of judgment. Plaintiff was not notified, as the Code requires, of the order sustaining the demurrer. If this case is not put upon the ground that the failure to give the notice was not jurisdictional, I think it was overruled by Norton v. Railroad Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452. It was, however, but a default, and the parties were in court. A plaintiff who for six months should fail to know what had become of a demurrer which had been submitted for decision would be guilty of great negligence. The remedy offered by section 473 was ample. The case of Norton v. Railroad Co. seems in point here.

It is also claimed that no appeal lies to this court from an order refusing to set aside the judgment, because the judgment was appealable. To this proposition many decisions of this court are cited. I do not care to review these cases. No doubt it has been held—and, I think, correctly—that, when a motion is made to vacate an order under such circumstances that it merely calls upon the court to repeat or overrule the former ruling on the same facts, the last order is not appealable,—not because the last order is not within the terms of section 963 of the Code, allowing appeals, for it may be, but because it would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appealing, contrary to the intent of the statute. Nor will such practice be allowed merely to permit a litigant to take an exception, or get a bill of exceptions, which he has neglected to do at the proper time. But I see no reason why this appeal should not be entertained. It is plainly within the terms of the statute allowing appeals, and no other method is suggested in which the right of the appellant to the relief sought could be considered here. An appeal upon the judgment roll would not present all the facts upon which the motion is based, even if one may have a bill of exceptions when he has not been in court and has taken no exceptions. Besides, it is a case in which it was eminently proper, if not necessary, that relief should first be asked from the trial court. Its action could not have been asked in any other mode. The defendant was not in court, and had no opportunity to be heard. The order is reversed, and the cause remanded, with directions to the court to grant appellant's motion.

We concur: HARRISON, J.; GAROUTTE, J.; HENSHAW, J.

McFARLAND, J. I dissent. This is an action of divorce, and the present appeal is by defendant from an order of the superior court denying his motion to strike from the judgment rendered in favor of plaintiff all the provisions thereof relating to the custody of the minor children of the parties, and to support by way of alimony. The facts of the case are these: The respondent and appellant were both born in, and are citizens of, the state of California. They were married, and their children were born, in this state, and they have been continuously domiciled and resident here. The parties have two children,—a girl named Lorraine, about five years old at the commencement of this action, and a boy named James Francis, about two years old at that time. This action was commenced December 20, 1893. About three weeks before that time, appellant, by force and fraud, took the child James Francis away from respondent, and, on the following day, took and carried away both of said children, and kept them secreted from respondent, and has never since let her see them; and, a short time before the commencement of this action, he clandestinely left the state of California, and took said children with him; and about November 27, 1893, he clandestinely left the United States, taking said children with him, and since then has temporarily sojourned in the city of Paris, in France. In January, 1894, he made application to the proper authorities of France for permission to be domiciled there; and it is admitted by respondent that he obtained such permission in July, 1894. But it appears by the preponderance of evidence that he claimed his legal residence and domicile to be in the city of San Francisco, Cal.; that "his purpose in applying for permission to fix his domicile in France was to prevent his wife from serving summons on him in an action for divorce which she had commenced, and also to keep her from getting possession of their children"; that his sojourning in France was only temporary, for the purposes above mentioned; and that his intention was and is to return to California, where all his interests are, as soon as these purposes shall be subserved. Service of summons was duly made upon him by publication, and sending him a copy of complaint and summons to Paris, France, in accordance with the provisions of the statute of California on that subject; and, default having been regularly entered against him, judgment, after the introduction of evidence, was duly entered in favor of respondent. By said judgment (1) a divorce was granted respondent upon the grounds of the adultery and extreme cruelty of appellant; (2) the custody of the said two children was given to respondent; and (3) it was further ordered that respondent "shall have the right, at such time in the future as she shall be advised, to apply to the court for suitable allowance and sum to be paid to her by said defendant for her support during life," etc., as she may be entitled to under her complaint. The motion made by appellant, from the refusal of which this appeal is taken, was to strike out the said second and third parts of said judgment, upon the ground that the said service of summons did not give the court jurisdiction over the matters embraced in those parts of the judgment.

Waiving the objection of respondent that said motion was not a proper remedy, under our system of practice, it is apparent that the motion could be granted only upon the theory that the judgment, so far as it embraces the parts sought to be stricken out, is void; absolutely void; void in the state where it was rendered. And a court should certainly not judicially declare such utter inefficiency of a sovereign state to deal with the property and personal rights of its own citizens, unless it be driven to such declaration by the force of inevitable judicial authority. I do not think that there is such authority. The case chiefly relied on is Pennoyer v. Neff, 95 U. S. 714, which is declared by counsel for appellant, and by others, to have established what is called the "modern" doctrine in regard to the jurisdiction of state courts over persons not personally served with process within the state. A close examination of that case shows, however, that the main proposition decided by it—which may, perhaps, be styled "modern"—is that a judgment in personam rendered in a state court against a nonresident upon substituted service cannot be enforced even in the state where it was rendered, or satisfied even out of property situated within the state where it was rendered, while, before that, the weight of authority was that, although the courts of another state would not recognize such a judgment, it was valid in the state where it was rendered, and could be satisfied out of property of the defendant situated within that state. This is evidently the view of that case taken by Mr. Freeman, for in his work on Judgments (section 567) he says: "Until a comparatively recent date, the opinion extensively prevailed that judgments in personam, entered after constructive service of process upon a nonresident, while they were not enforceable beyond the limits of the state where entered, were nevertheless so far valid in that state. This opinion has been overthrown by the supreme court of the United States in the case of Pennoyer v. Neff, 95 U. S. 714." Many of the authorities which show that such was the former doctrine may be found in the cases cited in the briefs, and in the opinion of the court in Weaver v. Boggs, 38 Md. 255. In that case the court states the rule in this language: "It is well settled that a judgment obtained in a court of one state cannot be enforced in the courts and against a citizen of another, unless the court rendering the judgment has acquired jurisdiction over the defendant by actual service of process upon him, or by his voluntary appearance to the suit, and submission to that jurisdiction. Such a judgment may be perfectly valid in the jurisdiction where rendered, and enforced there, even against the property, assets, and credits of a nonresident defendant there situated, but it cannot be enforced or made the foundation of an action in another state. A law which substitutes constructive for actual service *is binding upon persons domiciled within the state where such law prevails, and as respects property of others situated there*, but can bind neither person nor property beyond its limits." (The italics are ours.) And in Machine Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92, the supreme court of the United States, speaking of the states of Pennsylvania and Maryland, says, "And the distinction between the validity of a judgment rendered in one state, under its local laws on the subject, and its validity in another state, is recognized by the highest tribunals of each of these states."

But, whether or not the state of the law on the question determined by Pennoyer v. Neff was the same before as after that decision, it is apparent that Pennoyer v. Neff did not determine the question involved in the case at bar. There Neff was a bona fide, actual nonresident. The facts of that case were that one Mitchell recovered in a state court of Oregon a personal judgment for professional services against Neff, who was a nonresident of that state, and resided in the state of California; that the service of summons upon Neff was by publication; that, on a common execution issued upon that judgment, certain land of Neff, situated in Oregon, was sold to Pennoyer; and that Neff brought an action against Pennoyer to recover said land, and recovered upon the ground that the judgment was not valid, even in Oregon, and could not be satisfied out of land in Oregon, because substituted service would not support a judgment against a nonresident. There was no claim that the defendant had either residence or domicile in Oregon. In that case the fact was that Neff was, in every sense, a nonresident of Oregon, having his domicile and citizenship elsewhere; and the scope of a judicial decision is limited by the facts upon which it is based. In the second place, however difficult it may be to accurately define "residence," in its legal signification, and to distinguish it from "domicile," it is apparent that in the opinion in Pennoyer v. Neff the word "nonresident" is used as expressing the fact of an actual, bona fide residence outside of the state where the judgment is rendered, —such a residence as usually accompanies domicile, and not a mere temporary flight from one's home, in fraudem legis. Indeed, throughout the opinion the words "residence" and "domicile" are used indiscriminately, and as synonymous. There was no necessity in that case to notice any distinction, if there be any, between the words; for Neff was a nonresident, in every sense, either of residence or domicile, and the opinion is to be taken as written in view of that fact. For instance, it is said in the opinion that "the plaintiff here was a nonresident of the state"; again, it is said that there cannot be an encroachment upon the independence of the state "in which the persons are domiciled"; again, it is said that "the state, through its tribunals, may compel persons domiciled within its limits to execute," etc.; again, it is said that property within a state, owned by "nonresidents," may be subjected to certain processes, and that this "in no respect infringes upon the sovereignty of the state where the owners are domiciled"; again, "process from tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory, and respond to proceedings against them;" and finally the court, in the last sentence of its opinion, says, "The question here respects only the validity of a money judgment rendered in one state, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein." And as, in the case at bar, the appellant was neither a nonresident of the state where the judgment was rendered nor domiciled elsewhere, as was the plaintiff in Pennoyer v. Neff, the latter case cannot be relied on as imperative authority for holding that the power of the state of California to control and preserve, through her tribunals, the personal and property rights of her own citizens, can be evaded by flight perpetrated for that express purpose. As to the reasons sometimes given for an opposite rule, how can the dangers of judgments upon substituted service against persons who might not have seen the publication be marshaled in aid of a party who, knowing of the coming suit, flees to avoid it? In Cooper v. Reynolds, 10 Wall. 308, no question was raised as to the validity of the asserted nonresidence of Reynolds.

That the laws of a sovereign are binding upon all its citizens domiciled within its borders, whether temporarily absent or not, seems to be the clear result of the authorities. "The laws of a sovereign rightfully extend over persons who are domiciled within his territory." Story, Confl. Laws, § 539. Freeman—although he also includes the extraterritorial effect of a judgment, which does not concern us here—sums up the result of the authorities as follows: "The position, however, which seems to be best sustained, both by reason and precedents, is that each state has the authority to provide the means by which its own citizens may be brought before the courts; that the courts of other states have no authority to disregard the means thus provided; and, finally, that every judgment or decree obtained in a state against some of its citizens, by virtue of a lawful though constructive service of process, should be obligatory upon such citizens in every other state whence it is taken. Nor is it destructive of the extraterritorial effect of a judgment based on constructive service that the defendant, being a citizen of the state, was temporarily absent therefrom. It is sufficient that he was at the time subject to the laws of the state, and to the territorial authority of the court." There are numerous judicial decisions to the same point, one or two of which we will notice: In Henderson v. Staniford, 105 Mass. 504, the court say: "The defendant was not in California when the action was commenced against him there, nor at any time during its pendency. No service of process or notice was ever made upon him personally. He did not appear by counsel, or otherwise, nor assent to the judgment which was rendered upon his default of appearance. But he had been for a long time before that a resident of California, the contract was made there, and that continued to be his legal domicile when judgment was rendered. He was therefore, upon principle of international rights, subject to the laws and to the jurisdiction of the courts of that state." In Welch v. Sykes, 3 Gilman, 201, the supreme court of Illinois declare that "it is competent for each state to prescribe the mode of bringing parties before its courts," and that, "although its regulations in this respect can have no extraterritorial operation, they are nevertheless binding on its own citizens." In Beard v. Beard, 21 Ind. 321, the question is quite exhaustively considered, and many authorities examined, and the general conclusion is that "notwithstanding a state may authorize its courts to render personal judgment, upon constructive notice, against its citizens, it cannot, we think, authorize such a judgment upon such notice against a citizen of another state, resident in such other state." But the statute there did not provide for service by publication, and the court say, "In such a case (that is, of temporary absence of a resident of the state), notice must be given by leaving a copy of process at his last place of residence." In Burnam v. Com., 1 Duv. 211, the court of appeals of Kentucky, considering a statute which provided for substituted service, said: "We cannot adjudge any provision in the act to be unconstitutional. As in other cases where actual notice cannot be given to absent defendants, there must either be no remedy, or constructive notice must be substituted as sufficient; and what constructive notice shall be given is a question of legislative discretion, rather than of power." In that case the defendants were presumably citizens and residents of the state, although temporarily absent. In Huntley v. Baker, 33 Hun, 578, the action was upon a money judgment rendered against the defendant in the state of Wisconsin, upon substituted service, when the defendant, who had lived for a long time in Wisconsin, was absent from that state, and in fact he never returned to it. The court, after referring to the doctrine that there is generally no extraterritorial jurisdiction, say: "But it has been repeatedly held in England that this doctrine is not applicable when the person sought to be charged by judgment is a subject or citizen of the country where and at the time the proceedings are taken, and when they are in conformity to the statute there, although the person be then absent from the country; and that is put upon the general ground that the person domiciled there owes allegiance to the country, and submission to its laws." It is then stated that there are not many reported cases on the point in this country, but reference is made to cases in the United States supreme court, and in the court of appeals of New York, where the English cases are cited with approval. The court then say: "Without stating the principle more at length, it may be assumed that by reason of the relation between the state and the citizen, which affords protection to him and his property, and imposes upon him duties as such, he may be charged by judgment in personam, binding on him everywhere, as the result of legal proceedings instituted and carried on in conformity to the statute of the state, prescribing a method of service which is not personal, and which in fact may not become actual notice to him. And this may be accomplished in his lawful absence from the state." The court then states that it is not necessary to consider the distinction between domicile and residence, but that such question was "one of fact, dependent upon all the circumstances appearing by and inferable from the testimony, to which it is unnecessary here to refer in detail," which justified the referee to conclude that the domicile or residence of the defendant had not been changed. And the evidence in that case was vastly stronger in favor of a permanent change of residence and domicile than in the case at bar. There are many other authorities to the same point, but we will only refer, in addition to those above cited, to Black, Judgm. § 907, and the numerous cases cited and quoted from in the notes to Steamboat Co. v. Foster, to be found in 48 Am. Dec., commencing at page 274.

In nearly all the cases on the subject the words "resident," "domicile," "citizen," and "inhabitant" are used indiscriminately to signify an actual, permanent residence, which has not been actually and in good faith changed; and "nonresident" is applied to one who is not such a citizen, inhabitant, or resident of, and has not such domicile within, the state in which the judgment is rendered. We are not concerned here with the question how far full faith and credit should be given to the judgment in another state, but only with the question, is it void in this state? As the appellant was not a nonresident, the case does not fall within the decision in Pennoyer v. Neff, and under the general authorities the judgment is valid in the state in which it was rendered. All that is necessary to be determined in this case is that a citizen and resident of California cannot escape the performance of his duties, and baffle our courts in their attempts to enforce the rights of others against him. by sudden flight and temporary absence, expressly intended for that purpose.

Every rule of law, and every sentiment of justice, is an obstruction to the success of such strategy. Nor will the affirmance of the order appealed from be violative of either the general international law, or the American interstate law. A sovereign state might be justified in refusing to enforce within its own territory, and against one of its own citizens, a judgment rendered in another state upon substituted service; but neither its interest nor its dignity would be touched by the enforcement of such a judgment by another state within its territory, and against its own citizens.

We cannot see merit in the point made by appellant that the substituted service was not sufficiently in compliance with the statute of this state which provides for it. The main contention is that the statement in the affidavit for publication that the defendant "has departed from the state of California, and is now absent therefrom," is of a mere conclusion, and not of a fact; but it would be difficult to suggest any other language that would express the facts of departure and absence with more clearness and certainty. The fact that a few of those words are used in the statute does not prevent their use in an affidavit, if they are apt words to express the meaning of the affiant.

Respondent contends, also, that the order appealed from should be affirmed upon the further grounds that those parts of the judgment which relate to the custody of the children and alimony are mere incidents to the divorce, and that the jurisdiction to grant the divorce, which is admitted on all hands, carries with it the jurisdiction of the incidents, and, furthermore, that the relation of children to parents is a status, like that of marriage, and that, therefore, an action to determine the custody of children, like a suit for divorce, is in the nature of a proceeding in rem. But it is unnecessary to discuss these points at length, because the views heretofore expressed would be determinative of the case in favor of respondent upon another ground. We may say, however, that, so far as the custody of the children is concerned, this second contention of respondent seems to be correct. The judgment merely determines generally the custody of the children, and whether it could be enforced in another state or country is not here involved. It is settled law that a decree of divorce operates upon the relation, the status, and that, therefore, such a decree founded upon constructive service by publication is valid, even as against one resident and domiciled beyond the state. See cases cited on pages 273, 274, 48 Am. Dec. A judgment for divorce is quasi, at least, in rem. Judgments in rem, it is well known, are not, as the name implies, confined to adjudications against things. They are rendered in many instances where the prior proceedings are entirely in personam, as in cases establishing or dissolving marriages. Freem. Judgm. § 606. In Pennoyer v. Neff, 95 U. S. 734, 735, it is said: "The jurisdiction which every state possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory." Now, is not the relation between parent and child a "civil status"? It is so assumed to be in Cooley, Const. Lim. (6th Ed.) p. 499. In Bish. Mar., Div. & Sep. § 1189, it is said that "the relation of parent and child is a status, * * * like marriage." And in Re Newman's Estate, 75 Cal. 213, 16 Pac. 887, the court said, "So far as the action of Maldonado v. Maldonado affected the status of the parties and the custody of the child, it was a proceeding in rem, and service by publication in such case is good." See, also, Wakefield v. Ives, 35 Iowa, 238, and People v. Allen, 40 Hun, 611. In Brenot v. Brenot, 102 Cal. 294, 36 Pac. 672, it was held that in an action for divorce the custody of the children was an incident in the main relief sought,—the divorce. See, also, Younger v. Younger, 106 Cal. 377, 39 Pac. 779. Upon these authorities, and upon principle, we think that, in an action brought for both divorce and the custody of the children, the latter is an incident of the former, and that the court has jurisdiction over the status founded on the relation of parent and child, as well as of the status founded on the relation of husband and wife, even as against a bona fide nonresident domiciled elsewhere. And in such a case the actual physical presence of the children is no more necessary for jurisdiction over the status in the one instance than is the presence of the husband necessary in the other. It is not necessary to determine whether or not jurisdiction to decree alimony would follow as an incident to the divorce. It is doubtful if the judgment in this case really awards any alimony, but, if it does, its validity in that respect has sufficient basis in the proposition first discussed in this opinion.

With respect to the statement of facts hereinbefore made, it is proper to observe that where, as in this case, the appeal is from a mere order of the court below granting or denying a motion, and where findings are not necessary, this court will assume the existence of such facts necessary to support the ruling of the lower court as fairly appear from the evidence. Here the preponderance of the evidence is largely in support of the facts above stated. Indeed, the fact that appellant fled the state, and clandestinely carried away the children, to avoid the action, is too apparent to be even debatable. The order appealed from should be affirmed.

We concur: BEATTY, C. J., and VAN FLEET, J.

(112 Cal. 131)

DE LA MONTANYA v. DE LA MONTANYA et al. (No. 15,997.)[1]

(Supreme Court of California. March 24, 1896.)

Guardian of Infant—Appointment—Jurisdiction.

A court has no jurisdiction to appoint a guardian of infants absent from the state, though their domicile be within it.

In bank. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Lorraine W. De La Montanya against James De La Montanya, Jr., her husband, and their children, for the custody of the children. Plaintiff had judgment, and from an order denying his motion for its vacation the husband appeals. Reversed.

Dorn & Dorn, for appellant. Garber, Boalt & Bishop, for respondent. Edwin R. Taylor, for guardian.

TEMPLE, J. This is an action prosecuted by the respondent for the custody of the children of plaintiff and defendant James De La Montanya, Jr., appellant. The children are the other defendants. The facts in regard to the time of the commencement of the action and the publication of summons, and the absence of the defendants from the state, are in all respects as in the divorce case, No. 15,996, just decided (44 Pac. 345). Default was entered May 8, 1894, and, on the same day, Francis E. Spencer was appointed guardian ad litem for the infant defendants. On the same day he filed an answer admitting all the allegations of the complaint, and joining in the prayer. Appellant did not appear in the case, and none of the defendants were within the jurisdiction of the court at any time after the suit was instituted. May 15, 1894, a decree was entered which formally adjudged (1) that all the defendants were citizens of this state, and domiciled therein; (2) that the removal by the appellant of the children from the state was without right, and in fraud and violation of the rights of plaintiff; (3) awarding exclusive custody of the children to plaintiff; and (4) requiring appellant to forthwith bring the infants into the state, and deliver them to the plaintiff. September 3, 1894, appellant, after due notice, applied for an order vacating and setting aside the decree, on the ground that the court had no jurisdiction to make it. Affidavits were read on the hearing setting forth facts showing the absence of all the defendants from the state. The motion was denied, and this appeal brought.

The order must be reversed, for the reasons given in the divorce case. Jurisdiction to appoint a guardian for infants, under the American system, is entirely local. I do not doubt that the mere presence of infants within a jurisdiction is sufficient to confer jurisdiction, although they may be residents of another state. But, as such jurisdiction is always exercised for the good of the child, the courts would never allow the power to be used for purposes of oppression, or to prevent an infant temporarily within its jurisdiction from being taken away, when its best interests required it, to its more permanent residence. The jurisdiction is never used except when necessary for the good of the child. Counsel claim here, also, as in the other case, that domicile, and not actual residence, is the test of jurisdiction to appoint a guardian of the person of infants. The case apparently most relied upon is In re Willoughby, 30 Ch. Div. 324. But that case, if authority at all upon the subject, is the other way. Counsel stated in his argument that England was the domicile at least by choice of the infant's father. Nothing in the case warrants that assertion. The case does not show that either parent of the infant was ever in England, or ever expected to be, or had a domicile there of any kind. On the contrary, it is expressly stated that the infant was domiciled in France, and the whole point of the opinions in the case is to show that domicile is not the test of jurisdiction, but that allegiance is. Judge Lindley, in his opinion on appeal, states the facts very curtly, as is the manner in the English courts: "This is a curious case. The infant is English by nationality, and French by domicile. Her father is dead, and her mother is, by the French law, under the Code Civil, the guardian of the infant. The infant is not resident here, and has no property here." The infant was simply a grandchild of an Englishman, and therefore, by the law of England, declared to be an English subject; and the broad doctrine is announced that the court had the power to appoint a guardian for an infant subject of Great Britain, wherever the infant might be, and although domiciled in a foreign country. By the same rule, it would have jurisdiction to appoint a guardian for any infant in the United States whose grandfather was a natural born subject of Great Britain, though its parents were natural born citizens of the United States, and neither infant nor its parents had ever been domiciled in England. It is easy to see that the case proves nothing for respondent. The order is reversed, and the trial court directed to grant to appellant the relief demanded in his motion.

We concur: HARRISON, J.; HENSHAW, J.; GAROUTTE, J.

(112 Cal. 46)

DUNN v. PRICE et al. (L. A. 82.)

(Supreme Court of California. March 24, 1896.)

Written Contract—Parol Evidence.

B., who had delivered personal property to certain persons under a written agreement to give them a bill of sale when their note for the price was fully paid, assigned the contract, giving the assignee authority to complete the same and collect the money; but the assignment did not purport to transfer title to the property, and B. thereafter received from C., one of the buyers, the latter's share of the note. Plaintiff, who claimed under a bill of sale from B.'s assignee, sought to recover the property from defendants, who had purchased the same from C. *Held*, that evidence was admissible to show an oral agreement between B. and C. that the latter should have title to one-third of the property on payment of his share of the price, since Code Civ. Proc. § 1856, makes parol evidence incompetent for the purpose of varying the terms of a written instrument only as between the parties thereto and their representatives or successors in interest, and plaintiff was neither.

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[1] Rehearing denied.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by James T. Dunn against Charles Price and others for the recovery of personal property. From an order denying a motion for a new trial after judgment for defendants, plaintiff appeals. Affirmed.

Wm. T. Kendrick, for appellant. W. B. Mathews and Walter Bordwell, for respondents.

BELCHER, C. This is an action to recover the possession or value, alleged to be $416, of four horses and two sets of harness, with damages for the detention thereof. The answer denied that the plaintiff was the owner or entitled to the possession of the described property, or of any part thereof, at the time of the commencement of the action, or at any time prior thereto, and denied that defendants had ever unlawfully withheld or detained said property, or any of the same, from the possession of the plaintiff. The case was tried by the court without a jury, and the findings were that the plaintiff was not at any of the times mentioned in the complaint, or at the commencement of the action, the owner of, or entitled to the possession of, the property described in the complaint, or of any part thereof. Judgment was accordingly entered that the plaintiff take nothing by the action. A motion for new trial was subsequently made upon a bill of exceptions, and denied, and from that order this appeal is prosecuted. The bill of exceptions contains no specifications that the findings were not justified by the evidence, and the only points made for a reversal are that the court erred in certain rulings upon the admission of evidence.

It appears from the record that on September 16, 1890, W. W. Howard, as party of the first part, entered into a written agreement with L. W. Weller, W. B. Brainard, and J. A. Brainard, as parties of the second part, whereby he agreed to sell to them, and they agreed to buy of him, a large amount of personal property, including that described in the complaint. The price to be paid was $1,366.10, for which a promissory note was given, payable three months after date, with interest at the rate of 2½ per cent. per month. The agreement provided that "the title of all the aforesaid personal property shall be and remain in and belong to the said party of the first part until the aforesaid payments of said promissory note have been made in full," and, "that any sum or sums of money that the parties of the second part shall pay to the party of the first part, upon the aforesaid note, before final payment thereof, shall be considered and treated as rent for the use of the aforesaid personal property, which the first party may give to them, until the whole of said note has been paid, and that on the full and complete payment of said note the party of the first part will make, execute, and deliver to the parties of the second part, a good and sufficient bill of sale of the aforesaid personal property, and deliver to them the absolute and unconditional possession thereof; and the parties of the second part hereby agree that they will give, as security that they will purchase and pay for all the aforesaid personal property in the manner hereinbefore described, a crop mortgage on all crops and grain put in by them in Los Angeles county during the winter and spring of 1890 and 1891, as soon as said crops are planted." Attached to this agreement was an assignment thereof made by Howard, and dated October 30, 1891, in these words: "For a valuable consideration in hand paid, I hereby sell, assign, transfer, and set over to California Loan & Trust Company, all my right, title, and interest in and to the within agreement, and authorize and empower and direct the California Loan & Trust Company to fulfill all agreements therein and collect all money thereon and do all other acts and things as fully as I might or could do." On August 26, 1892, the California Loan & Trust Company executed to J. T. Dunn, the plaintiff, a bill of sale of all the property described in the said agreement; and on the next day he entered into a new agreement with said L. W. Weller, W. B. Brainard, and J. A. Brainard, whereby he agreed to sell to them, and they to buy of him, all of the said property, for the sum of $1,000, for which a note was given, payable three months after date, with interest at the rate of 10 per cent. per annum, and which was to be secured by a crop mortgage on all crops and grain put in by them in Los Angeles county during the winter and spring of 1892 and 1893, as soon as crops are planted. This agreement contained the same provisions in regard to the title, the advance payments, and the making a bill of sale, etc., as those above quoted from the agreement made by Howard. Indorsed upon this agreement, under date of October 12, 1893, was a release by L. W. Weller and W. B. Brainard to James T. Dunn from all his obligations to them under the said agreement, and a transfer by them to him of all their interest in or to the property described in the said agreement. The only right or title to the property in controversy shown to be in the plaintiff was such as he acquired through the assignment of the Howard contract to the California Loan & Trust Company, and the bill of sale of the company to him. And the only title to the said property shown to be in defendants was such as they acquired by a purchase thereof from J. A. Brainard. George Price, one of the defendants, testified that he bought the horses of J. A. Brainard in October, 1893, and gave to W. W. Howard a mortgage thereon for the full purchase price, and also a crop mortgage for the same debt, which Howard still held at the time of the trial, in January, 1894. J. A. Brainard testified that the only title he ever had to the property he acquired from W. W. Howard. He was then asked by counsel for defendants, and answered, the following questions: "Q. Was there any understanding or agreement between you and Mr. Howard, at the time you executed that contract, with reference to your paying any portion of it? A. Yes, sir, there was. Q. State what that agreement was. A. When Mr. Howard had the contract drawn up, or was going to draw it up, I told him I would not sign the contract unless, if either one paid his own one-third, he was to have one-third of the stuff clear, and Mr. Howard said that was all right. I made this statement to him for my benefit only. Q. Did you subsequently make any payment to Mr. Howard on that contract? A. I paid Mr. Howard $585 as one-third of the note. That was about one year from the time we dissolved. Q. At the time you signed that contract, did Mr. Howard agree that, if you paid one-third of the purchase price, you should have one-third of the stock and the property released to you? A. He did. This $585 which I paid Howard was one-third of the amount that was at that time due on the contract." W. B. Brainard testified in reference to the release indorsed upon the plaintiff's agreement or contract under date of October 12, 1893. He was asked by counsel for defendant: "Q. What was the consideration for the execution of this instrument? A. The consideration for the execution of the instrument was J. T. Dunn's agreement with us, at the time of the execution, to release myself and L. W. Weller from all obligations under our agreement to purchase the horses described in the complaint, and the other property described in the agreement." The above questions were severally objected to by counsel for plaintiff, upon the ground that they were incompetent, irrelevant, and immaterial, and the objections were overruled. These rulings constitute the errors complained of, and upon which the plaintiff relies for a reversal of the order appealed from.

It is claimed that the answers to the first four questions were improperly admitted, because the object and effect of the evidence was to vary and supersede the terms of a written agreement by a contemporaneous oral agreement concerning the same matter, which is inhibited by section 1625 of the Civil Code, and section 1856 of the Code of Civil Procedure. The sections referred to read as follows:

"Sec. 1625. The execution of a contract in writing, whether the law requires it to be in writing or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

"Sec. 1856. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and, therefore, there can be between the parties and their representatives, or successors in interest, no evidence of the terms of agreement other than the contents of the writing," etc.

It will be observed that the rule thus declared applies only as between the parties to the instrument, and their representatives or successors in interest. It cannot be invoked by strangers to the instrument. "The rule that parol testimony may not be given to contradict a written contract applies only in suits between the parties to it, or their privies. In a contention between a party to an instrument and a stranger, either can give parol testimony differing from the contents of the instrument." McMasters v. Insurance Co., 55 N. Y. 222; Lowell Manuf'g Co. v. Safeguard Fire Ins. Co., 88 N. Y. 591; Darby v. Hotel Co., 97 Cal. 384, 32 Pac. 454. The evidence objected to was evidently admitted upon the theory that the plaintiff was not shown to be the representative or successor in interest of Howard, as to the property involved in this action; and this theory, so far as we can discover from the record, was very clearly tenable. Howard must be presumed to have owned the property which he contracted to sell by his agreement of September 16, 1890. The assignment of that agreement to the California Loan & Trust Company did not purport to transfer the title to any of the property described, but, in effect, seems to have been only a power of attorney authorizing the company to carry out the contract, and to collect the money that would become due thereon, and then execute a bill of sale to the purchasers. The note does not appear to have been assigned, and it must have been intended that the money, when collected, should be paid over to Howard. And that this must have been so is further shown by the fact that Howard afterwards received from J. A. Brainard one-third of the amount due on the note, and also, as late as October, 1893, received from the defendants a mortgage on the horses, and a crop mortgage to secure their purchase price. No authority is shown in the trust company to sell the property to any third party, and, under these circumstances, the court below might properly have concluded that the bill of sale from the company to the plaintiff passed no title, and was without effect. Besides, section 1698 of the Civil Code provides that "a contract in writing may be altered by a contract in writing, or by an executed oral agreement." Here it appears that the oral agreement between Howard and Brainard was executed, and the evidence as to the circumstances attending it was therefore properly admitted.

The last question objected to was neither irrelevant nor incompetent. Plaintiff having accepted a release and transfer from L. W. Weller and W. B. Brainard, it was proper to show what was the consideration for that release and transfer. It may be, as claimed, that J. A. Brainard was not thereby released from any of his obligations, but that was a question of law. We see no prejudicial error in any of the rulings complained of, and advise that the order appealed from be affirmed.

We concur: BRITT, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(112 Cal. 8)

MAIER v. FREEMAN et al. (L. A. 10.) [1]

(Supreme Court of California. March 24, 1896.)

CHATTEL MORTGAGES — RIGHTS OF MORTGAGEE — SUBSTITUTION—GARNISHMENT.

1. Where the mortgagee authorizes the mortgagor, before the mortgage debt is due, to sell the mortgaged chattels, the proceeds to be applied upon the mortgage debt, the mortgagee has no lien on the unpaid price due the mortgagor, as against creditors of the mortgagor attaching the purchase money by garnishment proceeding; Civ. Code, § 2888, providing that the title to mortgaged chattels remains in the mortgagor.

2. Service of a writ of garnishment by a creditor of the seller upon the buyer before completion of the sale, by delivery of the chattels sold, creates no lien on the purchase price.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Interpleader by Simon Maier against B. N. Freeman and others. From the judgment, defendant Freeman and certain others appeal. Affirmed.

Ben Goodrich, A. B. McCutchen, and John D. Pope, for appellants. Allen & Flint and Graves, O'Melveny & Shankland, for respondent.

BRITT, C. The plaintiff, Maier, being indebted in the sum of $2,898.90 for sheep purchased by him from one Nellis, and conflicting claims being made upon him for the money by several creditors of Nellis, he instituted this action against said creditors and Nellis to compel them to interplead concerning their several pretensions. This being done, after trial, the court entered judgment awarding the fund (which Maier had then paid into court) to certain of the defendants who had summoned Maier as garnishee in the course of actions prosecuted by them, respectively, against Nellis. By such determination of the court the demands of Haas, Baruch & Co., a copartnership, and of defendant Perkins, are to be first paid, and the fund is sufficient to satisfy them in full. The residue thereof is to be paid to defendant Boyce, and is not sufficient to pay the whole of his claim. Defendants Freeman, Kimball, and Hoskins constitute a copartnership engaged in business in the territory of Arizona, under the firm name of the Arizona Central Bank; they having complied with the laws of the territory respecting fictitious names of partnerships, and being authorized to carry on business under that name. They claim the whole of the fund in dispute by reason of a chattel mortgage made by Nellis to them upon the said sheep, and certain other transactions they had with him touching the sheep, before the sale thereof to Maier. The court gave judgment in favor of Freeman and his said copartners, against Nellis, personally, for the unpaid amount of the debt specified in the mortgage,—something over $4,000. They appeal from that portion of the judgment which applies the fund to the payment of the attaching creditors, and ignores their mortgage security. Boyce appeals from so much of the judgment as postpones his demand to those of Haas, Baruch & Co. and Perkins.

The appeal of Freeman, Kimball, and Hoskins presents several interesting questions (some of them not necessary to be now considered), which have been argued by their counsel ably and ingeniously; but, in our opinion, the judgment adverse to them was right. On November 28, 1893, before the debt specified in the mortgage became due, the mortgagees agreed with Nellis in writing as follows: "We hereby appoint William Nellis as agent to take six cars of sheep to California, one of which goes to San Bernardino and five to Los Angeles, he to turn over the proceeds of said sheep to us to be applied upon his mortgage to us, which said mortgage covers said sheep. This applies to these six cars only, and extends for ten days only from this date, said sheep to be shipped in our name. Arizona Central Bank, M'tgees, by J. H. Hoskins. 11-28-'93." Appellants allege that it was part of the agreement between the parties to the mortgage that the mortgagor should deposit the net proceeds of the sale of the sheep in a bank at Los Angeles to the credit of the mortgagees; also, that the sale and delivery of the sheep to Maier was made pursuant to such agreement; and so, in substance, was the finding of the court. Now, plainly, by this agreement, the mortgagees intended, upon a sale by Nellis, that title to the sheep should pass to the purchaser free of the lien of their mortgage, and that the proceeds of the sale should be paid to Nellis; and on these facts the lien on the sheep was not translated to the proceeds in the hands of the purchaser. Bank v. West, 46 Me. 15, is a case directly in point, and we agree with the view there stated (page 20), that "from the time of sale the lien of the mortgage was extinguished, and the mortgagee was left with no security but the personal promise of the mortgagor to pay the proceeds to him." There are many decisions that the mortgagee of chattels may authorize the mortgagor to sell the incumbered property and apply the proceeds of sale upon the debt secured, and that such an agreement does not render the mortgage fraudulent in law, nor affect the lien thereof, prior to the sale (Brackett v. Harvey, 91 N. Y. 221; Murray v. McNealy, 86 Ala. 234, 5 South. 565; Lane v. Starr, 1 S. D. 107, 45 N. W. 212, and cases cited); but we have found no case in which the lien was held to attach to the proceeds unpaid by the purchaser. The doctrine of the case from 46 Me., above cited, is that, if the mortgagee "wished to reach the proceeds in the hands of the purchasers, he, like other creditors, should have resorted to a trustee process under the statute."

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[1] Rehearing denied.

It is urged, for the mortgagees, that the agreement of November 28, 1893, operated to create a trust in their favor in the fund to be derived from the sale, or an equitable assignment of such fund to them. It seems to us there might be more color for this contention, or some part of it, if the mortgage had vested the title to the sheep in the mortgagees, as was the rule of the common law; but, under our law, and presumptively under that of Arizona, the title remained in Nellis. Civ. Code, § 2888; Bank v. Moore, 106 Cal. 681, 39 Pac. 1071. He being the owner and possessed of the sheep, to say that his agreement created, as against creditors, a trust in or an assignment of the proceeds of a sale which he had not then made, or, so far as shown, contracted to make, is to say that he could create a secret trust in the sheep or a pledge thereof and yet retain possession of them, contrary to the statutes. Civ. Code, §§ 2988, 3440. Authorities are cited to show that such enactments have no application to choses in action; but the agreement of November 28th did not purport to deal with a chose in action. And, aside from other considerations, the retention by Nellis of the authority to collect the anticipated fund to arise from the sale was inconsistent with the idea of an equitable assignment of the same. Christmas v. Russell, 14 Wall. 69, 84; Christmas' Adm'r v. Griswold, 8 Ohio St. 558.

The appeal of Boyce is easier of disposition. By the contract of sale between Nellis and Maier, the former was to deliver the sheep at Maier's slaughter house, about five miles from the railroad station at Los Angeles. They were to be weighed at the slaughter house, and he was to be paid for them at the rate of three cents per pound. The garnishment in the suit of Boyce against Nellis was served on Maier after the sheep had been unloaded at the station, and while they were yet in charge of Nellis' employés, and before they had reached the slaughter house or had been weighed; consequently, before the sale was completed, and before any credit existed in favor of Nellis and against Maier, and when it was not certain that any ever would exist. The law aids the vigilant, but in this instance the creditor was vigilant overmuch, and his attachment was invalid. The garnishment under his subsequent execution was after the attachments of the other creditors had been levied and perfected by judgment, and they were rightly held entitled to precedence in the distribution of the fund. Early v. Town of Redwood City, 57 Cal. 193; 1 Freem. Ex'ns, § 165. The judgment should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

112 Cal. 159

McBEAN v. CITY OF FRESNO et al.

(Sac. 86.)

(Supreme Court of California. March 25, 1896.)

MUNICIPAL CORPORATIONS — CONTRACTS — DISPOSITION OF SEWAGE — CONSTITUTIONAL PROVISIONS.

1. A city authorized to maintain a system of sewers has authority to contract for the disposition of the outfall of the sewers without the limits of the city.

2. Const. art. 11, § 18, prohibiting the city from incurring indebtedness or liability, in any manner or for any purpose, exceeding in any year the income and revenue provided for such year, does not invalidate a contract for the disposition of the sewage of the city for a period of five years, the sum to be paid yearly being within the amount which the city is authorized to levy yearly for such purpose; but no portion of the amount payable one year can be paid from the amount levied for a succeeding year.

3. Nor does the charter of the city of Fresno (St. 1883, p. 255), providing that the trustees shall not create, audit, allow, or permit to accrue any debt or liability in excess of the available money in the treasury that may be legally apportioned and appropriated, render such a contract invalid.

4. Such a contract, in the absence of fraud, or statute prohibiting the same, will not be *held* invalid, as a suspension of the legislative power of the trustees of the city, succeeding those by whom the contract was entered into, where, at the time the contract was entered into, it was fair and reasonable, in view of the expense the contractor would be required to incur to fulfill his contract.

Department 2. Appeal from superior court, Fresno county; Stanton L. Carter, Judge.

Action by Alexander McBean against the city of Fresno and W. H. McKenzie, treasurer. There was a judgment for defendants, and plaintiff appeals. Reversed.

W. C. Graves and E. D. Edwards, for appellant. I. W. Moultrie, for respondents.

HENSHAW, J. The city of Fresno duly and regularly, so far as form and procedure are concerned, entered into a contract with plaintiff by which plaintiff agreed to take care of and dispose of the sewage of the city for the period of five years for the sum of $4,900 per annum, payable quarterly. Plaintiff was required to give, and did give, a bond in the sum of $10,000, to which extent he agreed to reimburse the corporation for any liability or loss it might incur or suffer by reason of a faulty performance of his contract. No natural means were available to Fresno for the disposition of its sewage. It had provided sewers, but had made no provision for the care of their contents. These were to be discharged beyond the city limits. But, before the sewers could be used, a sewer farm was necessary for the reception and treatment of the waste matter. The city had secured no such farm. Under these circumstances, the contract with McBean was entered into. He made the necessary expenditures, and year by year performed his contract according to its letter and spirit. Each year, in turn, the city levied, collected, and apportioned to the sewer fund a tax to cover the yearly amount due McBean, and duly audited and paid his demands on the fund. This continued for three years. During the fiscal year ending May 31, 1894, plaintiff performed his contract, but the city refused payment upon the ground that the contract was void. McBean then instituted this action, charging, in the first count, for the value of labor and services furnished at defendant's request, and, in the second, pleading at length and standing upon the contract in question. He also averred that there was in the sewer fund, not otherwise appropriated, and available for the payment of his demand, more than $3,000, and such is the undisputed fact. Indeed, none of these facts is disputed. Upon the trial most of them were admittted under stipulation, and others proved without conflict. The court sustained a general demurrer to the second cause of action. At the close of plaintiff's case a motion for nonsuit upon the cause of action in assumpsit was made and granted. These two rulings are the errors complained of.

Against the validity of the contract, the first objection urged is that the city had no power to enter into this contract for the care and disposition of its sewage, because "it has no reference whatever to the sewage within the city, but provides for the care and disposal of the sewage from the outfall of the sewers some distance from the city." We see no force in this objection. Proper sewers are in this day so essential to the hygiene and sanitation of a municipality that a court would not look to see whether a power to construct and maintain them had been granted by the charter, but rather only to see whether, by possibility, the power had been expressly denied. In the case of the city of Fresno, a city of the fifth class, the power is, however, expressly conferred. "The board of trustees shall have power to establish, construct, and maintain drains and sewers." Municipal Corporation Bill, § 764, subd. 5. Disposition of the outfall is an essential part of the maintenance of a sewer system, and it must often be necessary for inland cities to arrange for that disposition without their corporate limits. Coldwater v. Tucker, 36 Mich. 474.

But the controlling questions presented by this contract for determination are: (1) Does it violate the constitution and charter of the city of Fresno? (2) Does it operate as a surrender or suspension of the legislative powers of the trustees of the city? The constitution provides (article 11, § 18): "No * * * city * * * shall incur indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for it for such year, without, etc. * * * Any indebtedness or liability incurred contrary to this provision shall be void." The charter of the city of Fresno provides, in terms harmonious with those of the constitution: "The trustees shall not create, audit, allow or permit to accrue any debt or liability in excess of the available money in the treasury that may be legally apportioned and appropriated for such purposes, etc." St. 1883, p. 255. The charter of the city of Fresno authorizes the levying and collecting of a tax, not exceeding 10 cents on each $100 for the sewer fund. Municipal Corporation Bill, § 764, subd. 9. No question is here presented but that the tax which may thus be collected is ample for the payment of the sums due or to become due to plaintiff under his contract, and the question of the validity of the contract is free from any embarrassment from this consideration. In the constitutional provision under consideration, the framers had in mind the great and ever-growing evil to which the municipalities of the state were subjected by the creation of a debt in one year, which debt was not, and was not expected to be, paid out of the revenues of that year, but was carried on into succeeding years, increasing like a rolling snowball as it went, until the burden of it became almost unbearable upon the taxpayers. It was to prevent this abuse that the constitutional provision was enacted. In Gas Co. v. Brickwedel, 62 Cal. 641, and in Shaw v. Statler, 74 Cal. 258, 15 Pac. 833, the question is discussed, and the interpretation of the constitutional provision laid down, and the reasons for it given. Each year's income and revenue must pay each year's indebtedness and liability, and no indebtedness or liability incurred in one year shall be paid out of the income or revenue of any future year. The taxpayers of municipalities are thus protected against the improvident creation of inordinate debts, which may be charged against them and their property in ever-increasing volume from year to year, until he who is without any property may be in a better financial situation than one who owns much.

Upon the other hand, the correlative rights of a creditor of the city, under these circumstances and under this law, have been recently set forth with exactness and clearness by Mr. Justice Harrison in Weaver v. City and County of San Francisco, 43 Pac. 972: "Whoever deals with a municipality does so with notice of the limitation of its powers, and with notice, also, that he can receive compensation for his labor and materials only from the revenues and income previously provided for the fiscal year during which his labor and materials are furnished, and with the knowledge, too, that all other persons dealing with the municipality have the same rights to compensation, and are subject to the same limitations, as he is. Even though, at the time of making his contract, there are funds in the treasury sufficient to meet the amount of his claim, he is charged with notice that these funds are liable to be paid out for municipal expenditures before his contract can mature into a claim against the city; and, if others, whose claims have accrued subsequent to his, are able to intercept these funds, he is in the same condition as any creditor who has dealt with one whose assets are exhausted before he presents his claim. He acquires no claim in the nature of a lien upon these funds for the amount of his demand, nor is there any legal obligation upon the municipality, any more than upon any other debtor, to pay the claims against it in the order in which they are incurred, unless they are presented in that order, and in such condition and with such formalities as entitle the claimant to immediate payment. In dealing with the municipality he must rely upon the integrity of its officers that they will not incur any liabilities during the year in excess of the income and revenues provided for that year, and, as a prudent man, he will ascertain, not only the amount of that income, but also the amount of the claims already existing, and of those that are likely to be incurred."

In the case of contracts extending over a period longer than one year, it may be readily seen that the municipality is abundantly protected, and that it is the contractor therewith who subjects himself to peril and risk of loss. If there are not revenues for any given year sufficient and available for the payment of his claims for that year, those claims become waste paper, and are not carried over as a charge against the income, and revenue of a succeeding year. This determination of the law in this state removes a potent objection found by the supreme court of Michigan to sustaining a contract under a law similar to our own, where the life of the contract was for several years. Says the court: "There can be no doubt, in our opinion, that this whole contract obligation is a liability to the full extent of the 30-years rental, and it is equally clear that all unpaid sums will be aggregated until paid." Niles Water Works v. City of Niles, 59 Mich. 312, 26 N. W. 525. In this state such a rule would not obtain, and the contract under consideration is left with its validity to be determined primarily as the question is answered, does it or does it not create a debt or liability for a given year exceeding the revenues of that year? And upon this it may be said, at the outset, that there is a contrariety of opinion in the courts of the states which have been called upon to interpret constitutional or charter provisions similar to or identical with our own. The state of Michigan, as will be observed from the case last cited, holds such contracts to be void, for the reason above quoted. Ohio, New Jersey, Montana, and Oregon have reached the same conclusion, and perhaps other states. State v. Medberry, 7 Ohio St. 526; Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249; Salem Water Co. v. City of Salem, 5 Or. 29; Water Works Co. v. Read, 50 N. J. Law, 665, 15 Atl. 10. Upon the other hand, in Illinois, Pennsylvania, Massachusetts, New York, Iowa, Indiana, and Oklahoma (and it may be others which have not come beneath our notice), it is uniformly held that contracts such as these are not violative of the constitutional inhibition. City of East St. Louis v. East St. Louis Gas Light & Coke Co., 98 Ill. 415; Appeal of City of Erie, 91 Pa. St. 398; Smith v. Dedham, 144 Mass. 177, 10 N. E. 782; Weston v. City of Syracuse, 17 N. Y. 110; Grant v. City of Davenport, 36 Iowa, 396; City of Valparaiso v. Gardner, 97 Ind. 1; City of Indianapolis v. Indianapolis Gas Light & Coke Co., 66 Ind. 396; Territory v. City of Oklahoma (Okl.) 37 Pac. 1094.

In a certain very restricted sense it may be said that a liability is created by a contract such as this; but to call it a present liability for the aggregate amount of the payments in the contract contemplated thereafter to be made is not legally permissible. A liability to the city would arise upon breach of contract, but the constitution never meant to protect the city from the consequences of its own willful and tortious acts. A liability might arise against the city for the negligence of its officers, and the damages due to an individual who had suffered therefrom might be great; but such liability for a municipal wrong the constitution never meant to protect against. When we come to consider the contractual relations between the city and appellant, it is at once seen that the city cannot be liable in any one year for more than $4,900, an amount far within the revenue derived to the sewer fund, and further that it cannot become liable for this amount at all until faithful service rendered by the contractor each year. If the city, in any one year, should fail to collect into its sewer fund moneys sufficient to pay the just claims of the contractor, then, as above said, it would be the contractor's loss, the city would be chargeable with no financial responsibility therefor, and the result, at the most, so far as it was concerned, would be a failure upon the part of its officers to observe good faith in their dealings. There need be here no struggles with the niceties of definitions given to "debt" or "liability." An able discussion of those questions will be found in the case of City of Valparaiso v. Gardner, 97 Ind. 1. We base our views upon the conviction that, at the time of entering into the contract, no debt or liability is created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed. These views find abundant support in the adjudicated cases in this state. Article 8 of the former constitution of California provided that the legislature shall not create any debts or liabilities in any manner which shall exceed the sum of $300,000, except under certain specified contingencies. The state made a contract for the care of its prison, for convict labor, etc., for the period of five years, agreeing to pay therefor the sum of $10,000 per month. The act came before this court for review in State v. McCauley, 15 Cal. 429, where the question was elaborately argued, and fully considered by the court. Chief Justice Field, in delivering the opinion of the court, spoke as follows: "The unconstitutionality of the act is asserted on two grounds: First, that it appropriated the sum of $600,000, and thus created a debt or liability against the people of the state exceeding the limit prescribed by the eighth article of the constitution. * * * The contract provides for the payment of $10,000 a month, and the act appropriates this sum per month. The appropriations are to take effect, and the services are to be rendered, in future. Until the services are rendered, there can be no debt on the part of the state. The lessee could not have claimed, at any time after the making of the contract, the aggregate of all the monthly installments, because the state never owed him that amount. The state only became indebted as the services were each month performed. * * * The eighth article was intended to prevent the state from running into debt, and to keep her expenditures, except in certain cases, within her revenues. These revenues may be appropriated in anticipation of their receipt as effectually as when actually in the treasury. The appropriation of the moneys, when received, meets the services as they are rendered, thus discharging the liabilities as they arise, or, rather, anticipating and preventing their existence. The appropriation accompanying the services operates, in fact, in the nature of a cash payment." This interpretation, after further consideration and argument, was reaffirmed in McCauley v. Brooks, 16 Cal. 11, and again in Koppikus v. Commissioners, 16 Cal. 248. In People v. Arguello, 37 Cal. 524, it is said: "A sum payable upon a contingency is not a debt, or does not become a debt until the contingency has happened."

These decisions being before the framers of the present constitution, under familiar rules of interpretation it will be held that their enactment of similar provisions was made in the light of them. Wallace v. Mayor, etc., 29 Cal. 181, is not in conflict with these decisions. The contract there contemplated a payment which might become a debt in the year in which the contract was executed, as well as in some future year. Under the peculiar language of the charter, which forbade the creation of any debt unless the money was actually in the treasury to meet it, it was declared that the council had no authority to provide for the creation of a debt to arise in the future, any more than to create one directly and in præsenti.

Upon the second proposition, namely, whether or not the contract operates as a surrender or suspension of the legislative powers of the trustees of the city, it is to be observed that there is in this state no inhibition against the making of a contract by a municipal board which shall extend for more than one year, or even beyond the term of office of the board which makes it. If the legislature desired to restrict municipalities in this particular, it could easily do so by the passage of a law, such as exists in some other states, declaring void any contract upon the part of a municipality which is to extend beyond the current fiscal year, or beyond the term of office of the authorities which enter into it. But, even in the absence of such provisions, courts look with disfavor upon contracts by municipalities involving the payment of moneys which extend over a long period of time—First, because such contracts, in their nature, tend to create a monopoly in favor of the other party thereto for supplying the city with the article contracted for; second, because they may involve an undue restraint upon the legislative powers of the successors of the board, and prevent those successors from availing themselves of a change in the times, of opposition, of reduced rates, or of other causes operating legitimately to decrease the price of the commodity, of which decrease in price the city, by reason of its contract, cannot avail itself. There is thus, by law and reason, a well-defined limit set to such contracts. In the absence of any other objection to them, they will not be upheld, in the absence of a clear showing of a reasonable necessity for their execution. But if, on the other hand, it be made to appear that, at the time the contract was entered into, it was fair and just and reasonable, and prompted by the necessities of the situation, or was in its nature advantageous to the municipality, then such a contract will not be construed as an unreasonable restraint upon the powers of succeeding boards. In Gaslight Co. v. Dunn, 62 Cal. 585, this court says: "In the absence of express limitation as to the period of time for which a contract may be made, we would hold, perhaps, that the contract with the plaintiff for five years was not beyond the power of the supervisors." In Riehl v. City of San Jose, 101 Cal. 442, 35 Pac. 1013, an action was brought to set aside a contract for five years, made by the city with an electric company for the lighting of its streets. The complaint sounded in fraud, and further declared that the contract was against public policy, illegal and void. The contract was upheld, it being found that there was no fraud, and "that the members of the common council acted as honest men, and exercised their honest discretion for the best interests of the city."

We have here, then, a contract made for a purpose expressly authorized by the charter, a contract which looked to supplying the city with an absolute need, a contract which pertained to the ordinary expenses of the city, and, together with other like expenses, was well within the limit of the current revenues authorized by its charter annually to be provided for this specific purpose. The term of the contract was fair indeed, in view of the considerable expense which the evidence showed plaintiff was obliged to undergo to fulfill his undertaking. Under these circumstances, we hold the contract to be valid, operative, and binding upon the city.

The judgment and order are reversed, and the cause remanded, with directions to the trial court to overrule defendants' demurrer.

We concur: McFARLAND, J.; GAROUTTE, J.

112 Cal. 85

SWAMP-LAND DIST. NO. 307 v. GLIDE.

(Sac. 5.)[1]

(Supreme Court of California. March 24, 1896.)

CONSTITUTIONAL LAW — RETROSPECTIVE ACTS — STATUTES — AMENDMENT — OPERATION AND EFFECT — LIMITATIONS — VESTED RIGHTS — SWAMP-LAND ASSESSMENTS—LEVY—APPEAL—REVIEW.

1. Under Pol. Code, § 3466, as amended in 1880, causes of action for collection of swamp-land assessments accrued when the county treasurer, 30 days after filing of the assessment list, reported the assessments as delinquent to the trustees. *Held*, that Act March 31, 1891 (amending said section by providing that assessments, when so reported delinquent, should be paid in installments as ordered by the trustees, and that causes of action thereon should accrue at the expiration of 20 days from the date of any order for the collection of an installment, or, if the entire assessment then remained unpaid, a cause of action should then accrue upon it), was not void as being retroactive, since it operated only on assessments existing, and as they stood when it went into effect.

2. Nor did it amend Code Civ. Proc. § 338, subd. 1, prescribing a limitation of three years, to which causes of action accruing under Pol. Code, § 3466, were subject, so as to require the republication thereof under the constitutional provision relating to amendments.

3. Under Pol. Code, § 3466, as amended in 1880, causes of action for collection of swamp-land assessments accrued when the county treasurer, 30 days after the filing of the assessment list, reported the assessment as delinquent to the trustees. Act March 31, 1891, amending said section, provides that assessments, when so reported delinquent, shall be paid in installments as ordered by the trustees, and that on the expiration of 20 days from the date of any order for installment a cause of action shall accrue on the installment, and on the entire assessment if the installment shall remain unpaid. Causes of action accruing under said section and under the act of 1891 are both subject to a three-years limitation. *Held*, that Act 1891 is not, in changing the time when the cause of action on an assessment accrues, unconstitutional, as interfering with the vested rights of one against whom an assessment was reported delinquent in 1889, since one can have no vested right in the running of the statute of limitations until it has barred the action.

4. The republication, as required by the constitution, of an entire law as amended, does not operate as a repeal and re-enactment of the portions of the act not altered by the revision.

5. When, in an action to collect a swamp-land assessment, defendant admits ownership of the land described, the fact that the land did not contain the acreage alleged is immaterial, where it is not shown that the assessment was levied by acreage.

6. The objection of variance between the estimate of acreage within the reclamation district and that in the assessment roll cannot be urged for the first time on appeal.

Department 2. Appeal from superior court, Yolo county.

Action by swamp-land district No. 307 against J. H. Glide for reclamation assessments. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

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[1] Rehearing denied.

Armstrong & Bruner, for appellant. McKune & George, for respondent.

HENSHAW, J. Appeal from the judgment, and from the order denying a new trial. The commissioners of the plaintiff swamp-land district in 1889 made their assessment under the reclamation act. The list was filed with the county treasurer April 5, 1889. The defendant refused to pay certain installments upon his assessment, and this action was brought, charging upon the installments, in separate counts, and seeking to collect the same. Section 3466 of the Political Code, as amended in 1880, was the law in force at the time of the assessment, and at the time when the charges therein became a lien upon the land. That section provided: First, that the county treasurer, at the end of 30 days after an assessment list was filed with him, should return the same to the board of trustees; second, that the board of trustees must thereupon commence action for the collection of such delinquent assessments, and for the enforcement of the lien. This law was found to be inconvenient, as it required the whole assessment to be paid at once, when the money could only be used from time to time. To remedy this difficulty the legislature, by act passed March 31, 1891, amended section 3466, Pol. Code, retaining the provision that the county treasurer must return the list to the board of trustees, and providing: First, that all unpaid assessments must be collected and paid in separate installments, of such amounts and at such times, respectively, as the board, from time to time, in its discretion, may, by order entered on its minutes, direct; second, that a cause of action for the collection of any such installment shall accrue at the expiration of 20 days from the date of the order directing its payment; third, that, if any such installment shall remain unpaid at the expiration of 20 days, then the whole of the assessment against the land owned by the person failing to pay such installment shall become due and payable at once, and may, in the discretion of the board, be collected immediately, in one action.

It has been decided in People v. Hulbert, 71 Cal. 72, 12 Pac. 43, that the cause of action contemplated by section 3466 of the Political Code, as amended in 1880, was one embraced within the provisions of subdivision 1 of section 338 of the Code of Civil Procedure. Appellant here contends that the last amendment to section 3466 of the Political Code operates to fix another and different limitation upon the cause of action, and that it is consequently inapplicable to this assessment and void—First, as having a retroactive effect; second, as an attempt to amend section 338 of the Code of Civil Procedure without reference to the amended act, or a republication of it as amended; and, third, as interfering with the defendant's vested rights in the bar of the statute. These contentions may be briefly disposed of:

1. The amendment has no retroactive effect. It operates upon existing assessments as they stood at the time the law went into effect. If at that time a cause of action upon an assessment was barred to a district, this amendment did not, and did not attempt to, revive the old, or give another cause of action therefor. What it did was merely to change the mode of procedure for the collection of the assessment, by providing for installments. and by changing the time when the cause of action accrues.

2. The amendment did not in fact, or in effect, modify or change section 338 of the Code of Civil Procedure. The statute of limitations begins to run against a right only when a cause of action upon that right has accrued. By the act of 1880 it began to run 30 days after the assessment list was filed with the treasurer, and, if action was not commenced within three years thereafter, the cause was barred. Code Civ. Proc. § 338, subd. 1. Under the amendment the cause of action accrued 20 days from the date of the order directing its payment. The right of action thereafter existed for 3 years, when it was barred by the same section of the Code of Civil Procedure. The same limitation exists in both cases, and it is the limitation provided by section 338, subd. 1, Code Civ. Proc. Manifestly, there has been no amendment, and no attempt to amend this section.

3. It is not claimed that the cause of action under the law of 1880 was barred, as to this assessment, at the time the amendment went into effect. Only two years of the three had passed; but it is insisted that appellant had such a vested right in the passage of time and the statute of limitations that the cause of action against him must be held to be the cause of action under the law of 1880, so that when the third year had expired, in March, 1891, the causes of action were one and all barred. Railroad Co. v. Shackelford, 63 Cal. 261, is here relied on. It is not at all in point. When the law of adverse possession was changed so as to require the payment of taxes by a claimant, the question was presented whether, in establishing the necessary five-years possession, it was incumbent to prove the payment of taxes during all of that period, when a part of it was paid before the amendment became a law. It was held not to be a question of vested right, but of giving to a law a retroactive effect, which the legislature never intended. But a man has no vested right in the running of the statute of limitations until it has completely run and barred the action; and, when a change in the statute is made during the time of its running, that time is not a credit to the defendant, under the new law. The whole period contemplated by the new law must lapse, to

bar the action. Such are the general rules applicable alike to criminal and civil actions, unless the new act itself expresses a contrary intent. Com. v. Duffy, 96 Pa. St. 506; Bigelow v. Bemis, 2 Allen, 497; Vance v. Vance, 108 U. S. 517, 2 Sup. Ct. 854; Sohn v. Waterson, 17 Wall. 599; Wheeler v. Jackson, 137 U. S. 255, 11 Sup. Ct. 76; Gilman v. Cutts, 23 N. H. 376; Henry v. Thorpe, 14 Ala. 103; 1 Wood, Lim. Act. (2d Ed.) § 12, and cases; Cooley, Const. Lim. (6th Ed.) p. 448; Bender v. Crawford, 33 Tex. 745; Pearsall v. Kenan, 79 N. C. 472.

Section 3466 of the Political Code was not repealed in 1891, but was amended in the particulars indicated. The constitution requires a republication at length of an amended act, that the legislators may readily see what effect the proposed amendments will have upon the original law. But this republication of portions of the act unchanged and unmodified by the amendment does not operate as a repeal and re-enactment of these portions which have continued to be the law throughout. Railroad Co. v. Shackelford, 63 Cal. 261.

Upon the trial, defendant admitted ownership of the tracts of land described in the complaint, and the court found accordingly. Whether or not one of these tracts so described, and so admitted to be land of defendant, contained 70 acres, as alleged, or less, is immaterial, as it is not shown that the assessment was levied upon the lands by acreage.

The claim that a difference exists between the acreage embraced within the exterior lines of the district and that in the assessment roll is here made for the first time, and cannot be considered. In any event, there would be no presumption in favor of the accuracy of the former estimate over that of the latter. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

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112 Cal. 17

PEOPLE v. FOO. (Cr. 79.)

(Supreme Court of California. March 24, 1896.)

CRIMINAL LAW — EVIDENCE — DECLARATIONS OF THIRD PERSONS — CROSS-EXAMINATION OF DEFENDANT — INSTRUCTIONS — REMARKS OF COUNSEL.

1. Where evidence offered is imperfect for want of preliminary proof, an objector must specifically point out the defect in his objection, or it will be waived. So an objection to the admission of an article as an exhibit as "incompetent, irrelevant, and immaterial, and not connected with the defendant," will not raise the question, on appeal, of the sufficient identification of the exhibit.

2. Testimony of declarations made by a third person is not admissible in behalf of a defendant charged with crime, though made in his presence.

3. Unless apparently done in bad faith, for the sole purpose of prejudicing him with the jury, a defendant, when on the stand as a witness in his own behalf, may properly be asked by the prosecution in cross-examination questions which, if answered in the affirmative, will tend to impeach statements made in his direct examination.

4. It is not error to refuse an instruction which is covered by another given.

5. A conviction will not be set aside because a prosecuting attorney, in his argument, urged the jury to disbelieve defendant's witnesses, who were Chinamen, where he also told them they were the sole judges of the credibility of all witnesses, and the court gave a proper and full instruction on the point.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Louie Foo was convicted of an assault with a deadly weapon, and appeals. Affirmed.

Cheney & Cronin and Marble & Phibbs, for appellant. Atty. Gen. Fitzgerald, for the People.

SEARLS, C. The defendant was informed against, with two others, viz. Lee Kim and Ah Young, for an assault with a deadly weapon upon one Hom Lock, alleged to have been committed in the county of Los Angeles, state of California, on the 12th day of January, 1895. The defendants demurred to the information upon the grounds "that said information does not substantially conform to the requirements of sections 950–952 of the Penal Code of California"; (2) "that the facts stated in said information do not constitute a public offense." Their demurrer was overruled, whereupon they entered a plea of not guilty. The defendant Louie Foo was tried separately, and a verdict of "guilty of an assault with a deadly weapon" returned. A motion for a new trial was made and overruled, and judgment of imprisonment for two years in the state prison at Folsom, Cal., was entered. Defendant appeals from the judgment, from the denial of a motion in arrest of judgment, and from an order denying his motion for a new trial.

The first point made by appellant is that the court erred in admitting in evidence certain cartridges offered by the prosecution. The point made here is that they were not sufficiently identified as the cartridges taken from a certain pistol presented by the witness J. B. Robbins. There had been testimony introduced tending to show that defendant and several other parties, all Chinamen, upon a public street in what is called "Chinatown," Los Angeles, had, by direction of defendant, fired a number of shots from pistols at the prosecuting witness, also a Chinaman; that defendant fired one or more of the shots; that immediately after the shooting defendant was seen running towards a wash house, where he was employed; that a few minutes later the witness J. B. Robbins proceeded to the wash house, found the defendant there, and arrested him, and in the room where he was found a pistol was also found in one of the beds, which Robbins, who was a police officer, took into his possession, examined, and found, as he said, indications of its having been recently fired, such as powder marks and smell of powder, etc. Robbins was recalled for the prosecution, when the following proceedings were had: "Mr. Appel: You spoke about finding a pistol down on Macy street, where you arrested the defendant Louie Foo. I will ask you to look at that pistol, and state whether that is the pistol? A. Yes, sir; that is the one I found down there. Q. And you took the cartridges out of it? A. Yes, sir. (Paper containing cartridges shown witness.) A. Yes, sir. Mr. Appel: We offer these in evidence. Mr. Cheney (for defendant): We object, upon the ground that it is incompetent, irrelevant, and immaterial, and not connected with this defendant. The Court: The objection is overruled. Mr. Cheney: Note an exception." The cartridges were afterwards submitted to the jury, and their appearance, as being fresh, and not covered with verdigris, commented upon as tending to show the pistol had been recently loaded. There was testimony on the part of the defendant tending to show that the pistol belonged to Suey Ah Him, who kept the wash house, that the bed in which it was found was his, and that it had been loaded for several months. The pistol and its contents, if properly identified, were clearly admissible in evidence as tending in some degree to show that defendant might have taken, fired, and reloaded it. The answer, "Yes, sir," made by the witness immediately after the expression in the record "paper containing cartridges shown witness," would seem to indicate the probability that a question was in that connection put to the witness, which was not put down; but, if so, we are not at liberty to conjecture what it was, or to formulate a question to fit the case. There is, it is true, an affidavit bound with the record, and filed the day the motion for a new trial was filed, in which Robbins, the witness, says the question was put to him, "Did you take these cartridges from the pistol?" or, "Are these the cartridges you took from the pistol?" and that he answered, "Yes," etc. This affidavit is not, however, marked, or in any way identified, as having been used on the motion, and is not embodied in the statement or contained in any bill of exceptions. As was said in People v. Mahoney, 77 Cal. 532, 20 Pac. 73, it is a mere loose paper, and wants the authentication essential to constitute any portion of the record. People v. Price, 17 Cal. 313; People v. Padillia, 42 Cal. 535.

The question still remains, was the objection offered by counsel for defendant sufficient to cover a want of identification of the cartridges as the ones taken from the pistol? We think this question must be answered in the negative. The general rule is, he who objects to the admission of evidence "must specify the ground of his objection when the evidence is offered, and will be considered as having waived all objections not specified." People v. Manning, 48 Cal. 338. Where the objection to the introduction of testimony is, in general terms, that it is irrelevant, without stating the particular reason why it is irrelevant, and the objection could have been cured by the party offering the testimony if the reason for it had been given, the supreme court will not notice the objection. Owen v. Frink, 24 Cal. 171. In Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271, it was held, where a general objection to the admission of evidence (that it was incompetent, irrelevant, and immaterial) is overruled by the trial court, the party against whom the ruling is made cannot be permitted to urge in the appellate court a particular objection which, if it had been openly urged in the trial court at the time of the ruling complained of, might have been easily cured. In Water Co. v. Swartz, 99 Cal. 278, 33 Pac. 878, a like ruling was made. The reasons given in those cases are peculiarly applicable to the case at bar. Here, had the specific objection, viz. that the cartridges had not been sufficiently identified, been pointed out, no doubt the identification would have been made complete. In People v. Frank, 28 Cal. 507, this court held that a general objection to testimony offered that it is irrelevant and inadmissible is not sufficient if the real ground of objection is that no proper foundation has been laid for its introduction. See, also, People v. Eckman, 72 Cal. 583, 14 Pac. 359. People v. Frank, 28 Cal. 507, is in point. The defendant was indicted for forgery At the trial, with the object of showing guilty knowledge, the prosecution introduced in evidence three other drafts, claimed to have been forged by defendant. As to one of them—"Draft No. 9"—there was no preliminary proof connecting defendant with it, or that it was a forgery. The objection to its introduction in evidence was that it was "irrelevant and incompetent." The objection was overruled, and an exception noted. The supreme court, after suggesting that at the time the court ruled upon the objection it doubtless expected that the needed proof would follow the admission, held that when no such evidence appeared counsel should have renewed the objection on that ground, and added: "We have repeatedly held that counsel must make their objection in such a manner as to leave no doubt as to the precise ground upon which it is placed. We do not think that was done in the present case, and we do not think that we should be justified in reversing the judgment on this ground, especially as it is more than probable that 'Draft No. 9' had no effect on the result." In People v. Mahoney, 77 Cal. 529, 20 Pac. 73, the converse of the proposition was involved. A witness was asked his opinion as an expert. An objection was made that the evidence was "incompetent, no foundation having been laid for it." The witness was then shown to be an expert, and answered as such, and this court held that the competency of the answer as evidence could not be inquired into under the objection as made. An objection made to a power of attorney offered in evidence, that it is "irrelevant and incompetent," does not enable the objector to raise the question that the power only authorizes the sale of "lots unsold," and that there is no evidence that the lot in controversy is unsold. As was said by the court, had the objection that there was no proof that the lot was unsold been specifically made, the plaintiff would have been afforded an opportunity to supply the necessary proof. Gardiner v. Schmaelzle, 47 Cal. 588. A general objection to the introduction of a copy of a deed in evidence is not a sufficient predicate to urge that it is not the best evidence. Eversdon v. Mayhew, 85 Cal. 1, 21 Pac. 431, and 24 Pac. 382. See, also, Satterlee v. Bliss, 36 Cal. 507. Where a certified copy of a deed duly recorded was offered in evidence, and the objection was that it was not "duly certified and proved," it was held to be a waiver of the objection that the original was not produced or not shown to be under the control of the party offering the evidence. Mayo v. Mazeaux, 38 Cal. 442. The concensus of opinion, as illustrated by these cases and many others, is that, where the proffered evidence is imperfect by the lack of preliminary proof, which may or may not be supplied by the party offering the evidence, the objector must specifically point out the defect by his objection, and if he fails to do so it is waived; and the general objections of "immaterial, inadmissible, irrelevant, and incompetent," made when the evidence is offered to the jury, are not sufficient to warrant an investigation on appeal of the insufficiency of such preliminary proof. "Inclusio unius est exclusio alterius." It follows that the objection of appellant cannot be upheld.

The next error assigned relates to a ruling of the court excluding evidence on cross-examination of the witness Robbins as to what was said to the witness by the boss Chinaman at the wash house when he, the witness, went to arrest the defendant. It was not in explanation of anything called out on the direct examination, was not proper cross-examination, and, as the declaration of a third party, was not admissible, although made in the presence of the defendant. The cases cited by the appellant, viz. People v. McCrea, 32 Cal. 98; People v. Estrado, 49 Cal. 171; People v. Ah Yute, 53 Cal. 613; People v. Shem Ah Fook, 64 Cal. 380, 1 Pac. 347,—were cases where declarations of third persons, made in the presence of defendants, and their replies thereto, etc., were offered as being tantamount to admissions by such defendants against their interest. No such offer was made here, and, if there had been, the testimony would not be admissible in favor of defendant.

Defendant was a witness on his own behalf, and testified at length touching his whereabouts on the night of the shooting, and denied generally having been present at the scene of such shooting, and averred that he was at the washhouse all of that evening until arrested. Upon cross-examination he said white people were there for clothing before the policeman came, but that he did not remember their names, as it was so common a thing. He was then asked—as was stated, to lay the foundation for impeachment—if he had not tried to get a white man to say in court that he was there before the policeman came, and again, "Didn't you and the rest of your men make some tickets at the time, that night of the shooting, and give them to a white man, so that he could swear that he had left some clothes there that night?" Objections were made to the questions by counsel for defendant upon the grounds "that it is incompetent, irrelevant, and immaterial, and not cross-examination; and, if it is for the purpose of impeachment, the proper foundation has not been laid." The argument of appellant is that the questions were but insinuations tending to prejudice the jury against defendant, and were not proper in cross-examination, and had nothing to do with defendant's guilt. In response to the question, defendant answered in the negative. We see no evidence of bad faith on the part of the prosecution in putting the questions. If every question asked on behalf of the people which looks to the guilt of a defendant is to be excluded for that reason, it must end all prosecution. Had the questions been answered in the affirmative, it would have tended to shake the statement of defendant that he was present at the washhouse the entire evening of the shooting.

Objection is made by appellant to the refusal of the court to give the following instruction: "The jury are instructed that the argument of the district attorney that the testimony of the Chinamen from the washhouse who testified to the alibi is not worth believing unless corroborated is not law, and that the testimony of a Chinaman must receive the same consideration as that of a white man, all other things being equal." The rule had already been enunciated by the court in better form, and in unexceptionable language, as follows: "The court instructs the jury that testimony of Chinese witnesses is governed by the same rules as that of any witness, and the credibility of Chinese witnesses must be determined by the jury in the same manner that they determine the credibility of any other class of witnesses."

Exceptions were also taken to the conduct of the district attorney in his address to the jury, where, in commenting upon Chinese testimony, he said in substance: (1) I do not think there is any doubt of the guilt of the defendant; and, (2) in substance, that the jury should disregard the testimony of all the Chinese witnesses in support of an alibi, as against the testimony of the white witnesses for the prosecution; and that the testimony of Chinese witnesses, unless corroborated by white witnesses, was insufficient to raise a reasonable doubt; and closing with: "But, gentlemen of the jury, you are the sole judges of the sufficiency of the evidence and the credibility of the witnesses." I do not find from the record that an exception was taken at the trial to the remarks of the district attorney touching the testimony of Chinese witnesses; but, conceding that there was, it was but the expression of an opinion of the prosecuting officer, followed by a clear statement of the undoubted right of the jury to pass upon the question, and is not of sufficient importance to warrant a reversal.

The instructions of the court were full, clear, and quite favorable to the defendant. The testimony on the part of the prosecution was full and explicit, and, if believed by the jury, fully warranted a verdict of guilty. No point is made upon the demurrer or the motion in arrest of judgment. Upon the whole case as presented, we recommend that the judgment and orders appealed from be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

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5 Cal. Unrep. 310

GAINSLEY v. GAINSLEY. (Sac. 67.)

(Supreme Court of California. March 24, 1896.)

TRIAL—SEPARATE STATEMENT OF FACTS—CONCLUSIONS OF LAW—JUDGMENT—CONTINUANCE.

1. Where the statement of facts found is distinctly separate from the conclusions of law, though both are written on one piece of paper, there is a substantial compliance with Code Civ. Proc. § 633, requiring that "the facts found and the conclusions of law must be separately stated."

2. Where the judgment fully expresses the conclusions of law, and is attached to the statement of facts found, and is filed at the same time, there need not be an additional statement of the conclusions of law.

3. A motion for a continuance on the ground of defendant's sickness was supported by a certificate signed "H. H. L." To the court's question as to who L. was, defendant's attorney answered that he did not know, and did not know whether L. was a physician or not. The motion was denied, and no exception was taken. The trial proceeded, and defendant's attorney's subsequent offers to prove that L. was a regular physician were denied. No offer of competent evidence to prove defendant's sickness was made, and no delay was asked for the purpose of an examination of defendant by a physician. *Held*, that the motion was properly denied.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by Seth Gainsley against Mamie E. Gainsley. Plaintiff had judgment, and defendant appeals. Affirmed.

Hiram W. Johnson and Johnson & Johnson, for appellant. Hinkson & Van Fleet, for respondent.

VANCLIEF, C. Action for divorce on the ground of adultery, in which the judgment was in favor of plaintiff. The defendant has appealed from the judgment and from an order denying her motion for a new trial.

The case was tried by the court without a jury, and findings were not waived. The only written findings of fact are those prefixed to the judgment, as follows: "And the court, being fully advised in the premises, finds that the allegations of plaintiff's complaint and supplementary complaint are sustained by the testimony, and are true; and all and singular the law and the premises being by the court here fully understood and considered, wherefore it is ordered, adjudged, and decreed that the marriage between the said plaintiff, Seth Gainsley, and the said defendant, Mamie E. Gainsley, be dissolved, and the same is hereby dissolved, and the said parties are, and each of them is, freed and absolutely released from the bonds of matrimony and all the obligations thereof. A. P. Catlin, Judge. Attest: W. B. Hamilton, Clerk, by E. F. Pfund, Deputy. [Seal.]" Indorsed: "Filed November 8, 1894. W. B. Hamilton, Clerk, by E. F. Pfund, Deputy."

1. No objection is made on the ground that the facts as found do not warrant the judgment, but it is contended for appellant that they are not stated separately from the conclusions of law. But I think the statement of facts found is as distinctly separate from the conclusions of law as if it had been written on a separate paper, and, in this respect, is in substantial compliance with section 633 of the Code of Civil Procedure. As to intermixture of law and facts in findings, see Millard v. Supreme Council, 81 Cal. 340, 22 Pac. 864; Burton v. Burton, 79 Cal. 490, 21 Pac. 847.

2. It is further contended that there are no written conclusions of law distinct from the judgment itself, and that, for this reason, the judgment cannot stand. In this case the judgment fully expresses the conclusions of law, and, having been attached to the statement of facts found and filed at the same time, there was no necessity for any other statement of the conclusions of law. All that is required is that "the facts found and the conclusions of law must be separately stated" (Code Civ. Proc. § 633); although it is true that a statement of the conclusions of law generally precedes the rendition of a final judgment, in which case it is provided that the judgment must accord with the preceding conclusions of law; but, except in cases of this kind, I can imagine no reason why the conclusions of law should be twice stated in the same case. It is well settled that the findings of fact and conclusions of law constitute the "decision" of the court, but this does not preclude the inclusion of the conclusions of law in the judgment alone, in case the judgment is drawn and filed at the same time that the findings of fact are drawn and filed. In such case, an additional statement of the

conclusions of law would be superfluous. In Miller v. Hicken, 92 Cal. 230, 28 Pac. 339, this court said: "It is objected that the court did not find, in terms, that the defendants and intervener had not 'constructive' notice of plaintiff's mortgage; but that followed from the facts found, and it is immaterial that the court did not make an express 'conclusion of law' to that effect." Whether or not the judgment in that case was erroneous depended upon the effect of the recordation of the mortgage and an alleged discharge thereof, as constructive notice to defendants. If, therefore, constructive notice, effected by our registration laws, is a conclusion of law, as seems to have been correctly assumed in the above quotation, that case authorizes the views above expressed. And it seems to be well settled that constructive notice, which is imputed by law, is a conclusion of law and not a fact. Birdsall v. Russell, 29 N. Y. 249; Drey v. Doyle, 99 Mo. 459, 12 S. W. 287; Jordan v. Pollock, 14 Ga. 156; Johnson v. Dooly, 72 Ga. 299; 16 Am. & Eng. Enc. Law, pp. 791, 792, and authorities there cited; And. Law Dict.; Black, Law Dict. What is here said is limited to notice expressly imputed by statute, as the case of Miller v. Hicken, supra, involved no other kind of notice.

3. There is nothing worthy of special consideration in the point that the findings of fact are not justified by the evidence, as the evidence strongly tended to prove all the material allegations of the complaint, and, as to the ground of divorce, much of it may be deemed direct.

4. It is contended that the court erred in denying defendant's motion for a continuance, on the ground that defendant was sick and unable to attend court, made, when the case was called for trial, upon the following certificate: "This is to certify that Mrs. M. E. Gainsley is suffering from nervous prostration, complicated with gastritis, and is not able to leave her rooom. H. H. Look." The motion was objected to on the ground that the showing of sickness was insufficient. Thereupon the court called attention to absence of any evidence that H. H. Look was a physician, and asked who he was, to which defendant's attorney answered that he did not know, and that he did not know whether Mr. Look was a physician or not. Thereupon the court denied the motion, and no exception was taken. The trial then proceeded, and, after the pleadings were read, defendant's attorney offered to prove that Mr. Look was a regular physician, but proffered no evidence, documentary or oral, and the court ordered the trial to proceed, to which order defendant's attorney excepted, and then asked the court for a delay of 20 minutes in which to procure evidence that Mr. Look was a regular practicing physician, and also to prove the illness of the defendant, and, this being denied, he again excepted. He then offered to prove, by a witness present, Henrietta Wohl, the sickness and inability of the defendant to attend the trial. This was denied, and he again excepted. After the examination of three witnesses for the plaintiff, defendant's attorney again asked the court to continue the case on the ground of the illness of defendant, but at this time offered no evidence of such illness. The court then took a recess until 1:30 o'clock p. m., at the expiration of which defendant's attorney offered to prove by Dr. Nichols that "Mr. Look was a regular practicing physician of standing and a member of the Medical Association of Sacramento," but the court declined to hear this testimony. After the examination of two witnesses for defendant, on motion of defendant, the further trial of the case was postponed for three days, at the expiration of which the trial was renewed, and the defendant, being present, testified in her own behalf. I think it does not appear that the court exceeded its discretionary power in denying defendant's motion for a continuance. No competent evidence of the sickness or inability of the defendant was offered, nor was the denial of the motion in the first instance excepted to. On the renewal of the motion, after a recess of an hour and a half, and without leave of the court, defendant's attorney proposed to prove by Dr. Nichols that Mr. Look was a regular practicing physician, but not that defendant was sick. As it appeared that the defendant was then in the city of Sacramento, why, during the recess, was not the certificate of Dr. Nichols or that of some other physician procured? Was Dr. Look the only physician in the city who would certify or testify to the inability of defendant to attend the trial? No delay was asked for the purpose of an examination of the defendant by any physician. The court may well have suspected that the motion was not in good faith, from the circumstances that the certificate of H. H. Look, not purporting to be that of a physician, and who was not known to be such by defendant's attorney, was the only evidence of sickness offered before the motion was first denied, and thereafter every offer made tended to confirm such suspicion. I think the order and judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are affirmed.

I concur in the judgment: TEMPLE, J.

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112 Cal. 14[illegible]

BULLOCK v. TAYLOR et al. (L. A. 88.)

(Supreme Court of California. March 25, 1896.)

Appeal—Notice—Adverse Parties — Dismissal.

1. A complaint for breach of contract alleged that defendants executed it as co-partners. It appeared that the firm name was signed by defendant P. A nonsuit was granted to the other defendants on the ground that it was not their contract, and judgment was rendered against P., who appealed, and served notice of

appeal on plaintiff alone. *Held*, that the other defendants were adverse parties, within Code Civ. Proc. § 940, requiring notice of appeal "upon all whose rights may be affected by a reversal of the judgment," because, if reversed for granting their motion for a nonsuit, they must litigate the case anew.

2. Adverse parties, who have not been served with notice of appeal, may move for its dismissal.

3. Where in any manner it is suggested that steps necessary to confer jurisdiction have not been taken, the court may dismiss an appeal of its own motion.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Waldorn York, Judge.

Action by John Bullock against Jones Taylor and others and C. O. Perry. From a judgment against him and in favor of plaintiff, defendant Perry appeals. Dismissed.

Geo. J. Denis, for appellant. Anderson & Anderson and H. C. Dillon, for respondent.

BRITT, C. Action for breach of a contract in writing, which plaintiff alleged was executed by defendants as co-partners. By its terms plaintiff undertook to haul freight to be furnished by defendants, and they promised to pay him therefor. It was executed in the alleged firm name by defendant C. O. Perry. At the trial the court granted the motion of defendants Taylor and Godbe for nonsuit as to them on the ground that the instrument sued on was not their contract, said Perry excepting. A verdict was returned in favor of plaintiff and against Perry for the sum of $2,500, on which judgment was entered. Perry appealed, but his notice of appeal was served on plaintiff only. He contends here for a reversal on the ground, among others, that the court erred in granting a nonsuit as to Taylor and Godbe and refusing it as to him, Perry. The said Taylor and Godbe have moved this court to dismiss the appeal, for the reason that they were not served with notice thereof. Section 940, Code Civ. Proc., requires such notice to be served on the adverse party; "that is to say, upon all whose rights may be affected by a reversal of the judgment." Williams v. Association, 66 Cal. 195, 5 Pac. 85; Harper v. Hildreth, 99 Cal. 267, 33 Pac. 1103; Lancaster v. Maxwell, 103 Cal. 67, 36 Pac. 951. "Adverse parties are those who, by the record, appear to be interested in the judgment so that they will be affected by its reversal or modification." Terry v Superior Court (Cal.) 42 Pac. 464. Suppose the judgment should be reversed for the alleged error of the court in granting the motion of Taylor and Godbe for nonsuit, whereby Perry was made solely responsible for plaintiff's damage, it is manifest that a new trial must be had, and that they must litigate the case anew. Indisputably, then, they may be affected by the reversal, and are interested in upholding the judgment; and service of the notice should, therefore, have been made on them. There could be no better illustration of the necessity of the rule than is afforded by the present case. The complaint alleged that the defendants entered into the contract sued upon. An answer filed on behalf of all the defendants admitted that allegation, and this was the only answer brought to this court in the transcript as originally filed, it being stipulated by plaintiff and defendant Perry that such transcript was correct, and that the appeal might be heard on the same. The fact is that Taylor and Godbe had filed a separate and amended answer, denying the partnership, and denying that they executed the contract, and this comes here in a supplemental transcript. Accordingly, before such supplemental transcript was filed, the point was made in the brief for appellant that the granting of the nonsuit as to Taylor and Godbe was in the face of the admission in the pleadings. It is conceded that this argument was advanced by inadvertence, the brief being prepared, not by the learned and candid gentleman who appears here for Perry, but by a friend not conversant with the true state of the record. The circumstance shows, however, the evils likely to result from committing the preparation of the record on appeal and the protection of the judgment solely to the hands of those not interested in sustaining every part of it; in other words, from not notifying all the adverse parties.

There is an objection by appellant that his co-defendants, not having been served with notice, are not parties to the record, and so have no standing to move for a dismissal. Blanc v. Rogers, 47 Cal. 606, is cited to support such objection. Concerning this we observe: (1) The matter going to the jurisdiction of this court to entertain the appeal, it would seem to be immaterial in what manner comes the suggestion that the steps necessary to confer such jurisdiction have not been taken, and so the court has said (In re Castle Dome Mining & Smelting Co., 79 Cal. 249, 250, 21 Pac. 746) the court may dismiss of its own motion (Bienenfeld v. Milling Co., 82 Cal. 425, 22 Pac. 1113). (2) To hold that only a party receiving notice of appeal may move to dismiss is to place with the appellant, in any case where there are several parties adverse to him, the power to select his opponents on appeal. Naturally he would choose those least interested in sustaining the judgment. The appeal should be dismissed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal is dismissed.

112 Cal. 94

DAILEY et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 209.)

(Supreme Court of California. March 24, 1896.)

CONSTITUTIONAL LAW — FREEDOM OF THE PRESS.

Under Const. art. 1, § 9, providing that "every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press," the superior court in which a murder case is pending has no jurisdiction, on application of the defendant, to make an order directing a particular person to refrain from giving any public performance of a certain play, and to cease from advertising the same, on the ground that such play is based on the facts of defendant's case as established at the preliminary examination and coroner's inquest, and that the production of such play during the progress of the trial would be an interference with the administration of justice, and deprive defendant of a fair and impartial trial. McFarland and Temple, JJ., dissenting.

In bank. Petition by W. R. Dailey and others for writ of certiorari to review the action of the superior court of the city and county of San Francisco, state of California, and D. J. Murphy, judge of such court, in making an order directing petitioner Dailey to desist and refrain from giving any public performance of a certain play, and to cease from advertising the same. Order annulled.

Carroll Cook, for petitioners. A. W. Thompson, William S. Barnes, John H. Dickinson, Eugene N. Deuprey, and Edgar D. Peixotto, for respondents.

GAROUTTE, J. One Durrant was upon trial in the city of San Francisco, charged with murder, and, while the jury was being impaneled, the petitioner, Dailey, advertised by posters and newspapers that he would produce in a certain theater in said city of San Francisco a play entitled "The Crime of a Century." Thereupon, Durrant presented an affidavit to the court wherein his trial was then pending, setting forth that said play was based upon the facts of his case as established at the preliminary examination and the coroner's inquest, and that the production of said play during the progress of his trial would be an interference with the administration of justice, and deprive him of a fair and impartial trial. The affidavit was full and complete as to details, but we see no purpose to be subserved by a further statement of the allegations therein set out. Upon the presentation of the affidavit the superior court made an order directing this petitioner, Dailey, to desist and refrain from giving any public performance of said play, and further ordered him to cease from advertising the same. The present proceeding is one of certiorari to review the action of the court in making the aforesaid order, it being insisted that the trial court thereby exceeded its power and jurisdiction. The record before us incidentally develops that this order was subsequently served upon petitioner, that he defied the power of the court in making it, produced the play, and was adjudged guilty of contempt; but with those matters we are not now concerned.

The production of a tragedy or comedy upon the theatrical stage is a publication to the world by word of mouth of the text of the author, and, as to the question here presented for our consideration, it is immaterial whether the words be publicly spoken from the stage or upon the hustings, or go out to the world through the channels of the printing press. By the constitutional provision we are about to invoke, a citizen may speak, write, or publish his sentiments with equal freedom, and this case now stands before us exactly as though one of the daily journals was threatening to publish its sentiments pertaining to the conduct of a criminal trial then pending, and the court where such trial was pending and in progress, believing such publication would interfere with the due administration of justice, had issued an order restraining and prohibiting the threatened action of the paper. We are entirely clear that the court had no jurisdiction to make the order which forms the basis of this proceeding, for such order was an attempted infringement upon rights guarantied to every citizen by section 9, art. 1, of the constitution of this state. That section provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." The wording of this section is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the constitution was the abolishment of consorship, and for courts to act as censors is directly violative of that purpose. This provision of the constitution as to freedom of speech varies somewhat from that of the constitution of the United States, and also more or less from the provisions of many state constitutions treating of this question; but, if there is a material difference in the various provisions, it works no harm to this petitioner, for the provision here considered is the broader, and gives him greater liberty in the exercise of the right granted. The meaning of this provision, or others of similar import, has been declared with unanimity by all commentators upon the law. Blackstone declares that the liberty of the press consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matters when published. He says: "Every freeman has an undoubted right to lay what sentiments he pleases before the public. To forbid this is to destroy the freedom of the press. But if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licensor, as was formerly done before and since the Revolution of 1688, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. * * * Thus the will of individuals is still left free. The abuse only of that free will is the object of legal punishment." Story, in his work upon the Constitution (section 1885), declares: "Indeed, the liberty of the press, as understood by the law of England, is the right to publish without any previous restraint or license; so that neither the courts of justice nor other persons are authorized to take notice of writings intended for the press; but are confined to those which are printed." De Lolme, in his Constitution of England (page 872), declares: "Liberty of the press consists in this: that neither courts of justice nor any other judges whatever are authorized to take notice of writings intended for the press, but are confined to those which are actually printed." In Ex parte Barry, 85 Cal. 607, 25 Pac. 256, the foregoing doctrine is reiterated and approved.

It would seem that the jurisdiction here attempted to be exercised would essentially belong to a court of equity. Yet, even if this proceeding for a restraining order had been inaugurated in such a forum, it would have signally failed. In Story, Eq. Jur. § 948a, the author says: "But the utmost extent to which courts of equity have gone in restraining any publication by injunction has been upon the principle of protecting the rights of property in the book or letters sought to be published. They have never assumed, at least since the destruction of the court of star chamber, to restrain any publication which purports to be a literary work, upon the mere ground that it is of a libelous character, and tends to the degradation or injury of the reputation or business of the plaintiff who seeks relief against such publication." And this principle was declared by the learned chancellor in Brandreth v. Lance, 8 Paige, Ch. 26, wherein he said: "It is very evident that this court cannot assume jurisdiction of the case presented by the complainant's bill, or of any other case of like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which, as the legislature has decided, cannot safely be intrusted to any tribunal, consistently with the principles of free government." After referring to the court of star chamber, he proceeds: "Since that court was abolished, however, I believe there is but one case upon record in which any court, either in this country or in England, has attempted, by an injunction or order of the court, to prohibit or restrain the publication of a libel, as such, in anticipation." In effect, the order made by the trial court in this case was one commanding the petitioner not to commit a contempt of court, and such a practice is novel in the extreme. The court had ample power to protect itself in the administration of justice after the contempt was committed. As to the offender, it could punish him; as to the defendant on trial, he could be deprived of no rights by any act of this petitioner. If the publication deprived him of a fair and impartial trial at that time, a second trial would have been awarded him.

We conclude that the order made by the trial court was an attempted restraint upon the right of free speech, as guarantied by the constitution of this state, and that petitioner's mouth could not be closed in advance for the purpose of preventing an utterance of his sentiments, however mischievous the prospective results of such utterance. He had the right of free speech, but at all times was responsible to the law for an abuse of that right. For the foregoing reasons, the order is annulled, as being beyond the power of the court to make.

We concur: BEATTY, C. J.; HARRISON, J.; VAN FLEET, J.; HENSHAW, J.

McFARLAND, J. I dissent. All the provisions of the constitution must be construed together, and effect given, when possible, to each. The one section (9) of article 1, which provides that "every citizen may freely speak," etc., is to be construed in view of that large and important part of the constitution by which a judicial department of the government is created, and all the usual and necessary powers of courts given to the tribunals established under it. One of the most essential of these powers of a court is to protect itself against unlawful intrusion upon its orderly conduct of business, and to insure litigants in a pending proceeding the free and unembarrassed administration of justice. In the case at bar, in a court of record established by the constitution, a trial was gravely progressing in which a man's life was at stake, and an act was about to be done which it is admitted "would be an interference with the administration of justice, and deprive him of a fair and impartial trial." Is it possible that a court is powerless to protect a defendant in a case pending before it from an act that would deprive him of a fair and impartial trial? In my opinion the right given by section 9 of article 1 not to be stopped beforehand from speaking slanders and writing libels, does not include the right not to be stopped from interfering with a pending proceeding in a court, and preventing a party thereto from having a fair and impartial trial. The right to slander and libel individuals, and the right of a court to prevent interference with the course of justice in a pending trial, are not inconsistent, and may both stand together. And I think that the cases where it has been held that a threatened publication could not be enjoined will be found to be nearly all cases of threatened libels against individuals or property, and not cases where there was a threatened interference with a pending proceeding in a court, and an attempt to deprive a party thereto of a fair and impartial trial. I think that the order under review should be affirmed.

I concur: TEMPLE, J.

(5 Cal. Unrep. 314)

SALISBURY v. BURR, Sheriff (PERKINS, Intervener). (L. A. 79.)[1]

(Supreme Court of California. March 24, 1896.)

INSOLVENCY—CALIFORNIA INSOLVENT ACT—FRAUDULENT TRANSFERS.

In replevin, where defendant, as assignee of an insolvent debtor, alleges that the property was fraudulently transferred to plaintiff by the insolvent in order to defeat his creditors, special findings that plaintiff knew the debtor was insolvent at the time of the transfer, and that the transfer was made to prevent the property from coming into the hands of the assignee, and from being distributed among the creditors with a view to defeat the object of the California insolvent act of 1880, plaintiff having reasonable cause so to believe, but that the transfer was not made to give preference to any creditor, are sufficient to support a general verdict for the defendant under Act April 16, 1880, § 55, relating to transfers by insolvent debtors.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

This was an action in claim and delivery, brought by A. B. Salisbury against John Burr, as sheriff, to recover a stock of merchandise taken by the sheriff under a writ of attachment sued out by Gregory Perkins, Jr., assignee of F. E. Randall. Perkins intervened. There was a verdict and judgment for the intervener, and, a motion for new trial having been granted, intervener appeals. Reversed.

Graff & Latham, for appellant. Walter Rose and W. H. Young, for respondent.

SEARLS, C. This is an appeal by the defendant and the intervener from an order of the court below granting a new trial on the motion of plaintiff. The action is in claim and delivery to recover by the plaintiff, A. B. Salisbury, a stock of groceries, trade fixtures, horses, wagons, harness, etc., alleged to be of the value of $2,800. The defendant, John Burr, denied the ownership or possession of plaintiff, and justified the taking and detention of the property: (1) As the sheriff of the county of Los Angeles, under and by virtue of a writ of attachment sued out by Gregory Perkins, Jr., in an action instituted by said Perkins against F. E. Randall, who was indebted to said Perkins in the sum of $370.98, which said writ was levied on the property March 5, 1895, as the property of said Randall. (2) Defendant justifies further by showing that on the day of the levy of the attachment, viz. March 5, 1895, said F. E. Randall filed his voluntary petition in insolvency, was adjudged an insolvent, and thereupon defendant was, by order of the court, duly appointed receiver of the estate of said insolvent, and on the 7th day of March, 1895, filed bond and qualified as such receiver, took possession of the property, and still retains the same as such receiver. That said insolvent, within 30 days next before the filing his petition in insolvency, pretended to sell said property to plaintiff. That such sale was fraudulent, without consideration, and made to defraud creditors and to prevent the property from going to the receiver, etc., averring certain facts tending to show fraud on the part of plaintiff and said Randall. George Perkins, Jr., intervened in the action by leave of the court, and showed by his complaint that he had been duly elected, and had qualified as assignee in insolvency of the estate of the insolvent, F. E. Randall, and had received an assignment of said estate, executed by the clerk of Los Angeles county; and also averred that the property in question had been fraudulently transferred by the insolvent to plaintiff, without consideration, out of the usual course of business, and to prevent the property coming to the hands of the assignee, and from being distributed to the creditors of said insolvent, and to defeat the object of the insolvent act of 1880; that plaintiff was cognizant of the fraud, etc., and that the insolvent had no other property than that conveyed, etc. The cause was tried by a jury, a general verdict rendered in favor of intervener, and several special findings returned. These findings may be summarized as follows: Randall was insolvent at the time he transferred the property to plaintiff, which fact plaintiff had reasonable cause to believe. The transfer was made with intent to prevent its coming to the assignee in insolvency; to prevent its being distributed ratably among his creditors; and with a view to defeat the object of the insolvency act of 1880, which last fact plaintiff had reasonable cause to believe at the time of the transfer. The transfer was not made to give a preference to any creditor or person having a claim against the insolvent, or to any one who was under liability to him, or to prevent the property which the insolvent received in exchange for the property transferred from coming to the hands of the assignee or from being ratably distributed; and, if the insolvent so intended, plaintiff had no knowledge thereof, or reason to so believe. There is a statement on appeal, but it does not set out any of the evidence, or the instructions given to the jury or refused by the court, and the question must turn upon the sufficiency of the specifications upon which the notice of motion for a new trial specified that it would be made "upon the minutes and records of the court and upon the instructions of the court to the jury and the pleadings, records, and findings in said action."

Under the fourth subdivision of section 659 of the Code of Civil Procedure it was necessary for the moving party to specify in his notice of motion the particular errors upon which he would rely. The only specifications of error are as follows: (1) Insufficiency of the special findings to justify the verdict, and that the general verdict is against the law. (2) Errors in law occurring at the trial, and excepted to by plaintiff. (3) That the verdict is against the law. (4) That the general verdict rendered by the jury in the action is not supported by the special findings of fact made by the jury. (5) Upon the ground that the general verdict is inconsistent, and contrary to the special findings made by the jury. (6) That upon the special findings of fact it appears that the plaintiff is entitled to judgment against defendant and intervener for the return of the property. There is no suggestion that the evidence failed to support the verdict or special findings. We must therefore assume that it was sufficient in these respects. If there is any error assigned which the court below could consider, it must have been that the special findings were antagonistic to the general verdict, and did not support it. The general verdict in favor of intervener was the equivalent of a finding in his favor upon all the issues in the case. The special findings did not cover all of those issues, but, so far as they went, they were in harmony with such general verdict, and tended to its support. We fail to find in the record any ground upon which, by the most liberal construction, the act of the court below granting the new trial can be upheld. It is suggested—but whether rightly we cannot say—that the court regarded the cases of Ohleyer v. Bunce, 65 Cal. 544, 4 Pac. 549, and Washburn v. Huntington, 78 Cal. 573, 21 Pac. 305, which construed section 55 of the insolvent act of 1880, as being overruled by Hass v. Whittier, 87 Cal. 613, 25 Pac. 917; and in the same case in 97 Cal. 411, 32 Pac. 449. Hass v. Whittier, 87 Cal. 613, 25 Pac. 917, was a case in which the action was brought by the assignee of an insolvent to recover from a creditor of the insolvent the value of certain personal property transferred to such creditor. There was no allegation in the complaint or finding that the insolvent transferred the property to his creditor "with a view to give a preference to any creditor or person having a claim against him," and on appeal this court reversed the judgment, for the want of such allegation and finding. In the case at bar the complaint in intervention shows that within 30 days next before filing his petition in insolvency the insolvent pretended to transfer the property in question to plaintiff; that the transfer was without consideration, "and such pretended transfer was made out of the usual course of business, with the full knowledge on the part of said Salisbury that said F. E. Randall was then insolvent; and the said pretended sale was entered into by and between said F. E. Randall and said Salisbury for the purpose of preventing said property from coming to this intervener as the assignee of said insolvent, to prevent the same from being ratably distributed among his creditors, and to defeat the object of the insolvent act of 1880; and at the time of said pretended transfer said F. E. Randall had no other property with which to pay his debts, or out of which the same could be satisfied; * * * that said A. B. Salisbury, for the purpose of defrauding said estate, is wrongfully claiming to be the owner thereof," etc. These allegations, while not as full and complete as they might have been, are deemed sufficient in the absence of a demurrer. Hass v. Whittier was here again (97 Cal. 411, 32 Pac. 449), and on the second appeal it was held, among other things, that where there is a transfer by an insolvent debtor to his creditor, not made in the usual and ordinary course of business, the transaction is presumed prima facie to be a preference not allowed by section 55 of the insolvent act; but that such presumption may be rebutted by showing that no preference was intended, and that the insolvent intended to treat all his creditors alike. In the present case there is no showing that the plaintiff was a creditor of Randall, the insolvent. Section 55 of the insolvent act of 1880 is aimed not only at cases where an insolvent debtor, in contemplation of insolvency, within one month before filing his petition in insolvency, causes his property to be seized, etc., with a view to giving a preference to a creditor or person having a claim against him, but also at all persons who receive assignments, transfers, or conveyances of his property within the same period, having reasonable cause to believe that such person (the assignor) is insolvent, and that the transfer, assignment, or conveyance "is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors," etc., in which cases the transfer is void, and the assignee in insolvency may recover the property or its value. We are satisfied that upon the specifications of errors as assigned in the notice of motion for a new trial no cause was assigned upon which a new trial could properly be granted, and hence we recommend that the order granting a new trial be reversed, and the cause be remanded, directing the entry of judgment in favor of intervener.

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[1] Reversed in banc. See 46 Pac. 270, 114 Cal. 451.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order granting a new trial is reversed, and the cause remanded, directing the entry of judgment in favor of intervener.

111 Cal. 544

PEOPLE ex rel. SAN FRANCISCO & S. J. RY. CO. v. CRAYCROFT et al., Board of City Trustees. (S. F. 360.)

(Supreme Court of California. March 14, 1896.)

RAILROAD COMPANIES — RIGHT OF WAY THROUGH TOWNS—GRANTED ACCORDING TO MERITS OF APPLICATION.

The grant of the right of way to a steam-railway company which desires to make a connection, through the town, of those portions of its road extending upon either side of the town, to its opposite termini, must be acted on according to the merits of the petition therefor, and is not within Act March 23, 1893 (St. 1893, p. 288), requiring that "every franchise or privilege to erect or lay telegraph wires, to construct or operate railroads along or upon any public street or highway, or to exercise any other privilege whatever" proposed to be granted by the governing body of any town, must be advertised, and be granted to the highest bidder.

In bank. Petition for a writ of mandamus by the San Francisco & San Joaquin Railway Company against Craycroft and others, constituting the board of trustees of the city of Fresno. Granted.

E. F. Preston, for relator. L. W. Moultrie, for respondents.

BEATTY, C. J. This is an original proceeding, in which the petitioner asks the issuance of a writ of mandate to the respondents, commanding them to act upon its petition for leave to extend its railway track through the city of Fresno, and across and along certain streets and lands of said city. The petitioner is a corporation organized and existing under the laws of California, and, by its incorporation, authorized and empowered to construct, maintain, and operate a steam railway for the transportation of passengers and freight from a point at or near the Bay of San Francisco, in a line generally easterly and southeasterly to a point at or near the city of Bakersfield, in Kern county, a distance of about 350 miles. The route of the road, as laid out, passes through the city of Fresno; and the petitioner has already constructed a section 20 miles in length on such proposed route, between Stockton and Fresno. It is necessary, for the proper and successful operation of the road, that it should be constructed as laid out; and this involves the right to pass through the city of Fresno upon a line and over and across the streets particularly designated in an application which was by the petitioner duly presented to the respondents. But they, instead of passing upon the question as to whether the proposed route was properly located, and the application one proper to be granted, resolved to advertise for bids for the privilege of operating a steam railway over the route proposed, and determined that they would grant said privilege to the highest bidder, without regard to the question whether such bidder was engaged in constructing a road between the same termini or not. There is not, in fact, any other corporation or person proposing to build such a road, or who could make a bona fide bid in competition with the petitioner; and the award of the privilege sought, to any other person, would simply prevent the construction of the road through the city of Fresno, and to that extent defeat the purpose for which the petitioner was incorporated. All these facts are admitted by the respondents, and it is not denied that the course they are pursuing involves a seeming absurdity; but they hold themselves bound to that course by the terms of an act of the legislature approved March 23, 1893, entitled "An act providing for the sale of railroad and other franchises in municipalities, and relative to granting of franchises." St. 1893, p. 288. This act does, in express terms, provide that "every franchise or privilege to erect or lay telegraph wires, to construct or operate railroads along or upon any public street or highway or to exercise any other privilege whatever hereafter proposed to be granted by the board of supervisors, common council or other governing or legislative body of any county, city and county, city, town or district within this state shall be granted upon the conditions in this act provided and not otherwise"; i. e. the fact that a franchise or privilege (describing it) has been asked, and that it is proposed to grant it to the highest bidder, shall be advertised, and at the expiration of the time limited the bids must be opened, and the franchise or privilege must be awarded to the highest bidder. Any member of a board of supervisors, or other governing body, who, by his vote, violates or attempts to violate any of the provisions of the act, is guilty of a misdemeanor, and of malfeasance in office, for which he may be removed by any court of competent jurisdiction.

It cannot be denied that the language of this act is broad enough to include the franchise and privilege which the petitioner seeks, but a statute will not always be held to include every case which falls within its literal terms. The penalty of death denounced against any person who draws blood in the street is not incurred by a surgeon who bleeds one who has fallen in a fit; and so, generally, no law will be so applied as to work a palpable absurdity. The word "railroad" is certainly broad enough to cover a steam railroad, and the privilege of laying and operating a steam railroad through a city is clearly included in "any privilege whatever"; but at the same time, if it is perfectly evident from the whole tenor of this act, and other acts in pari materia, that the legislature could not have intended the consequences of a literal construction of the language above quoted, such a construction cannot obtain. It is the policy of this state to encourage the building of railroads, and a corporation complying with the statutory prerequisites acquires, among other things, the right to construct and operate its road between the termini named in its articles of incorporation. In the exercise of this right, it may pass through cities and towns along its route, if they are willing to grant the privilege. Generally it is to the interest of the inhabitants of such towns and cities, as well as of the railroad company, to have the road pass through the corporate limits; and it is not to be supposed that the legislature intended to make it impracticable, if not impossible, for the builders of the road and the governing bodies of the cities and towns along the route to promote their mutual interests in this way. But, if this law is to be enforced in a literal sense, such must be the result. When a railway is constructed to the boundaries of a town or city, the corporate authorities may be as desirous as the builders of the road to have it pass through on its selected route, but their hands are tied. They cannot grant the privilege to any but the highest bidder, and the highest bidder may be some one who merely desires to prevent the road from passing through, and who cannot make any use of the franchise except for that purpose. In fact, the franchise sought is not the subject of competition. A particular railway company desires permission to construct its road through the town, or, in other words, to make a connection through the town of those portions of its road extending upon either side of the town to its opposite termini. In the nature of things, there can be no competition for this privilege. The builder of the road must own and operate the whole line. The right to do so is part of its corporate franchise, and how is it possible that any other person or corporation can acquire the right to construct and own and operate, as a distinct and independent road and franchise, that part of the road necessary to connect its two ends? This law was not intended to apply to such a case, but only to those cases—as of street railroads—in which bona fide competition is possible. It follows that, when the application of petitioner was presented, it was the duty of respondents to consider and act upon it, without subjecting the petitioner or themselves to a condition which might preclude them, in the exercise of a proper discretion, from granting the privilege sought. It is ordered that a peremptory writ of mandate issue, commanding the respondents to act upon the application of petitioner without reference to any bids for the privilege sought, and to grant or deny it according to its merits.

We concur: HARRISON, J.; VAN FLEET, J.; McFARLAND, J.; GAROUTTE, J.; TEMPLE, J.

(112 Cal. 135)

PEOPLE v. HOWARD. (Cr. 37.)[1]

(Supreme Court of California. March 24, 1896.)

HOMICIDE—APPEAL—HARMLESS ERROR—EVIDENCE—CHARACTER OF DECEASED.

1. In a prosecution for murder, one of the state's witnesses testified that defendant called at her house, inquiring for deceased, and made threats against him. *Held*, that it was not reversible error to refuse to permit defendant to show by cross-examination that defendant went to witness' house in response to a call by the witness for a policeman, defendant having been given the right to call the witness as his own to prove such fact.

2. Where, in a prosecution for murder, defendant introduces evidence to show that the reputation of deceased for peace was bad, it is not error to admit evidence to show that his reputation in such respect was good, on the ground that the evidence of defendant was immaterial, in that it was not shown that the reputation of deceased was known to defendant, defendant's evidence having shown that he was well acquainted with deceased, and knew of threats against him made by deceased.

3. The prosecution claimed that defendant shot deceased, with whom he had had a wordy dispute, in the back, after he had turned from defendant. Defendant claimed that he shot while deceased was making a murderous assault upon him. *Held*, that it was proper to refuse, as unwarranted by the evidence, an instruction that a person whose life has been threatened, if he casually meets his foe, and has reasonable cause to believe him armed and ready to execute his threats, and that his personal safety can be secured in no other way, need not wait to be assaulted, but may kill his foe if necessary to secure himself from the imminent danger.

4. A person whose life has been threatened, casually meeting his foe, and having "good reason" to believe him armed, and ready to execute his threats, and that "personal safety" can be secured in no other way, before he is assaulted, is not justified in shooting his foe, to secure himself from the imminent danger. Such a homicide would be murder. Beatty, C. J., dissenting.

In bank. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

John E. Howard was convicted of murder, and appeals. Affirmed.

Lamberson & Middlecoff and H. C. Lillie, for appellant. Atty. Gen. Fitzgerald and Power & Alford, for the People.

TEMPLE, J. Defendant, having been convicted of the crime of murder in the first degree, and sentenced to suffer death, takes this appeal from the judgment and from an order refusing a new trial.

The first point has reference to certain rulings sustaining objections to questions propounded by the defense on cross-examination of witnesses for the people. The deceased, prior to the homicide, was living with a prostitute named Susana Del Gardo. She testified for the prosecution that on the day preceding the killing the defendant called at her house and inquired for the deceased, and that, being informed that he was not there, proceeded to utter some threats in regard to him. On cross-examination she was asked by counsel for the defense if she had sent for a policeman by one Bradley. This was objected to on the ground that it was not proper cross-examination. Counsel for the defense stated that they proposed to show that she had sent for a policeman, and that defendant, who was acting as a deputy marshal, went in response to such request. The objection was sustained, the court saying: "You have the liberty to recall the witness as your own." I think the question should have been allowed, but it was at least a debatable question, and upon such matters a large discretion must be given to the trial court. The defense was not deprived of the evidence by the ruling, and I think we can see that defendant was not injured. The witness did finally answer the question on cross-examination, for she said she had not sent by any one word to the marshal to the effect suggested. The testimony would have been important as explaining that defendant was not then seeking the deceased, but it would not have qualified or contradicted anything that the witness had said. It was a new fact, favorable to the defendant. I think it was legitimate cross-examination, for it would have rebutted an unfavorable inference which might be made from the testimony of the witness. But it would have been just as effectual for that purpose if given by the defense as their own testimony.

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[1] Rehearing denied.

The same course of reasoning will dispose of a similar exception taken during the cross-examination of Bradley.

I am unable to see how the fact (if it was a fact) that defendant was employed by the city marshal to find evidence to secure convictions in a certain class of cases would have thrown any light upon the homicide. Nothing indicates that a prosecution of that character was contemplated against the deceased. On the contrary, it seems that the deceased was expected to assist defendant in procuring evidence. The theory of the defense, however, was not that the fatal affray grew out of this matter, but that deceased was indignant because he thought defendant had attempted to have him arrested for beating the witness Del Gardo, and therefore made an assault upon him. Evidence was offered by the defense, and received without objection, to the effect that the reputation of De La Nina for peace and quietness was bad. Afterwards the prosecution in rebuttal offered testimony to the effect that De La Nina's reputation in the respects named was good. The defense objected on the ground that it was irrelevant, immaterial, and incompetent, and that no foundation had been laid for the introduction of such testimony. The objection was overruled, and the evidence was received. It is now claimed here that this ruling was erroneous. This contention seems to be founded upon the proposition that the evidence introduced by the defense upon this point was wholly immaterial, because it was not made to appear that defendant knew of the bad reputation of the deceased,—if it was bad,—and therefore it was error to permit the prosecution to disprove it. But I do not think this proposition can be maintained. The evidence shows that defendant was acting as deputy marshal of Tulare. He testified in his own behalf that he knew De La Nina quite well. The testimony given by several witnesses tended to prove that they were quite well acquainted. The witness Del Gardo testified that defendant told her that De La Nina was a man he did not like, and that he was glad "to get to run him out of town, and make him some trouble." He claims himself that he went to the house of Del Gardo to see about arresting him for having beaten his mistress, and that several different persons had informed him of threats made against him by the deceased. It was, therefore, doubtless assumed by court and counsel that whatever reputation De La Nina bore was known to the defendant. The defendant cannot complain that this proposition was practically conceded to him. According to his own contention, therefore, the evidence was material. In rare cases such evidence may be introduced as one of the circumstances tending to justify a defendant in the belief that he is in imminent danger, and that it was necessary to take life in self-defense. Of course it could have no material bearing upon that point unless defendant was at the time aware of the character of his assailant. In this case all parties seem to have assumed that such knowledge existed, and I think the state of the evidence warranted the belief.

Many other objections were taken to rulings admitting or refusing to admit evidence. But they were all unimportant, and in my judgment they are all correct. A discussion of them would not be interesting or profitable.

The court refused to give the following instruction asked by the defendant. In so doing, it is contended, the court erred: "One whose life has been threatened may arm himself to resist his foe; and if he casually meets such foe, having good reason to believe him armed and ready to execute his threats, and that his personal safety can be secured in no other way, need not wait to be assaulted, but may secure himself from the imminent danger, even by killing his adversary, if necessary." I find considerable difficulty in understanding why the defense desired this instruction, or upon what view of the facts it could help them. The prosecution claimed that there had been some wordy dispute between the defendant and De La Nina, and that defendant shot deceased, after deceased had turned away from him, through his head, from behind, and that deceased was unarmed, and had made no demonstration towards defendant. The theory of the defense and the evidence of the defendant was that the deceased was slain while making a murderous assault upon the defendant with a deadly weapon. There was no evidence whatever tending to make a case to which the instruction asked would have the slightest application. But the instruction was not correct. A homicide committed under the circumstances indicated would be murder. It lacks several matters essential to a case of self-defense. (1) It does not require that a defendant shall believe himself in imminent danger, nor that the killing is necessary. (2) It leaves out the requirement that the circumstances must be such as would convince a reasonable man that danger was imminent, and that it was absolutely necessary to take life to save himself from death or great bodily injury. It not only does not require that the danger shall be real, but ignores the doctrine of appearances as well. And (3) it tells the jury that to secure immunity from any sort of injury would justify the taking of human life. The phrase "personal safety" does not necessarily indicate the class of injuries, danger and fear of which will alone justify taking human life. The addition made by the court to the fifth instruction asked by the defendant correctly states the law upon the subject. There was nothing in the line of argument pursued by the district attorney of which the defendant can rightfully complain. The judgment and order are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.; VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.

BEATTY, C. J. I concur in the judgment. As to the ruling of the court upon the question to the witness Del Gardo, it was clearly erroneous, and the propriety of the question, in my opinion, not open to debate. It was also highly material, and the exclusion of the evidence could not be defended upon the ground that it was within the discretion of the court. But the witness subsequently answered questions to the same effect, and therefore it can be seen that the ruling, though erroneous, was not prejudicial.

As to the instruction refused by the court and commented upon by Justice TEMPLE, it was perhaps not sufficiently explicit in some respects, but is not, in my opinion, open to the second ground of objection stated by him. Its refusal was justified, however, upon the ground that there was no evidence to which it was pertinent.

112 Cal. 174

HOLLY v. HEISKELL. (Sac. 82.)

(Supreme Court of California. March 28, 1896.)

CLAIM AND DELIVERY — PLEADING — ALLEGATION OF RIGHT OF POSSESSION.

In an action to recover personal property, the complaint must allege the ultimate fact that plaintiff is the owner of or entitled to possession of the property at the time the action is commenced; an allegation of ownership or right of possession on a prior date is insufficient.

Department 2. Appeal from superior court, Fresno county; Stanton L. Carter, Judge.

Action by George N. Holly against William Heiskell. Judgment for plaintiff, and defendant appeals. Reversed.

E. D. Edwards, for appellant. Strother & Strother, for respondent.

McFARLAND, J. This is an appeal by defendant, upon the judgment roll, from a judgment in favor of plaintiff. The action is claim and delivery. Appellant contends that the judgment must be reversed because there is no averment in the complaint that respondent was the owner or entitled to the possession of the property sued for at the time the action was brought; and, under the authorities, the contention must be sustained. In a suit to recover personal property, the complaint must show the ultimate fact that plaintiff was owner or entitled to possession at the time of the commencement of the action; and it is not sufficient to merely aver that he was the owner or entitled to possession at some period prior to that time. It was so expressly held in Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 750, Afflerbach v. McGovern, 79 Cal. 269, 21 Pac. 837, and Masterson v. Clark (Cal.) 41 Pac. 796; and the two first-named cases were referred to approvingly in the still more recent case of Williams v. Ashe (Cal.) 43 Pac. 595. Counsel for respondent seek to show us a distinction between those cases and the case at bar, but we are not able to see it. In Afflerbach v. McGovern there was no demurrer to the complaint. In the case at bar the only averment of the respondent's ownership or right of possession is "that on the 22d day of April, 1895, plaintiff was the owner and entitled to the possession of the following described personal property, to wit." And the action was not commenced until after the said 22d day of April. Under the authorities above cited, the complaint does not state facts sufficient to constitute a cause of action; and, of course, that objection can be taken at any time. The judgment appealed from is reversed, and the cause remanded, with directions to the court below to allow respondent to amend his complaint, if he shall be so advised.

We concur: GAROUTTE, J.; HENSHAW, J.

112 Cal. 255

SAVINGS BANK OF SOUTHERN CALIFORNIA v. THORNTON et al. (L. A. 16.)

(Supreme Court of California. April 1, 1896.)

MORTGAGES—PROMISE TO PAY PRIOR LIEN—RIGHT OF ACTION.

Where the mortgagee in a mortgage taken to secure the repayment of money loaned to the mortgagor assumes and agrees to pay an unpaid balance due on a prior note and mortgage given by the same mortgagor to a third party, such agreement is for the benefit of the mortgagor only; and no right of action founded on the contract arises in favor of such third party incidentally to be benefited thereby.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

This was an action brought by the Savings Bank of Southern California against Isabella Thornton and James C. Barr and others to recover the unpaid balance on a note and mortgage executed by Barr and wife to plaintiff, for the sum of $1,000. There was judgment for defendants, and plaintiff appealed. Affirmed.

Albert M. Stephens, for appellant. J. T. Houx, for respondents.

BRITT, C. Counsel agree that the plaintiff's appeal was taken from an order of the superior court refusing its motion for new trial, made after a second trial of the case; and we shall so regard it, although on the face of the notice of appeal it is at least doubtful whether it is not directed to a previous order of the court granting a like motion of the defendant Thornton after a former trial. Defendants James C. Barr and wife on January 24, 1888, executed to plaintiff their promissory note for the sum of $1,000, payable in two years from date, with interest, and, to secure the same, executed also a mortgage of certain lands. On January 24, 1890, said note being mainly unpaid, the defendant Thornton loaned to Barr and wife the sum of $432.60; and, as security for its repayment, they executed to her an instrument in form a deed absolute of the land previously mortgaged to plaintiff. Such instrument (intended as a mortgage) contained a clause to the effect that the second party named therein, said Isabella Thornton, "assumes and agrees to pay" the balance unpaid on the said former note and mortgage. The Barrs have never repaid to her said sum of $432.60, or any part thereof; and the land is worth less than the sum due to plaintiff. Plaintiff brought this action to foreclose its said mortgage, and the question for decision here is whether the defendant Thornton is personally liable to the plaintiff for any deficiency which may remain after applying upon its mortgage debt the proceeds of sale of the incumbered land; plaintiff claiming that her agreement with the Barrs was made for its benefit. Civ. Code, § 1559.

The respondent urges in support of the order, among other matters, that she never assented to the clause in her mortgage providing that she should discharge the prior mortgage, and that it was inserted without authority from her by the agent who had the business in hand for her; that she did what she could to rescind the contract apparently created by the instrument as soon as she learned of the existence of that clause; and that she received no consideration for such agreement. Without considering these propositions, which are combated by appellant as being unsustained by the evidence, we are of opinion that on other grounds the decision in her favor was right. This is not the case where the grantee of mortgaged premises undertakes, as part of the consideration for the conveyance, to pay the grantor's debt to the mortgagee, of which transaction several examples are furnished by our Reports: Alvord v. Gold Co., 106 Cal. 547, 40 Pac. 27; Williams v. Naftzger, 103 Cal. 438, 37 Pac. 411; Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609. Here, the promisor, Mrs. Thornton, owed the Barrs nothing, and did not undertake to discharge a debt of her own to them by paying the amount thereof to plaintiff. She undertook to release the land from a prior incumbrance for the benefit, not of plaintiff, but of Barr and wife, whose property the land remained. "Regarding the conveyance as a mortgage, the stipulation was in effect to advance to the promisee on the security of the property, to discharge prior liens, and was made for the benefit of the promisee only. If such a contract could be enforced by the creditor who would be incidentally benefited by its performance, every agreement by which one party should agree with another, for a consideration moving from him, to become security for him to his creditors, or to advance money to pay his debts, could be enforced by the parties whose claims were thus to be secured or paid." Garnsey v. Rogers, 47 N. Y. 233, 241. Such benefit, therefore, as plaintiff would derive from the performance of the contract by Mrs. Thornton being merely an incident thereof, no right of action founded on the contract arose in plaintiff's favor. Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100. Appellant relies on Ricard v. Sanderson, 41 N. Y. 179, and Bassett v. Bradley, 48 Conn. 224. But the first of these decisions rested on the supposed authority of previous cases which have been said in this court to have "little persuasive effect" (Biddel v. Brizzolara, 64 Cal. 357, 30 Pac. 609); and it can hardly now be considered authoritative, even in the court which pronounced it (Garnsey v. Rogers, supra; Pardee v. Treat, 82 N. Y. 385; Jones, Mortg. § 756, note 4). And in the Connecticut case, the plaintiff, a prior mortgagee, had taken an assignment of the rights of the mortgagor under such a promise of the subsequent mortgagee, and on that ground was permitted to maintain the action, the court saying: "In such cases there is little room for the conclusion that the promise was made for the benefit of the prior mortgagee. It is simply a transaction between the immediate parties." 48 Conn. 240. See, also, Keller v. Ashford, 133 U. S. 624, 10 Sup. Ct. 494, and cases there cited. Other difficulties attending the theory of respondent's liability to plaintiff suggest themselves by reason of the maturity of the Barrs' debt to her, and their failure to pay it; but what has been said already suffices for the disposal of the case. The order denying plaintiff's motion for new trial should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying plaintiff's motion for a new trial is affirmed.

(112 Cal. 176)

In re BYRNE'S ESTATE. (Sac. 60.)[1]

(Supreme Court of California. March 28, 1896.)

SALE OF DECEDENT'S ESTATE—PETITION—MINES—SALE—PETITION.

1. Under Code Civ. Proc. § 1537, authorizing the probate court to order a sale of property of a decedent on presentation of a petition showing

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[1] Rehearing denied.

certain facts, the court acquires no jurisdiction unless the petition avers all the facts required.

2. A petition describing land of a decedent as acquired by him under a mineral entry, designating it as the "Irish and Byrne Mine," without averring that the land is or contains a mine, and which avers that no work has been performed thereon for 20 years, fails to show that the property is a mine or an interest in a mine, within Code Civ. Proc. § 1529, authorizing the sale under order of court of "mines or interests in mines" belonging to decedents' estates.

Department 1. Appeal from superior court, Placer county.

Petition by an heir of Joseph Byrne for a sale of real property belonging to the estate. From an order directing the sale, Maggie G. Barrett, administratrix, appeals. Reversed.

W. B. Lardner (Geo. B. Merrill, of counsel), for appellant. L. L. Chamberlain, for respondent Byrne. J. M. Fulweiler, for respondents absent heirs.

HARRISON, J. Appeal from an order directing the sale of certain real property belonging to the estate of the decedent. The deceased died intestate, and letters of administration were issued upon his estate to Maggie G. Barrett, who duly made and returned to the court an inventory of the estate, and caused to be published a proper notice to his creditors. Thereafter one of the heirs at law of the deceased presented to the superior court a petition for the sale of certain real property belonging to the estate, upon the ground that it would be for the best interest of said estate that it should be sold, assigning various reasons therefor. The administratrix demurred to this petition, and filed certain objections thereto, which were overruled, and the court made an order directing her to cause the property to be sold. From this order she has appealed.

The authority of the superior court to order the sale of any real property belonging to the estate of a deceased person depends upon the presentation of a petition therefor containing a statement of the facts required by section 1537, Code Civ. Proc. The sufficiency of the petition is the basis of the order of sale, and upon a direct appeal from this order, if the petition is defective in any of these statutory requirements, it is fatal to the validity of the order. It is conceded by the respondent that the petition fails to state many of the facts made requisite by section 1537; but it is contended by him that, because the real property which he asks to have sold is a mine, that section is inapplicable, and that the proceedings are to be governed by the provisions of sections 1529–1533, Id. These sections are headed "Summary Sales of Mines and Mining Interests," and form article 3 of the chapter providing for "Sales in General," while article 4 of the same chapter is headed "The Sale of Real Estate, Interests Therein, and Confirmation Thereof." Section 1536 authorizes the making of an order for the sale of "real as well as personal property"; and section 1537 declares that, "to obtain such order," the petition therein referred to must be presented, containing certain enumerated facts. It may be conceded that a mine or an interest in a mine belonging to the estate of a decedent, where the only title is that of possession, which may be lost by abandonment or by failure to comply with local regulations, is subject to the provisions of article 3; but it does not follow that a piece of real estate may be sold under these provisions merely because there is thought to be mining ground within its boundaries. In the present case the property which is directed to be sold is a tract of land containing 115 acres, of which the decedent was the owner in fee simple, by virtue of a patent issued therefor by the United States. It was patented under a mineral entry in 1874, 16 acres thereof "included in the same patent" being situate in a different township; and it is stated in the petition that no work has been done upon the mine for upwards of 20 years. The description in the petition refutes the idea that the property is either a mine or a mining interest, within the meaning of section 1529. There is no direct statement, either in the petition or in the order, that the property is either a mine or an interest in a mine; nor is it even stated that there is any mining ground upon the tract of land. Throughout the entire proceedings it is treated as real estate, except for the name which it bears,—"Irish and Byrne Mine." This, however, is not even evidence that the property is a "mine." The order of the court directs the administratrix to sell "the real estate belonging to the said estate hereinafter described" and, in giving the description of the property, proceeds: "The following real estate, hereby authorized to be sold, being situate in the said county of Placer, state of California, and bounded and described as follows, to wit: An undivided one-half interest in and to the Irish and Byrne Placer Mine; also sixteen acres included in the same patent, situate at Wisconsin Hill, Tp. 7, Placer county, Cal., more particularly designated as mineral entry No. 334, in the series of the Sacramento land office, * * * in the Wisconsin Hill mining district, and containing 115.54 acres, more or less, and found more fully described in Book C of Patents, pages 265–9, Placer county records." We hold, therefore, that the property directed to be sold is real estate, and that the court could not make an order directing the administratrix to sell it, unless there was presented to it such a petition as is required by section 1537, Code Civ. Proc. The order is reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

112 Cal. 75

CONSOLIDATED NATIONAL BANK OF SAN DIEGO v. HAYES et al. (L. A. 57.)

(Supreme Court of California. March 24, 1896.)

EXECUTORS AND ADMINISTRATORS—PRESENTATION OF CLAIM — MORTGAGE — FORECLOSURE — PARTIES—INTEREST—LIMITATIONS.

1. A claim against an estate recited that it was indebted to a certain bank on a note of a specified date and amount, with interest from such date; such "note being secured by mortgage recorded in the recorder's office of S. county, in Book No. 36 of Mortgages, at page 211 et seq. A copy of said note and mortgage is hereto attached." The attached paper was a copy of the mortgage, with the indorsements thereon showing the date, volume, and page of its record in the recorder's office, and containing a copy of the note. *Held* a substantial compliance with Code Civ. Proc. § 1497, providing that if the claim be founded on a bond, bill, note, or any other instrument, a copy of such instrument must accompany the claim, and if it be secured by a mortgage, or other lien, which has been recorded in the office of the county recorder, it shall be sufficient to describe the mortgage or lien, and refer to the date, volume, and page of its record.

2. Where a claim against an estate is secured by a mortgage, and has been filed among the approved claims against such estate, it is no objection to the foreclosure of the mortgage that the verification of the claim was defective.

3. The mere delivery of a note and mortgage by the mortgagee, as collateral security for a debt, without any indorsement or written transfer, will not preclude such mortgagee from suing on the note and foreclosing the mortgage in his own name, with the consent of the pledgee.

4. A claim against an estate was on a note of $3,000, dated December 20, 1887, which bore interest at 12 per cent., and, as presented, was "for $3,000 and accrued interest." It was by the administrators "allowed and approved for $3,000 this 15th day of May, 1889"; and by the court it was "allowed and approved for $3,000 this 15th day of November, 1889." The note was secured by mortgage. *Held*, that on foreclosure of the mortgage, not brought within three months after such allowance, it was error to allow interest from the date of the note, under Code Civ. Proc. §§ 1498, 1503, providing that, whenever any claim presented to an administrator or judge is rejected, the holder must bring suit in the proper court against the executor, etc., within three months after the date of its rejection, otherwise the claim shall be barred.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county.

Action by the Consolidated National Bank of San Diego against Richard V. Hayes and others to foreclose a mortgage. From a judgment for plaintiff, defendants appeal on the judgment roll. Modified and affirmed.

Trippet & Neale and Leroy & Palmer, for appellants. C. H. Rippey, for respondent.

BELCHER, C. This action was brought to foreclose a mortgage executed by Edward Hayes and Richard V. Hayes to secure payment of a promissory note made by them to the plaintiff. The note was for $3,000, bearing interest at the rate of 12 per cent. per annum, compounding quarterly, and was dated December 20, 1887, and payable March 20, 1888. The mortgage was executed April 3, 1888. Edward Hayes died testate on February 4, 1889. His will was duly admitted to probate, and Richard V. Hayes and Edward Dougherty were appointed and duly qualified as administrators of the estate with the will annexed. Notice to creditors was duly published, and within the time limited in the notice the plaintiff presented to the administrators, for allowance, its claim based on said note and mortgage; and the same was allowed and approved by them and by the judge of the court, and filed in the court among the acknowledged debts of the estate. The action is based on said claim, and was commenced April 26, 1892. The defendants are the two administrators and the widow and children of the decedent. The administrators and the other defendants answered separately. The answer of the administrators denied the nonpayment of the note; denied that the interests or claims of defendants in the premises described were subsequent or subject to the lien of the plaintiff's mortgage; denied that the claim of plaintiff was duly or properly presented to or allowed by the administrators or the judge of the superior court; denied that the plaintiff was the lawful owner or holder of said note or mortgage; and, as a further defense, set up that, prior to the commencement of the action, plaintiff pledged, assigned, and delivered said note and mortgage to the Savings Bank of San Diego as collateral security for the payment of an indebtedness of the plaintiff to said savings bank amounting to $3,000, with interest thereon at 10 per cent. per annum from said date, and that no part of said sum had been paid, and the savings bank still held the said note and mortgage as collateral security for the payment of said indebtedness. The answer of the other defendants set up the same defense as above, and, in addition thereto, that the cause of action was barred by the provisions of sections 337 and 1500 of the Code of Civil Procedure. The court below found in favor of the plaintiff, and gave judgment foreclosing the mortgage, from which the defendants have appealed on the judgment roll, without any statement or bill of exceptions.

1. Section 1500 of the Code of Civil Procedure provides that no holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except that an action may be brought to enforce a mortgage or lien against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint. In the complaint in this case there was no such waiver, and appellants contend that there was no legal presentation of the claim relied on, and hence that the action was not authorized and cannot be maintained. This contention is based upon the theory that no copy of the note accompanied the claim, and that no sufficient

affidavit in support of the claim was attached thereto. The claim presented was as follows: "Estate of Edward Hayes, Deceased. To the Consolidated National Bank of San Diego, Dr., May 15, 1889. To one promissory note dated December 20, 1887, $3,000, and interest thereon from date of note at the rate of twelve per cent. per annum; said note being secured by a mortgage recorded in the recorder's office of San Diego county, in book Number 36, of Mortgages, at page 211 et seq. A copy of said note and mortgage is hereto attached." The attached paper was a copy of the mortgage, with all the indorsements thereon, showing the date, volume, and page of its record in the recorder's office, and also containing a full and complete copy of the note. This, we think, was quite sufficient to meet the requirements of section 1497, Code Civ. Proc., which provides, "If the claim be founded on a bond, bill, note, or any other instrument, a copy of such instrument must accompany the claim;" and "If the claim, or any part thereof, be secured by a mortgage, or other lien, which has been recorded in the office of the recorder of the county in which the land affected by it lies, it shall be sufficient to describe the mortgage or lien, and refer to the date, volume and page of its record." See Bank v. Burns, 104 Cal. 473, 38 Pac. 102.

The affidavit was in these words: "State of California, County of San Diego—ss.: John Ginty, cashier and authorized officer of the corporation whose foregoing claim is herewith presented to the administrators of said deceased, being duly sworn, says that the amount thereof, to wit, the sum of three thousand (3,000) dollars, and accrued interest till paid, is justly due to said claimant; that no payments have been made thereon which are not credited; and that there are no offsets to the same, to the knowledge of said claimant. [Signed] John Ginty, Cashier." It is objected that this affidavit was insufficient, because (1) it did not state that the affiant was the cashier of the corporation, and as such made the affidavit; (2) it did not set forth the reason why it was made by him; and (3) it stated that there were no offsets to the claim "to the knowledge of said claimant," when it should have stated that there were no offsets "to the knowledge of the affiant." And in support of the objection the case of Perkins v. Onyett, 86 Cal. 348, 24 Pac. 1024, is cited. That case is not in point. By reference to it, it will be seen that it was an action against an estate, based upon a note and mortgage, but that no claim on the mortgage was ever presented, and the claim on the note was supported by a defective affidavit, and was rejected by the executor. In the opinion the court clearly distinguished the case from that of Estate of Swain, 67 Cal. 637, 8 Pac. 497. In the last-named case, as in this, the claims had been allowed and approved by the administrator and the probate judge, and had been filed among the approved claims against the estate, and it was held that such allowance established prima facie their validity. Afterwards, upon the settlement of the final account of the administrator, the heirs contested the claims, but upon the hearing they were adjudged to be valid, and on appeal the judgment was affirmed. This court said: "In law, the allowance of the claims, although made upon defective verifications, was not void. It was a judicial act, which entitled the claims to rank as acknowledged debts of the estate, to be paid in due course of administration; but, as a judicial act in their favor, it was not binding and conclusive against the heirs, because they were not parties to it. They had therefore the right to question the allowance at the settlement of the estate. The burden of showing the invalidity of the allowance was, however, cast upon them." In this case the letters of administration were issued to defendants, Hayes and Dougherty, April 8, 1889. The notice to creditors was given April 22, 1889, and the plaintiff's claim was presented and allowed May 15, 1889. Under section 1491, Code Civ. Proc., the time for the presentation of claims must have expired in February, 1890, and may have expired in August, 1889. Under section 1622, Code Civ. Proc., an exhibit under oath, showing the claims presented, the names of claimants, and other matters, was due from the administrators in October, 1889; and, if such an exhibit was not rendered, it was, by the next section, made the duty of the court to enforce its rendition. Under section 1628, Code Civ. Proc., a full account and report of the administration was due as early at least as April, 1890, and may have been due in September, 1889; and, if not presented, it was made the duty of the court to compel the rendering of it by attachment. And under section 1626, Code Civ. Proc., when an exhibit was rendered any person interested was authorized to appear and contest any account or statement therein contained. It does not appear here that the exhibit and full account of the administration were not rendered as required, nor that there was ever any contest in regard to plaintiff's claim in the probate court. It must therefore be assumed that the exhibit and account were rendered, and that plaintiff's claim was in no way objected to or questioned. Indeed, it is admitted by counsel for appellants that "the allowance of the claim entitles it to rank as an acknowledged debt against the estate, to be paid in due course of administration," the only contention being that, because of the defective verification, the foreclosure of the mortgage should be denied. But a mortgage is a mere incident of the debt it was intended to secure, and passes by an assignment of the debt, is discharged by a payment of the debt, and is barred by the statute of limitations when the debt is barred. If, therefore, the allowance of the plaintiff's claim was sufficient to make it an acknowledged debt of the estate, it was also sufficient to keep alive the mortgage, and to entitle the plaintiff to have it foreclosed.

2. Appellants contend that the plaintiff was not the real party in interest, and hence the action could not be prosecuted in its name. Section 367, Code Civ. Proc. The court below found that the plaintiff on the 13th day of March, 1889, delivered the said note and mortgage to the Savings Bank of San Diego, without any indorsement or written transfer thereof, to secure the payment of an indebtedness of the plaintiff to the savings bank then existing, for the sum of $3,000, with interest thereon; that no part of said indebtedness had been paid, and the savings bank still held the said note and mortgage as security for the payment thereof; that on May 15, 1889, the plaintiff, with the consent of the savings bank, presented the claim, based on said note and mortgage, to the administrators, and the same was allowed and approved by them and the probate judge, and filed and registered in court as alleged in the complaint; and that on the 26th day of April, 1892, this action was commenced by and in the name of the plaintiff, with the consent of the said savings bank. We do not think the delivery of the note and mortgage, without any indorsement or written transfer, constituted such a transfer as would deprive the plaintiff of the right to sue on them in its own name, with the consent of the transferee. At most, it was only a pledge, and, as between the pledgor and pledgee, the legal title remained in the former. And the rule is that, when a plaintiff holds the legal title to the demand, he is the real party in interest. O'Connor v. Irvine, 74 Cal. 435, 16 Pac. 236; Grant v. Heverin, 77 Cal. 263, 18 Pac. 647, and 19 Pac. 493.

3. As before stated, the note was dated December 20, 1887, and bore interest at the rate of 12 per cent. per annum. The claim presented was "for $3,000 and accrued interest." It was by the administrators "allowed and approved for $3,000 this 15th day of May, 1889," and by the judge of the court it was "allowed and approved for $3,000 this 15th day of November, 1889." The court below found that no part of the promissory note mentioned in the complaint, or of the principal or interest due thereon, was ever paid, and that there was due and unpaid on the note and mortgage the sum of $3,000 principal and $3,913.16 interest, the interest being computed from the date of the note, for which sums judgment was entered. Appellants contend that the court erred in computing and allowing interest on the note from its date to the date of the presentation and allowance of the claim by the administrators, and that the judgment should be modified by striking therefrom the interest so allowed, estimated by counsel to be $2,068.16. We think this contention must be sustained. The claim was allowed by the administrators and the judge for the principal only, and was, in effect, rejected as to the accrued interest. The Code provides that "whenever any claim is presented to an executor or administrator or to a judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow." Code Civ. Proc. § 1503. The Code further provides that "when a claim is rejected either by the executor or administrator or a judge of the superior court, the holder must bring suit in the proper court against the executor or administrator within three months after the date of its rejection * * * otherwise the claim shall be forever barred." Code Civ. Proc. § 1498. This suit was not brought within three months after the rejection of the claim for accrued interest, and was therefore not in time to avoid the bar of the statute.

4. It is claimed for appellant Richard V. Hayes that the action was barred, and the judgment should therefore be reversed as to him. No personal judgment was asked for or rendered against any of the defendants, or against the estate, and counsel for respondent state in their brief that "it was stipulated at the trial that the decree of foreclosure should be so drawn as to not affect any interest in the land acquired by Richard V. Hayes prior to the execution of the mortgage, but, by a mere inadvertence, the stipulation was overlooked, in drawing the judgment." The judgment should therefore, in accordance with the alleged stipulation, be modified so that only the interest in the land which the said Richard V. Hayes took as heir at law or devisee of the decedent be included in the foreclosure. We advise that the cause be remanded, with directions to the court below to modify the judgment in accordance with the views above expressed, and that as so modified it be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the cause is remanded, with directions to the court below to modify the judgment in accordance with the views above expressed, and as so modified it is affirmed.

112 Cal. 244

RYAN v. LOS ANGELES ICE & COLD STORAGE CO. (L. A. 22.)

(Supreme Court of California. April 1, 1896.)

NEGLIGENCE—WHAT CONSTITUTES—FELLOW SERVANTS—TRIAL—INSTRUCTIONS.

1. In an action for personal injuries it appeared that plaintiff had been employed by defendant as a carpenter, and afterwards as a general laborer, making alterations and repairs. He was not a machinist, nor familiar with machinery. He was ordered by the engineer in charge of a gas generator in defendant's factory to tighten certain bolts in order to stop a leak. It appeared that gas was being generated at the time, though working pressure had not been reached; that while so tightening bolts as ordered, the generator exploded. There was testimony that it needed skill to tighten the bolts safely, so as to keep the strain equal, but none

that plaintiff possessed that skill, or that he had any knowledge of the machinery, except what he may have picked up during his employment, or that he had ever done similar work before. *Held*, that the evidence justified a verdict for plaintiff.

2. In an action for injuries caused by the explosion of a gas generator, where the testimony showed that, in order to stop a leak in the generator, plaintiff, an inexperienced man, was tightening certain bolts; that the work was dangerous, while the generator was under pressure, because of the liability of disturbing the strain by unequal tightening of the bolts; and that while so at work the generator exploded, —the jury were justified in finding that the explosion was caused by the tightening of the bolts by an inexperienced workman.

3. In an action for personal injuries, where it appeared that defendant employed an inexperienced man to do work which was unsafe unless performed by a skilled workman, without cautioning him expressly as to the danger, it was not necessary to show further that defendant should have foreseen that an accident would occur, or even that it would probably occur, in order to hold him liable.

4. Where, in an action for negligence, the court instructed the jury that, if they found by a preponderance of evidence that certain facts existed, they should find for plaintiff, but, if plaintiff failed to prove any of those facts by a preponderance of evidence, then the verdict should be for defendant, and the facts mentioned were within the issue, no reference being made to the evidence as sustaining or tending to sustain any particular fact, such instructions are not in violation of Const. art. 6, § 19, which declares that judges shall not charge juries with respect to matters of fact.

5. Plaintiff, while working upon a gas generator in defendant's factory, under the direction of the engineer, was injured by the explosion thereof. It did not appear, except from plaintiff's own testimony, whether the engineer had ordered him to do the work, but it was shown that he saw plaintiff at work, and that the engineer was, in the absence of the general manager, in charge of the machinery, and that at the time of the explosion the manager was absent. *Held*, that the engineer, having the power of control at the time, was not a fellow servant of plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by Patrick F. Ryan against the Los Angeles Ice & Cold Storage Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Wells, Monroe & Lee and Calvin Edgerton, for appellant. E. H. Lamme and Anderson & Anderson, for respondent.

HAYNES, C. Action to recover damages for personal injuries, and this appeal is from the judgment and from an order denying defendant's motion for a new trial. The injury occurred March 20, 1890. Plaintiff was a carpenter by trade, and some two years prior to the accident was employed by the defendant in that capacity alone, but after the completion of the buildings he was used in making alterations and repairs when necessary, and as a general laborer, roustabout, or handy man. He was not an engineer, or machinist, or familiar with machinery at the time he entered defendant's service, nor afterwards, and prior to the accident, except so far as his general employment may have given opportunity for observation. A new still or generator had been put in place, and was first attempted to be used the day of the accident. This generator consisted of a wrought-iron shell about 2 feet in diameter, and was made in two sections, each about 10 feet long, connected at the center by a cast-iron drum, and each end closed with a heavy cast-iron head, kept in place by iron rods running from end to end on the outside of the shell and through the heads, and secured by nuts on the outside of the heads, by which they could be drawn and secured against the ends of the shell. These heads were rabbeted to the depth of five-eighths of an inch, corresponding to the ends of the shell or cylinder, the groove being nearly filled with lead, so that the ends of the cylinder were drawn partially into the grooves against the lead, the object being to make a tight joint. Within the generator or cylinder were a system of steam pipes, connected with the boiler in the engine room, for the purpose of heating the aqua ammonia with which the generator was filled to about two-thirds of its capacity, the steam not escaping into the generator, but passing through it within the pipes. The ammonia being thus heated produces a gas which fills the remaining space in the generator in the same manner that steam fills the vacant space in a boiler, and the pressure of the gas thus generated increases rapidly as the heat of the ammonia is increased. The steam, being confined within pipes, does not add to the pressure of the gas except as it operates in heating the ammonia. According to Mr. Troutwein, a witness for defendant, the proper working steam pressure is 45 to 50 pounds, and that produces an ammonia pressure of 180 to 235 pounds to the square inch. On the day of the accident the generator had been charged with ammonia for the first time. The steam pressure being used at the time of the accident appears to have been 20 pounds, and the ammonia pressure is variously stated at from 117 to 120 pounds, as shown by the gauge. A working pressure had not yet been reached, but at this stage it was discovered that the generator was leaking at the drum in the center of the generator, and the plaintiff and another employé, who had no more knowledge or experience, were called upon by the engineer, according to plaintiff's testimony, "to get a socket wrench and a bar, and set up on those bolts or nuts and stop that leak," and while they were doing so, or had just ceased work on it, the generator exploded, and the plaintiff was seriously injured. The jury returned a general verdict for the plaintiff, and also answers to certain special issues submitted to them. It is not claimed, however, that the special issues required a different judgment, but it is strenuously insisted that the evidence does not justify the verdict. It would require more space than can be devoted to this opinion to discuss fully and in detail the many points made by counsel for appellant on this branch of the case. The controlling questions only can be noticed.

It is urged that plaintiff's employment was general; that he worked at anything he was called upon to do, and that this included the work of tightening up the nuts on the generator, and that he was not inexperienced in that particular work. Conceding that, in a sense, his employment in course of time became general, the evidence is uncontradicted that he was wholly inexperienced in the operation of machinery, except so far as he may have acquired it during his employment by the defendant; but there is no evidence tending to show that he understood or appreciated the expansive force of steam, or of the gas generated from ammonia, or the principles involved in the construction of generators, or the care required to preserve an equal strain upon all its parts. Whether he had, prior to the time of the accident, assisted in this particular work, is a matter about which the evidence is strongly conflicting; but the jury found upon one of the special issues that "the explosion was caused by allowing inexperienced men to tighten up on the nuts on the bolts with an increasing ammonia pressure." Even if plaintiff had before this been required to tighten such bolts under similar circumstances, the operation being conceded to be dangerous unless skillfully done, his skill and experience would not thereby be necessarily established. These qualifications require something more than knowing how to handle a wrench. He must be able to determine where the pressure is least, and when he has secured an equal pressure upon all the bolts, then, if further tightening is required, he may turn each uniformly a little, so as not to disturb to any appreciable extent the equal pressure secured. If he is simply told to turn each a little, and go round the whole number, he may commence where the bolts are tightest, and thus increase the already unequal pressure, while strictly obeying instructions. Whether the plaintiff had ever tightened the bolts before is disputed. Richards, one of the engineers, says he did not set plaintiff and Richmond at work tightening the bolts, but saw them at work at it. Dempsey, another of the engineers, testified that he did not exactly remember whether he set the men at work at it or not; that he saw them at work at it; that he did not pay any particular attention to how they proceeded. "Of course, they understood how to do it. They had been instructed before. Every man that had ever tightened had always been instructed to turn the nuts first one some and then others, and keep going round and round." It is not clear from defendant's testimony that they received any instructions at that time; and whether the plaintiff had ever received instructions as to the mode of doing the work must depend upon whether he had ever done it before. Plaintiff denied that he had done so while the generator had pressure on. It is clear that he was not an engineer, and was not employed as such. The work was dangerous, and required skill, and should have been performed by the engineers. No man, however skilled and experienced, can tell where the bolts are slack or tight, unless he has hold of the wrench, and therefore cannot tell whether the work is being properly and safely performed, though standing by and directing it; for, though the tension of the rods or bolts may have been equal before heat was applied, it is by no means certain that the expansion of them, when heated, would be equal. Whether the tightening could be done with reasonable safety without first reducing the pressure was strongly controverted in the evidence, but there was no controversy that doing it without reducing the pressure required care and skill.

Appellant also contends that the accident occurred from an unforeseen and unaccountable cause, which cannot with certainty be traced to the negligence of defendant, and that therefore no relief can be granted the plaintiff. In one aspect of the evidence the explosion seems difficult of satisfactory explanation. The generator was manufactured at Carbondale, Pa., and was there tested with water pressure, and also with air pressure, up to 350 pounds to the square inch, and was calculated to sustain a pressure five times greater than the working pressure required of it. The day before the accident, according to the testimony of Engineer Richards, they subjected it to an air pressure of 160 pounds, and according to the testimony of Mr. Hendrick, 130 pounds. Just before the explosion the gauge showed a pressure of 120 pounds, according to Richards. A given number of pounds pressure, whether produced by gas or condensed air, would make no difference in testing the strength of the cylinder or generator, though possibly, if a break occurred, the expansive qualities of the gas might produce more serious results. If, therefore, the generator were in all its parts in the same condition at the time of the accident that it was in the day before when tested with a greater pressure, it would seem impossible that it should have given way. The solution must therefore be found in what was done to the generator at the time of the explosion. All the expert evidence shows that the danger of doing such work while the generator is under pressure lies in disturbing the equality of the strain upon the parts; that is, in making one part sustain more than its just proportion of the pressure; but as to whether it is prudent or reasonably safe to do the work in question while there is a pressure, there is a serious conflict. It is true, as appellant contends, that the mere happening of an accident, the attending circumstances being unknown, is not evidence of negligence on the part of the owner of the machinery or appliance; but in this case, the tightening of the nuts and the explosion concurring in point of time, we are not authorized to say that the jury could not properly infer that the procuring cause of the explosion was the tightening of the nuts. The explosion did occur. A cause—the tightening of the nuts—which might have produced it, if unskillfully done, concurred; while the prior tests to which the generator was subjected would seem to exclude all other supposable causes. It is said, however, that the tightening of the nuts and the explosion did not concur in point of time; that plaintiff and Richmond had completed their work. But this statement is not quite accurate. It is true that, after they had been at work some time in tightening the nuts, they stopped, and stepped aside, to see whether the work they did affected the leak, and that at that moment the explosion occurred. But the fact that they were not at work turning up the nuts at the moment or within a minute or two or three minutes of the explosion does not affect the question. The steam had not been turned off the pipes, nor had the steam pressure reached its working point, so that the heating power of the steam was increasing, and the pressure of the gas generated by the heat was also increasing; but this small increase in the pressure could not have affected the generator had it been in the condition it was in the day before, when it sustained a much greater pressure; and hence this extremely short interval between the suspension of the work and the explosion does not affect the theory adopted by the jury that the explosion was caused by the tightening of the nuts by inexperienced men.

But counsel for appellant, in their very able brief, further contend that, in order to establish negligence upon the part of the defendant, it must not only appear that the explosion was caused by the agencies and in the manner above indicated, but that such result should reasonably have been foreseen by the defendant; "that a party is not to be held responsible for injuries which could not reasonably have been foreseen or expected as a result of his misconduct." There was evidence tending to show that it was unsafe for a skilled engineer or machinist to tighten up these nuts while the pressure was on, though it may be conceded that the preponderance of the evidence was that it could be done by skilled men with reasonable safety; but there was little conflict in the evidence tending to show that it was dangerous for unskilled or inexperienced men to do it. In order to fix the liability of the master, it is not necessary that he should know that injury will inevitably follow, for that would exhibit express malice, or intent to injure; nor that he knew or believed that it would probably occur, for that would be recklessness scarcely less criminal. This court in Ingerman v. Moore, 90 Cal. 421, 422, 27 Pac. 306, quoted with approbation the following from Jones v. Mining Co., 66 Wis. 277, 28 N. W. 207: "We think it is now clearly settled that if a master employs a servant to work in a dangerous place, or where the mode of doing the work is dangerous, and apparent to a person of capacity and knowledge of the subject, yet, if the servant employed to do work of such a dangerous character, or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely with proper care on his part." The instructions given plaintiff by the engineer have already been considered; but, in addition to what has been said, it may be added that it nowhere appears that he was informed that the work was dangerous, or that his safety in any degree depended upon the manner of doing it, or the care with which it was done.

What has been said covers appellant's first and second points. Its third point is that the verdict is against law; but, if we are right in our conclusions upon the propositions above discussed, this contention cannot be sustained. In support of it, however, appellant calls attention to the special finding No. 8. That question and the answer of the jury thereto are as follows: "Did plaintiff and Richmond tighten on one nut, and then pass to the next, tightening a little on each nut as they went along? If not, what does the proof show in respect to tightening the nuts? State how they tightened. A. Yes, but was ignorant of the manner in which the same should be tightened." What has been said heretofore in reference to these instructions, and the manner in which the work should be done, is sufficient to show the meaning of the answer given by the jury.

It is also claimed by appellant that the first and second instructions given by the court of its own motion, and instructions 1 and 3 given at plaintiff's request, violate that provision of the constitution which declares that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Article 6, § 19. The objection to these instructions is not well taken. The court instructed the jury that, if they found by a preponderance of the evidence that certain enumerated facts existed, they should find for the plaintiff; but that, if the plaintiff failed to prove any of said facts by a preponderance of the evidence, their verdict should be for defendant. The enumerated facts were within the issues as to which evidence had been given. No reference was made to the evidence as sustaining or tending to sustain any fact.

It is also insisted that the court erred in refusing to give certain instructions requested by defendant. These instructions were to the effect that Richards and Dempsey, the engineers, were fellow servants of the plaintiff; that, if defendant had exercised proper care in selecting them, and the plaintiff was injured through their negligence, they and the plaintiff being engaged in the same general business, the defendant was not liable. The facts did not justify such an instruction. E. E. Hendrick was superintendent and general manager of the corporation defendant. He testified that Richards "was an engineer, and had charge of the refrigerating machine under my direction when I was there, and had sole charge of running the refrigerating machine in my absence, and hired and discharged men under my direction." Mr. Hendrick had been at the works, directing the starting up of the refrigerating machine,—the generator of which exploded,—and was engaged about it until about half an hour before the explosion, when he left, and went up town for some fittings, and did not return until after the explosion. The testimony of Richards and Dempsey, the engineers, was not clear as to which called the plaintiff to do the work, but it is clear that Richards saw him and Richmond doing the work, and did not object; while the plaintiff testified that it was Richards who called them to do the work. Richards, therefore, had the same power to control the men in Hendrick's absence that Hendrick had when he was present.

The remaining instructions requested by defendant are fully covered by the general discussion, and were properly refused, and the motion for a nonsuit was properly denied. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(5 Cal. Unrep. 319)

THOMAS v. PACIFIC BEACH CO. (L. A. 111.)[1]

(Supreme Court of California. April 1, 1896.)

LIMITATION OF ACTIONS — ACCRUAL OF CAUSE OF ACTION.

1. An action by a vendee against the vendor to recover the purchase price paid for land on failure of the vendor to convey as required by the written contract of sale is an action founded upon an instrument in writing, within Code Civ. Proc. § 337, and must be brought within four years.

2. Where the contract of sale requires a conveyance by the vendor "on demand," the statute does not begin to run against an action by the vendee for breach thereof by the vendor until after demand by the vendee for a conveyance.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by R. A. Thomas against the Pacific Beach Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

McDonald & McDonald, for appellant. Mr. Hunsaker and Henry J. Stevens, for respondent.

SEARLS, C. This is a special assumpsit upon a contract by which defendant agreed to convey certain land to the plaintiff. The first count of the complaint, which was filed September 24, 1894, avers, in substance, that on the 12th day of December, 1887, in California, plaintiff and defendant entered into a written contract by the terms of which defendant agreed to sell to plaintiff lot 11 in block 358 of Pacific Beach for $500, with interest on deferred payments at 10 per cent. per annum, payable $167 at date of agreement, $166 and interest June 12, 1888, and $167 and interest December 12, 1888; and defendant further agreed that, "in consideration of plaintiff making such payments, to execute to him upon his demand a grant deed conveying to him the real property above described." The complaint then avers the payment by plaintiff of the sums at the times specified therefor, except that the last payment was made before due, viz. October 10, 1888, and that a discount of 5 per cent. was made on account of such sooner payment. Total amount paid, $512.90. That in September, 1891, plaintiff demanded a deed, which defendant neglected and refused to execute. On the 7th day of October, 1893, plaintiff demanded of defendant the repayment of the sum of $512.90 so paid, and offered to restore defendant everything of value received under the contract, which was refused by defendant. That plaintiff has been damaged in the sum of $512.90 and interest from the respective times of payment. There are four other precisely similar counts or causes of action set out in the complaint, except that they arise on a precisely similar agreement to convey lots 12, 13, 14, and 15, in the same block of land. Defendant demurred to the complaint, averring in apt terms, among other things, that plaintiff's causes of action were barred by the provisions of sections 337, 339, 343, Code Civ. Proc. The demurrer was overruled, and thereupon defendant answered, setting up as a defense the bar of the causes of action by said several sections of the Code of Civil Procedure, as in the demurrer. Judgment was rendered in favor of plaintiff upon the said five several causes of action, as prayed for in the complaint, except that interest was allowed only from October 7, 1893, the date when plaintiff demanded repayment. Defendant appeals from the judgment and from an order denying its motion for a new trial.

The only point made on the appeal relates to the bar of the causes of action under the statute of limitations. We need not refer to the findings, for the reason that, while they are full and complete in favor of plaintiff upon the several pleas of the sections, respectively, of the statutes of limitations, the demurrer presents the whole question with equal clearness and perspicuity. The action, as before stated, is special assumpsit upon the written agreement. The contention of appellant is that this is not "an action upon any contract, obligation, or liability founded upon an instrument in writing executed in this state," but is an action of implied assumpsit, upon the defendant's breach of its contract to convey, to recover the purchase money paid; and consequently subject to the bar of subdivision 1, § 339, Code Civ. Proc.; in other words, that the action was barred within two years after the cause of action arose. What we term an implied assumpsit arises in all that class of cases in which money is due from the defendant to the plaintiff ex æquo et bono, and it may be recovered in an action for money had and received. In the large class of cases in which an action for money had and received will lie, no express promise need be averred or proven under our system of practice; but upon proof of the facts showing the duty to devolve upon the defendant to make payment, the law raises the implied promise to pay. The action is most frequently resorted to in actions ex contractu, where no recovery could be had upon the contract actually made, as, for instance, where money has been paid upon contracts void under the statute of frauds, in cases of the rescission of the contract, cases of the payment of money under a mistake of fact, etc. But in the present instance the liability of the defendant is founded upon the instrument in writing pleaded in the complaint, viz. the contract to convey the lots of land. The obligation of defendant is founded directly upon a breach of that contract, not remotely or ultimately, as in Chipman v. Morrill, 20 Cal. 131, but immediately, as a necessary sequence of the violation of the contract to convey, upon which plaintiff had paid his money. When defendant, upon payment by plaintiff of the purchase price, refused to convey the land as provided for in its contract, it was guilty of a breach of that contract, for which an action would lie in favor of plaintiff, either for a specific performance of the contract to convey, or in damages for the refusal. In the latter case plaintiff was entitled to recover as damages, under section 3306 of the Civil Code, the price paid, and interest thereon, together with his expenses properly incurred in examining the title, etc. Plaintiff counts upon the violation of the contract, and seeks to recover the price paid and interest. If this is not an action upon a contract, obligation, or liability founded upon an instrument in writing, etc., within the purview of section 337 of the Code of Civil Procedure, it would be difficult to name one that is. It follows that plaintiff had, under that section, four years within which to bring the action after the breach occurred.

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[1] Reversed in banc. See 46 Pac. 809, 115 Cal. 136.

2. When did plaintiff's cause of action accrue? In an ordinary agreement to convey land upon payment of the purchase price the obligation of the vendor to convey arises upon the payment by the vendee of the agreed price, and no demand of a conveyance is necessary. Chatfield v. Williams, 85 Cal. 518, 24 Pac. 839; Camp v. Morse, 5 Denio, 164. In such a case the statute of limitations begins to run from the date when the vendee was entitled to bring his action, viz. the date of the final payment. But that is not this case. The parties had a right to make such contract as they saw fit. They might have provided that a deed should have been executed and delivered 30 days, or at any other specified time, either before or after the final payment was made. What they did in fact agree upon in writing was, as is averred in the complaint, not denied by the answer, and found by the court, as follows: "And defendant further agreed, in consideration of plaintiff making such payments, to execute to him, upon his demand, a grant deed conveying to him the real property above described." Under this agreement a demand was a condition precedent to the duty of defendant to convey, and until it was made plaintiff's right of action was not complete. Bolles v. Stearns, 11 Cush. 320; Gould, Pl. c. 4, § 15; Rice v. Churchill, 2 Denio, 145. Under the wording of the contract the agreement to convey was not a dependent one, but an independent covenant that in consideration of payment defendant would thereafter, when demand was made, convey the property. The demand for a conveyance was made upon defendant in September, 1891. This demand set the statute of limitations in motion from that date, and, as the action was commenced within four years next thereafter, it was not barred. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

112 Cal. 208

RALSTON et al. v. BANK OF CALIFORNIA. (No. 15,970.)

(Supreme Court of California. March 31, 1896.)

CONVERSION—REFUSAL OF CORPORATION TO TRANSFER STOCK—DAMAGES.

1. Refusal without right by a corporation to register a transfer of its stock constitutes a conversion thereof.

2. The measure of damages for conversion being declared by Civ. Code, § 3336, to be the value of the property at the time of the conversion, with interest, one cannot, in an action for conversion of corporate stock, consisting in the refusal of the corporation to register a transfer thereof, recover, as part of the damages, dividends which had been declared prior to the con-

version; recovery of the dividends after demand therefor being a separate cause of action.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by A. J. Ralston and others, trustees, against the Bank of California. Judgment for defendant. Plaintiffs appeal. Reversed.

Mastick, Belcher & Mastick, for appellants. Allen & McAllister, for respondent.

PER CURIAM. Defendant is a corporation engaged in the business of banking, and having a capital stock divided into 30,000 shares of the par value of $100 each. One J. Baum owned 60 shares of such stock, and held a certificate therefor which provided that no transfer of the stock described in the certificate would be made upon the books until payment of all indebtedness due to the bank from the person in whose name the stock might stand on such books. In 1881 Baum transferred said certificate, for value, to Peder Sather, who, on September 13, 1886, demanded of the bank the appropriate entry of the transfer on its books. Baum then being in failing circumstances, and indebted to the bank in a sum greatly exceeding the value of the stock, it refused compliance with Sather's demand. Soon afterwards Sather died, and in April, 1888, said shares and certificate were by decree of court distributed to the plaintiffs in trust under the will of said deceased. Meanwhile, on March 10, 1887, the bank sold and transferred to the firm of Greenebaum & Co., at a large discount, the indebtedness held by it against said Baum. On July 3, 1888, plaintiffs produced to the bank the proofs of their ownership of the stock as trustees under Sather's will, and demanded registry of the transfer on the books, which the bank refused unless plaintiffs would pay the balance of its claims against Baum above the amount received from Greenebaum & Co. The stock was then worth $200 per share, and dividends had been declared and had become due thereon since September 13, 1886, amounting to $1,110. Plaintiffs brought this action for the conversion of the stock and such dividends, laying their damages at $13,470. Afterwards, and before the trial, the value of the stock rose to $281 per share. These facts, among others, being found by the court, or admitted by the pleadings, the court held that there had been no conversion by defendant, and rendered judgment in its favor.

It appears from the opinion of the learned judge of the court below, accompanying the findings, that the judgment went upon the ground that, from the nature of corporate shares, there can be no actual conversion thereof; that the fiction of a constructive conversion of such property can be indulged only when, under the rules of law, the owner is entitled to consider himself deprived of the same; and that here the rules of law forbid such result, since the effect would be to vest the bank with the property in its own shares, contrary to the policy of the law. The argument in this court in support of the judgment follows quite similar lines. It is not claimed that defendant had the legal right to refuse plaintiffs' demand for registry of the transfer, its lien having been lost by the sale and transfer to Greenebaum & Co. We are not convinced that there is any fiction in ascribing the term "conversion" to the defendant's refusal; but, however this may be, there is at the present day no difficulty in applying the remedy which was afforded by the common-law action of trover to a case where the owner of corporate shares has been wrongfully deprived thereof, even though his possession of the certificate evidencing his title has not been disturbed. Payne v. Elliott, 54 Cal. 339. See People v. Williams, 60 Cal. 1; Dodge v. Meyer, 61 Cal. 405. "It may be stated as a rule," says an eminent author (though he dissents from its principle), "that, where a corporation refuses to allow a transfer of shares upon its books, the assignee may treat this as a conversion of his shares, and sue the company for their value." Mor. Priv. Corp. § 217. Such is the law as declared and enforced in this state. Kimball v. Water Co., 44 Cal. 173; Fromm v. Mining Co., 61 Cal. 629. A suit in equity, where registration of the transfer may be compelled, or damages recovered as an alternative, may be preferable, but it is not exclusive of the remedy invoked in this action. Mor. Priv. Corp. §§ 216–221; Cook, Stock & S. §§ 289–292.

The argument that the corporation becomes the owner of the shares converted, and hence that its stock is reduced otherwise than in the manner provided by law (Civ. Code, § 359); and hence, further, that such conversion is legally impossible, because contravening the policy of the law, has no great force. If necessary to save itself from loss, the bank might have contracted for and have received the title to these shares in payment of Baum's debts to it, and the transaction would have been perfectly legal. Ex parte Holmes, 5 Cow. 426. With the same purpose in view, the bank, apparently in good faith and under claim of right, refused the registry, and this had the undesigned effect of converting the shares; and it is not perceived how acquisition of title by this means can, though wrongful as regards the plaintiffs, be more obnoxious to public policy than by contract in the case supposed. The authorized capital is not reduced, for the shares are not extinguished, but may be reissued. Cook, Stock & S. § 314; Mor. Priv. Corp. § 434; Bank v. Wickersham, 99 Cal. 655, 34 Pac. 444. Cases may arise when no conversion by the corporation should affect the status of a stockholder in his relations to creditors of the corporation, but no such consideration is here presented. 2 Thomp. Corp. 2055 et seq.

Baum being indebted to the bank at the time of Sather's demand for entry of the transfer in 1886, the bank's refusal at that time was justified. Jennings v. Bank, 79 Cal. 323, 21 Pac. 852. And there was no conversion until the similar demand on July 3, 1888. Several years elapsed between the commencement of the action and the trial, and there is no finding that the action has been prosecuted with reasonable diligence. The measure of damages for the conversion of the shares is therefore their value at that time, with interest. Civ. Code, § 3336. But we do not see how appellant can, in this action, recover the dividends prayed for. The theory of the complaint is that respondent, at a certain time, converted the stock. Appellant would therefore be entitled, upon his own averment, to recover the value of the stock at that time, with legal interest thereon since that date. Such is the measure of damages established in this state, except where, under certain circumstances, not existing here, the highest market value at any time between conversion and the verdict may be recovered. Civ. Code, § 3336. And it matters not what the rule may be elsewhere. Now, the value of the stock, as such, is alleged to have been at that date $206 per share, amounting to $12,360; and there is no provision for adding to the measure of damages for property converted, dividends, or other incidents. If, under the circumstances of this case, appellant could recover the dividends, as a separate cause of action, he could do so only after a demand made for the same, which was not averred. Bills v. Mining Co., 106 Cal. 9, 39 Pac. 43, opinions of Beatty, C. J., and Garoutte, J., and cases there cited.

There is no necessity for a new trial. The judgment is reversed, and the cause remanded, with instructions to the court below to render judgment for plaintiff in the sum of $12,360, with interest thereon from July 3, 1888.

McFARLAND, J. I concur in the judgment solely on the authority of previous decisions of this court, and particularly Kimball v. Water Co., 44 Cal. 173, and Fromm v. Mining Co., 61 Cal. 629. If the question were an open one, I would hold, with the court below, that the refusal of a corporation to make a transfer on its books of shares of stock from one stockholder to another is not a conversion of such stock by the corporation.

(112 Cal. 151)

VAUGHAN v. KNOWLTON et al. (No. 19,584.)

(Supreme Court of California. March 25, 1896.)

SURVEY—EVIDENCE—SUFFICIENCY.

In an action to quiet title plaintiff alleged that a half section line was located in a certain place, and claimed title through a deed describing the land by section and subdivision. Defendant, an adjoining owner on the north, asserted that said line was situated south of that place, and south of the actual center of the section. It appeared that the section was not surveyed by the United States, but was within a confirmed Mexican grant. A surveyor, who had made a survey for a former proprietor, testified for plaintiff that at about the center and on the east line of the section he found stakes equidistant from the north line of the section, and that said stakes though different from the others in said section, were such as surveyors used. The line indicated by said stakes was coincident with the half section line claimed by plaintiff. There was no evidence that any other line had been run upon the ground than the one indicated by said stakes, nor that the survey was unauthorized. *Held*, that it was error to order a nonsuit on the ground that the evidence failed to show that the half-section line was not where plaintiff alleged that it was.

Commissioners' decision. Department 2. Appeal from superior court, Orange county; J. W. Towner, Judge.

Trespass to try title by Charles Vaughan against William M. Knowlton and others. From the judgment rendered, plaintiff appeals. Reversed.

E. M. Hannah and J. W. Ballard, for appellant. Victor Montgomery, for respondents.

HAYNES, C. Action to quiet title. At the conclusion of plaintiff's evidence McChesney's motion for a nonsuit was granted, and plaintiff appeals from the judgment thereon, and from an order denying his motion for a new trial. The property in controversy is described in the complaint as the N. E. ¼ of the N. E. ¼ of the S. W. ¼ of section 22, township 4 S., range 10 W., San Bernardino B. and M., containing 10 acres, more or less, and also by metes and bounds. The latter description will be noticed later. None of the defendants answered except McChesney. His answer denies plaintiff's ownership "of a strip of land 35.83 feet wide off the north side of the tract of land described in plaintiff's complaint," admits that he claims said strip, and alleges that he is the owner thereof, and entitled to its possession. He also denies plaintiff's description by metes and bounds, and alleges a different description. In his second defense McChesney describes his own land as the S. ½ of the S. E. ¼ of the S. E. ¼ of the N. W. ¼ of the same section, and also describes it by metes and bounds, and alleges the area to be five acres more or less. Defendant's land lies north of and adjoins plaintiff's, and the only dispute is as to the location of the east and west half-section line, which separates the two lots; the defendant contending that it is 35.83 feet south of the line contended for by plaintiff. The true location of that line is the only question at issue between the parties as to which evidence was given. It was stipulated between the parties that both derived title from a common source, and that the deed from Alfred Robinson, trustee, to John J. Weglein, dated April 6, 1874, conveyed a fee simple title to the land described therein, viz. "the north half of the south half of section 22" of said township and range. Some further stipulations were made, which need not be noticed. Plaintiff put in evidence the several mesne conveyances from Robinson down to himself, each of which described plaintiff's land as the N. E. ¼ of the N. E. ¼ of the S. W. ¼ of section 22, and several of these conveyances also added thereto: "Or known as lot seven of plat showing subdivision of north ½ of south half of section 22, surveyed and sworn to January 10, 1871, by George C. Knox, deputy county surveyor, as per map,"—the contents being stated at 10 acres.

The only witness examined was S. O. Wood, a civil engineer, who made a survey for A. W. Danforth in December, 1889. A plat of the section, made from the notes of said survey, was put in evidence by the plaintiff. Danforth's north line is also the same half-section line which separates plaintiff's and defendant's lots. This section was not surveyed by the United States, it having been within a confirmed Mexican grant. Mr. Wood testified that he found stakes at the southeast, the northeast, and northwest corners of the section. The section lines, measured from north to south, are 5,360.50 feet in length, showing an excess of 80.50 feet. The east and west half-section line shown upon said plat is 4.42 feet south of the actual center of the section. Plaintiff's description of his lot by metes and bounds commences at a point 1,993.5 feet north of the south line of the section (being the claimed southeast corner of his lot), and from that point runs north 682.33 feet to the center line of the section as located upon the plat; thus making said center line 2,675.83 feet from the south line of the section, and 2,684.67 feet from the north line. Defendant, in his description by metes and bounds, takes the same point on the south line of the section from which to measure, and places his south line 2,640 feet therefrom, thus placing the center line of the section 35.83 feet further south than the line contended for by the plaintiff, and 40.65 feet south of the actual center of the section. If, therefore, the evidence was such as to justify a finding that the half-section line is where the plaintiff claims it to be, or is at any place north of the line claimed by the defendant, the nonsuit should have been denied.

The south line of the section is necessarily established by the pleadings and evidence, since the defendant adopts the same line, as is conclusively shown by his admission in his answer that he claims the northerly 35.83 feet described in the plaintiff's complaint, and his measurements set out in his answer show that the south line of the section which he adopts as his starting point is identical with the south line of the section as found by the surveyor and adopted by the plaintiff. This section measures more than a mile north and south, but it is an interior section, and does not touch either the north or west lines of the township, and is therefore not a fractional section. It contains an excess of 9.98 acres, if we assume that it measures just one mile east and west. If no lines had ever been run upon the ground subdividing the section, all the parcels described in the several deeds and in the pleadings would have been capable of exact ascertainment, and hence would have been definite and sufficient; and in that case the evidence would have been quite sufficient to sustain plaintiff's case, since there could have been no conflict in the descriptions in their deeds, and the half-section line, when run, would have fixed the location of each without conflict; and in case the lines had never been run, or in any way established upon the ground, the east and west quarter line must have been run so as to divide the section in two equal parts, and that would have placed the line 4.42 feet north of the line claimed by plaintiff, the effect being to move both parties that much further north. Such, at least, is the requirement as to surveys made by the United States, and when surveys are extended over confirmed Mexican grants the intention is that they shall conform as nearly as possible to the government surveys. Section 2396 of the Revised Statutes of the United States provides that "the corners of half and quarter sections, not marked on the surveys, shall be placed as nearly as possible equi-distant from those two corners which stand on the same line." But where the subdivision line has been run and marked upon the ground, and can be identified, it must be adhered to. Cragin v. Powell, 128 U. S. 697, 9 Sup. Ct. 203. If, then, there was no original subdivision of the section upon the ground, the claim of the plaintiff must have been sustained. There was evidence, however, tending to show that a survey had been made, not only of the exterior lines of the section, but of the half-section line in dispute. Not only was mention made of a map of a survey of the north half of the south half of the section (which was not put in evidence), but Mr. Wood testified that at the center of the section he found a stake (marked upon the plat put in evidence as "St. B., Old Stake"); and on the east line of the section he also found an old stake, marked upon the plat "Old Stake, St. C." These stakes are at the same distance from the south line of the section, viz. 2,675.83 feet, and also the same distance from the north line of the section, viz. 2,684.67 feet. He said the stake at B. was not a stake such as is usually set by the land company, and took particular pains to look around, and that there were no other stakes there. He then went to the northeast corner of the section, and found a surveyor's stake, "what is termed the 'Capt. Healey stake.'" The witness then followed down the east line of the section, and found one of the land company's stakes at the southeast corner of the section. His testimony as to his measurement on that line is somewhat confused, partly because once he referred to "this point" (pointing to map) without further designation of it, and in another place the word "to" is used, when it is evident the word "from" should have been used. But, read in connection with the plat, it is readily understood, though the distance from the northeast corner of the section down to the east and west line, which subdivides the north half of the section, is not given except upon the map. The distances covering the Danforth land, the Polhemus land, and from the latter to the southeast corner of the section, are readily understood, and correspond with the distances already stated and shown on the map. Then the witness went back to the northeast corner of the section, and measured west 2,640 feet (one-half mile), and found "a little stake set there by the land company." From that point he turned, "and ran down 1,320 feet south, and found a stake there,—what is known as the 'land company's stake'; from there I measured down and found this stake again which was found at station B, 1,364.67 feet, I found what corresponded to my measurement, and we then concluded it was the center of the section," though he said it did not "correspond exactly with the general outlines of the company, nor did it correspond exactly with the United States survey, because it is a rule of the United States survey that the posts shall be placed in the center of the section, and they were not, although very nearly in the center; and, these lines being parallel, and having this line at station B, I produced this line here, and turned my angle, and gave that as the line." The witness also gave the distance from B to the north and south lines of the section, as before stated. The stakes at B and C were similar, though different from the other stakes in that section. But this difference in the stakes strengthens, rather than weakens, the evidence tending to establish that line. The stakes at the corners of the section were recognized as Capt. Healey's stakes; but in some of the deeds in plaintiff's chain of title reference is made to a subdivision of the N. ½ of the S. ½ of the section by George C. Knox, deputy county surveyor, in 1871, and to this survey may be referred the old stakes B and C, which are different from Capt. Healey's stakes. At the time of this survey by the witness, in 1889, he and Mr. Danforth set a stake made from a railroad tie beside the old stake at B, and said: "I didn't allow the stake to be disturbed, because that was evidently a former stake." In March, 1894, the witness was at this point B again, and found the old stake gone, and the stake he had put beside it lay over on the ground, but right south of it, a distance of 34.13 feet was found one of the land company's stakes. "That was not there at the time I made the survey in 1889; that had been set subsequent to that time." The witness said he did not look for any stake between B and C; that he found no stake on the lines south of B in 1889; that the stake found south of B in 1894 "would correspond very closely to the map of the surveys which the Stearns Rancho Company claim, to the land company's subdivision."

The only ground of defendant's motion for nonsuit necessary to be noticed is that "the evidence fails to establish that the land described in the complaint is located in the south half of section 22." The motion for a nonsuit should have been denied. The stakes at B and C, though distinguishable from the land company's stakes, were such as surveyors use. The one at B was "centered with a nail." Both were precisely parallel to the north and south lines of the section, a circumstance that could not be reasonably accounted for upon any theory other than that they marked a survey. It must also be assumed as clearly proven that the stake found in 1894 was a recent one, and had no existence in 1889. No other stake is shown to correspond to it either to the east or west. There being no evidence tending to show that any different line had ever been run upon the ground than the one indicated by the old stakes found at B and C, and that line being approximately in the center of the section, it should be taken, in the absence of all other evidence, as the half-section line. There was no evidence of a different line ever having been run upon the ground, and, if the evidence was insufficient to show that any line had been run, the law would fix the line at the center of the section where it should have been. If it can be shown that the line was actually run at a different place from that indicated by the stakes found by the witness, and that place can be identified, such line must prevail. If it cannot, the line B C must prevail, unless it is shown to have been unauthorized; and, if no authorized survey can be established, the actual center of the section must be taken as the line. It is true, there was no direct evidence that the line contended for by plaintiff was an authorized survey; but the fact of its close correspondence to the actual center line of the section, and the presumption, in the absence of evidence to the contrary, that the line, if run, was so run as to divide the section in two equal parts, is sufficient to require a reversal of the judgment. We come to this conclusion with the less hesitation because the question of boundaries of land are important, and should be fairly and finally settled and fixed, to the end that further disputes and litigation shall be avoided. The judgment and order appealed from should be reversed, and a new trial granted.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

112 Cal. 191

MERRIAM v. BACHIONI et al. (L. A. 73.)

(Supreme Court of California. March 28, 1896.)

PUBLIC LANDS—CONTENDING CLAIMANTS—JUDGMENT OF STATE COURT—RES JUDICATA.

1. In an action in a state court for the possession of public land prior to the issue of a patent, on the ground that defendant in possession was an alien born, and had not declared her intention to become a citizen prior to her filing, the judgment did not conclude the action of the land office on the question of defendant's alienage and the claimant's rights to enter land, nor control the title evidenced by the patent subsequently issued.

2. After the filing of a pre-emption and the performance of those conditions necessary to perfect the claim, a subsequent homestead applicant cannot, by entry and fulfillment of the requirements of the law, obtain an equitable title against the pre-emptor.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Frank B. Merriam against Maria Poggi Bachioni and Louis Bachioni to compel defendants to convey the legal title to lands to him as beneficiary of a constructive trust. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Rippey & Nutt, for appellant. J. W. Hughes and S. S. Knoles, for respondents.

BRITT, C. On May 21, 1887, defendant Maria Poggi, now the wife of said Louis Bachioni, resided on a tract of public land in San Diego county, and on May 30th following she filed her declaratory statement in the local land office of the United States, claiming the right of pre-emption as to such land. On said May 21st the plaintiff, Merriam, filed in the same office his application to enter the land as a homestead under the federal laws relating to entries of that character, and obtained the usual receiver's duplicate receipt. In November, 1887, he entered into possession of the greater part of the land. The contest thus arising over the right to acquire title from the government was prosecuted to a final decision of the general land office in favor of said Maria, rendered in May, 1894. Merriam's homestead entry was rejected on the ground that the land was covered by her pre-emption entry, and accordingly the patent of the United States for the land was issued to her in August, 1894. In the year 1889, and while such contest was pending before the land department, Merriam brought an action against Maria Poggi in the superior court of said county, alleging in his complaint the circumstances of his homestead entry and possession thereunder; that she claimed the land in virtue of her pre-emption filing; that she was alien born, and had not declared her intention to become a citizen prior to her said filing, and that she was in possession of parts of the land in hostility to him. She resisted such action, but the court found the facts to be as alleged by Merriam, and gave judgment in his favor for the possession of the whole tract in dispute. This was in March, 1890. Shortly afterwards she was ejected from the land by the sheriff under such judgment, and Merriam has ever since had possession thereof. After the patent was issued, he instituted the present action to compel the Bachionis to convey the legal title to him, claiming that the effect of the patent to said Maria was to make her his trustee. It is not now alleged that she was incompetent, by reason of alienage or otherwise, to exercise the right of pre-emption, except in so far as that question was determined by said judgment of the superior court. The court below held that his complaint, which discloses the matters above stated, among others, does not state a cause of action, and rendered judgment dismissing his suit.

Plaintiff argues, first, that by fulfilling the requirements of the law concerning his homestead application he obtained an equitable title which the officers of the land department were bound to protect. But, conceding that such performance on his part is alleged in the complaint, yet it appears that the pre-emption of defendant Maria had its inception by her settlement on the land previous to his homestead entry, and the patent is evidence that she performed those things necessary to perfect her claim as a pre-emptor. Railroad Co. v. Purcell, 77 Cal. 69, 18 Pac. 886. Of course, as against such prior right, his performance of the conditions prescribed for acquiring title in the manner attempted by him was unavailing. Plummer v. Brown, 70 Cal. 544, 12 Pac. 464; Young v. Shinn, 48 Cal. 26. There are certain allegations of the complaint from which the inference may be drawn that Maria Poggi's notice of intention to make final proof in support of her entry, as provided by the act of March 3, 1879 (20 Stat. 472), was defective in some particulars; but it is not shown that this circumstance was material in the controversy, or that Merriam had not actual notice of her intention to "prove up," or that the final decision of the land department was rendered in ignorance of the facts, or through any mistake of law in that behalf. The matter is not mentioned in the brief for the plaintiff here, and we allude to it only to show that it has not been overlooked.

Appellant's next point is that the judgment obtained by him in the superior court, pursuant to which Maria Poggi was ousted from the land, operates now as an estoppel against her, and causes the patent to inure to his benefit. This sounds like strange doctrine. If it be true, then the courts of the state may become the tribunals for determining all conflicting claims to the public lands, to the entire supersession of that established by congress for the purpose,—the land office of the United States. The state courts may, for some purposes, deal with the possession of public land prior to the issue of the patent, but they have no authority to give a judgment "in advance of the action of the government which would render its patents a nullity when issued. * * * It is impossible thus to transfer a title which is yet in the United States." Marquez v. Frisbie, 101 U. S. 475. The authorities to support the proposition that a court of ordinary jurisdiction cannot, by its judgment between contending claimants of the right to enter a tract of public land, forestall the action of the land department of the general government in such contest are well collected in Forbes v. Driscoll, 4 Dak. 336, 31 N. W. 633, and Adams v. Couch (Okl.) 26 Pac. 1010; and we have no doubt, whatever may have been the lawful effect of the former judgment on the mere possessory right of the parties, if it had any at all, that it yet could not conclude the action of the land office on the question of the defendant's alienage, and cannot operate to control the title evidenced by the patent subsequently issued. See Thrift v. Delaney, 69 Cal. 188, 10 Pac. 475, and cases cited. Appellant lays stress on Shinn v. Young, 57 Cal. 525, but there the parties claimed under different sources of title, and the controversy was primarily whether title had passed from the United States. Thrift v. Delaney, 69 Cal. 194, 10 Pac. 475. That it had so passed to one of the litigating parties being once adjudged, the determination was held conclusive on them in a subsequent action; while here the prior judgment, as construed by plaintiff, related to the right to obtain title still in the United States, which, as shown, was not then within the competence of the court to decide. The judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(5 Cal. Unrep. 323)

O'CONOR v. CLARKE et al. (L. A. 11.)

(Supreme Court of California. April 2, 1896.)

BILLS — PARTIES — TRANSFER — FINDINGS — NEW TRIAL—DISCRETION.

1. A person writing his name on a bill before maturity, to enable the drawer to whose order it was drawn to negotiate the same, is liable as an indorser.

2. A bill drawn payable to the drawer's order, and indorsed by him in blank, before maturity, is transferable by delivery merely.

3. An indorsee of a note takes the same subject only to such defenses as would have been good against his indorser.

4. A finding that all the allegations in the complaint not specifically found on are true, and the allegations in defendant's answer not specifically found on are untrue, does not require a reversal, where it appears that specific findings, on the allegations not directly found upon, would have necessarily been adverse to appellant.

5. The refusal of a new trial on the ground of newly-discovered evidence will only be reversed for abuse of discretion.

Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Andrew J. O'Conor, receiver of the Consolidated National Bank of San Diego, against W. H. Clarke and others. From a judgment for plaintiff, defendant Frank A. Kimball appeals. Affirmed.

Works & Works, for appellant. Jas. E. Wadham, for respondent.

PER CURIAM. This is an action upon a bill of exchange, and the material facts of the case are as follows: On August 12, 1890, Livingston, Clarke & Co. drew the said bill of exchange on the Pacific Hardware Company, payable to their own order 90 days after date; and on the 27th day of that month the same was accepted by the drawee, "payable at office Sather Banking Company, San Francisco, Calif." Thereafter, and before the maturity thereof, the defendants W. H. Clarke, Frank A. Kimball, Sidney Selover, and J. B. Livingston indorsed the said bill of exchange, to enable the drawers to negotiate the same and obtain money thereon; and thereupon Livingston, Clarke & Co. indorsed the said bill, and sold, assigned, and transferred the same to the Sather Banking Company. On November 8, 1890, the indorsers, Clarke, Kimball, Selover, and Livingston, by an instrument in writing, signed by them, waived demand, protest, and notice of protest of and upon the said bill of exchange; and thereafter, in January, 1891, the same was for value sold, assigned, and delivered by the Sather Banking Company to the Consolidated National Bank of San Diego, which has ever since been the owner and holder thereof. Interest on the said bill of exchange was paid by the Pacific Hardware Company up to March 10, 1893, but no other payments of principal or interest have ever been made. On November 16, 1893, the plaintiff, as duly appointed and qualified receiver of the Consolidated National Bank, commenced this action against the drawers, drawee, and four indorsers of the said bill of exchange, to recover the principal and interest still due and unpaid on the same. All of the defendants were duly served with summons, but only the defendant Kimball appeared to contest the plaintiff's right to recover. He demurred to the complaint, and, his demurrer being overruled, answered, setting up several separate defenses to the action. At the commencement of the trial, the plaintiff moved the court to dismiss the action as to the defendants Livingston, Clarke & Co., and as to Livingston and Clarke individually; and the motion was granted, against the objection of defendant Kimball. And, at the conclusion of the trial, the court found upon all the issues raised in favor of the plaintiff, and gave judgment against the defendants the Pacific Hardware Company, Sidney Selover, and Frank A. Kimball, for the full amount due on the said bill of exchange. From this judgment, and an order denying his motion for a new trial, the defendant Kimball appeals.

1. The demurrer to the complaint was properly overruled. The pleading stated facts sufficient to constitute a cause of action, and there was no uncertainty in any of the particulars pointed out which would authorize a reversal.

2. We see no material error in any of the rulings complained of. The appellant wrote his name on the back of the instrument before its maturity, and before it was sold and delivered to the Sather Banking Company, to enable the drawers to negotiate it and obtain money thereon. He was therefore an indorser, and liable as such. Civ. Code, §§ 3108, 3117; Fisk v. Miller, 63 Cal. 367. The payees indorsed the instrument in blank before maturity, and transferred it to the banking company for value. It was thereafter payable to bearer, and transferable by mere delivery.

Counsel sought to prove that appellant had been released from his obligation as an indorser for various reasons, but none of the offered and rejected evidence would have affected that result. It is sufficient, therefore, to say, without detailing the evidence, that it was irrelevant and immaterial, and was properly excluded.

3. The court found that there was no change made in the terms of the said draft, and that there was no contract, understanding, agreement, or intention to change or alter the same. This finding is assailed as not justified by the evidence. But there was evidence—and it would seem a preponderance of it—clearly tending to support the finding; and the judgment cannot therefore be reversed on this ground.

4. Following the specific findings, there is a general finding to the effect that all allegations in the complaint "not specially found on are true," and all allegations in defendant's answer "not specially found on are untrue." This finding is also assailed as "a sort of blanket finding," and not justified by the evidence. It is urged that one of the allegations of the complaint is that appellant indorsed the bill "for a valuable consideration"; that this allegation is denied by the answer; and that the plaintiff offered no evidence in support of it. But the court had already found that appellant indorsed the bill before maturity, and to enable Livingston, Clarke & Co. to negotiate it. The correctness of this finding is not questioned, and, if the indorsement was made as stated, it imposed a binding obligation, and no further evidence as to the consideration therefor was necessary.

It is further urged that defendant alleged in his answer that he signed the paper at the solicitation of the drawers thereof, and upon their representation that the draft would be paid out of the proceeds of the sale of the cargo of mahogany mentioned in the instrument, and that he proved the allegation, and plaintiff offered no evidence on the subject. Conceding this to be so, still the facts alleged, if found to be true, would constitute no defense as against the plaintiff. The Sather Banking Company purchased the draft in good faith and for value before maturity, and it therefore took it free from all equities and defenses which may have existed between the original parties to it. And the Consolidated National Bank took the same title that its transferror had, and subject only to such defenses as would have been good against the transferror.

The finding complained of, though a "blanket finding," must be sustained, the rule being that "where the findings made dispose of the issues sufficiently to support the judgment, and make it clear that, if more specific findings had been made, they must necessarily have been adverse to appellant, the judgment cannot be reversed for failure to find specifically upon each issue." Hulsman v. Todd, 96 Cal. 228, 31 Pac. 39.

5. One of the grounds on which the motion for new trial was made was newly-discovered evidence. In support of the motion, counsel for appellant read certain affidavits; but all the material facts stated in them were squarely contradicted by counter affidavits read for respondent. The granting of a new trial upon the ground of newly-discovered evidence is a matter which rests largely in the discretion of the trial court, and its exercise will not be disturbed on appeal except in case of abuse clearly shown by the record. O'Rourke v, Vennekohl, 104 Cal. 254, 37 Pac. 930; Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342; People v. Urquidas, 96 Cal. 239, 31 Pac. 52. In this case no abuse of discretion which would justify a reversal is shown.

It follows that the judgment and order appealed from must be affirmed, and it is so ordered.

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112 Cal. 171

EICH v. GREELY et al. (Sac. 1.)

(Supreme Court of California. March 26, 1896.)

NEGOTIABLE INSTRUMENTS—ANSWER—IMMATERIAL AVERMENTS—STRIKING—DEMURRER.

1. Under Code Civ. Proc. § 453, authorizing the striking of immaterial averments, an averment that the transfer of a note by the payee after maturity was fraudulent as to the makers is properly stricken from the answer in an action by the indorsee against the makers, where the answer admits the note and an amount due thereon exceeding the demand of the makers against the payee set up as a counterclaim.

2. A demurrer to the entire answer in an action on a note is improperly sustained, where a payment on the note is sufficiently pleaded, though the plea of the same payment as a counterclaim is fatally defective.

Commissioners' decision. Department 2. Appeal from superior court, Yuba county; E. A. Davis, Judge.

Action by John H. Eich against Justus Greely and J. R. Garrett on a note. From a judgment for plaintiff, defendants appeal. Reversed.

Wm. G. Murphy, for appellants. McDaniel & Folsom, for respondent.

SEARLS, C. This is an action by the plaintiff as indorsee of a negotiable promissory note made by defendants, who are appellants here, for $3,000 and interest at 10 per cent. per annum from date of note, viz. July 7, 1893. The note fell due November 1, 1893. The complaint is in the usual form upon a promissory note. An answer was filed by defendants, to which plaintiff demurred, and also moved to strike out portions thereof. The motion to strike out was granted, and the demurrer sustained. Defendants declining to amend their answer, their default was entered, and judgment rendered in favor of plaintiff in consonance with the prayer of his complaint. The appeal is from the final judgment, and the sufficiency or the answer as against the demurrer thereto, and the motion to strike out, are the only questions involved in the appeal.

We epitomize in part and quote the residue of the answer, as follows: (1) Defendants admit the making of the note to John Eich as payee. (2) Aver that it was indorsed after maturity. (3) Deny there was any consideration for the note beyond $2,000. (4) "The defendants aver that the payee of said note, John Eich, is and was, before the indorsement of said note, indebted to the defendants for and on account of said note, and the consideration thereof, and as an offset thereto, in the sum of $1,000, for money paid, laid out, and expended for and on account of said John Eich, payee of said note, by defendants, at his special instance and request, for labor done and performed for said John Eich while he was the owner and holder of said note, and before the same became due, and which sum of $1,000 was and is an offset and payment on account of said note; that the said John Eich has not paid the same, though demand has been made on him therefor." (5) Aver that they paid on account of said note $1,000 before the transfer thereof to plaintiff, of which said plaintiff had notice before he received the note. (6) The transfer to plaintiff was without consideration, and was made with the fraudulent intent on the part of the payee and plaintiff of defrauding the defendants out of said sum of $1,000. (7) The plaintiff is the son of John Eich, payee of said note. The following is the portion of the answer stricken out by the court: "That, for the further purpose of defrauding the defendants out of said sum of $1,000, the said John Eich has transferred all his other property to his daughters and the said son, the plaintiff, John H. Eich; that said John H. Eich, the plaintiff, was and is a party to all of said fraudulent transfers and transactions, was well aware of the fraudulent intent which induced said transfers,—all of which were done by said John Eich and the plaintiff with intent to defraud the defendants out of said $1,000; that said John Eich is now insolvent, by reason of said fraudulent transfers of his property, and is unable to respond in said sum of $1,000, and, unless the same be credited on said note, defendants will lose the same." We think the motion to strike out was properly granted.

1. The answer admitted the making of the note, and, on the showing of defendants themselves, there was an amount due thereon at least sufficient to cover all their cross demands. This being so, it was entirely immaterial to them, or to their case, whether or not plaintiff and the payee of the note had procured a fraudulent transfer of all or any part of the property of the latter. It was an irrelevant matter, having no office to fill, and hence no proper place in the pleading, and was therefore properly stricken out, under section 453 of the Code of Civil Procedure.

2. We are of opinion the demurrer was improperly sustained. It was to the whole answer. That portion of it constituting a counterclaim was fatally defective, and liable to all the objections urged against it by the demurrer, for the reason that it mingles together in one cause of action sundry causes which might have been severally pleaded under the practice permitting the common counts to be pleaded. Under the Hilary rules of the English courts, all of the common counts could be united in a single count, but such a practice is not permitted under our Code; and the result of the effort so to do, in the present case, leaves the pleading ambiguous, unintelligible and uncertain. Still, the plea of payment of $1,000 on the note before its indorsement to plaintiff, with notice thereof to the latter, coupled with the denial that it was indorsed before maturity, and the allegation that the transfer of the note was without consideration, constituted, pro tanto, a valid defense to the action. We recommend that the judgment be reversed, and the cause remanded, with leave to the defendants to amend their answer if they shall be so advised.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with leave to the defendants to amend their answer.

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112 Cal. 180

SIMPSON v. FERGUSON. (No. 19,476.)

(Supreme Court of California. March 28, 1896.)

CHATTEL MORTGAGE—GROWING CROPS—RIGHTS OF MORTGAGOR IN.

1. Civ. Code, § 2955 et seq., providing the manner of mortgaging growing crops, is intended to be exclusive of other modes, and is a declaration of legislative intent that such property shall be regarded as a chattel.

2. While growing crops are sometimes, and for some purposes, a part of the realty, as between a mortgagor of the land and the mortgagee the mortgagor is the owner of the crops growing thereon, free from any lien of the mortgagee, and with full power to dispose of or mortgage the same, until he is divested of possession of the land by foreclosure proceedings, either by a receiver, or under final decree.

In bank. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by Simpson against Ferguson. Judgment for plaintiff, and defendant appeals. Modified.

G. A. Skinner, for appellant. E. B. Stanton, for respondent.

VAN FLEET, J. Upon consideration of this cause in bank, after a more full and thorough presentation thereof than was had in department, we are still satisfied that the conclusion reached by the department was correct, and should be adhered to.

It is urged that section 2955 and following of the Civil Code, providing for the manner of mortgaging growing crops, do not establish an exclusive method; that as this class of property may under some conditions be regarded as realty, and under other conditions as personalty, it must follow that under corresponding conditions the property may be the subject of a real-estate mortgage, or a chattel mortgage, according to the circumstances; and that plaintiff having a valid mortgage upon the land, with its rents, issues, and profits, this gives him a valid lien upon the growing crops, as effectually, to the same extent, for all purposes, as if executed with the formalities required in the case of a crop mortgage. We are unable to coincide in this view In the first place, we think it quite manifest, from the provisions of the Code in question, that the legislature intended thereby to provide an exclusive mode for the mortgaging of growing crops, and intended to declare that for such purposes this species of property shall be regarded as a chattel. There is nothing in the statute to indicate that it was not intended to cover every case of a mortgage given upon that class of property. In the second place, while it is perfectly true that growing crops may be either personal or real property, according to circumstances, and while, as suggested by respondent, a mortgage of the land gives a lien upon everything that would pass by a grant of the land, which includes crops growing thereon, it is nevertheless well established that such lien, so far as the growing crops are concerned, is limited in its effect to the crops growing upon and unsevered from the land at the time of foreclosure. It does not vest the mortgagee with a right to the crops grown intermediate the giving of the mortgage and the foreclosure thereof. Until the latter event, where, as in this state, the mortgage creates no estate in the mortgagee, but confers only a lien upon the property, the mortgagor is entitled to such crops, with the same absolute right and dominion over them as if the mortgage did not exist. This doctrine is thoroughly well settled, with no considerable diversity upon the subject among text writers or the courts. The general rule is well stated in Mr. Jones' work on Mortgages (5th Ed.) § 670, where it is said: "So long as the mortgagor is allowed to remain in possession, he is entitled to receive and apply to his own use the income and profits of the mortgaged estate. His contract is to pay interest, and not rent. Although the mortgagee may have the right to take possession upon a breach of the condition, if he does not exercise this right he cannot claim the profits. Upon a bill in equity to obtain foreclosure and sale, he may, in proper cases, apply for the appointment of a receiver to take for his benefit the earnings of the property. He is then confined to the rents and profits accruing during the pendency of the suit. If he neglects to apply for a receiver, the final decree, if silent upon this subject, does not affect the mortgagor's possession or right to the earnings in the meantime. It is only after sale under the decree, except where statutes provide otherwise, that the mortgagor is wholly divested of title, and consequently of right to possession. Unless restrained by the terms of the mortgage, the mortgagor in possession may work mines or quarries upon the mortgaged property, and whatever he severs from the realty becomes unincumbered personalty, and his own property. Even if the rents and profits of the mortgaged property are expressly pledged for the security of the mortgage debt, with the right in the mortgagee to take possession upon default, the mortgagee is not entitled to the rents and profits until he takes actual possession, or until possession is taken in his behalf by a receiver." In Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. 420, the authorities upon this subject are exhaustively reviewed, and it is there held (quoting from the syllabus): "A conveyance to a trustee, absolute on its face, but with an instrument of defeasance showing that it is to secure payment of a debt due to a third party, is a mortgage, and is subject to the rule that a mortgagee is not entitled to the rents and profits until he acquires actual possession. The rule that the mortgagee is not entitled to the rents and profits before actual possession applies even when the mortgagor covenants in the mortgage to surrender the mortgaged property on default in payment of the debt, and nevertheless refuses to deliver it after default, and drives the trustee to his action to enforce the trust." In that case the court, stating the doctrine as laid down in Gilman v. Telegraph Co., 91 U. S. 603, say: "It was declared by this court that where a railroad company executed a mortgage to trustees on its property and franchise, 'together with the tolls, rents, and profits to be had, gained or levied thereupon,' to secure the payment of bonds issued by it, the trustees in behalf of the creditors were not entitled to the tolls and profits of the road, even after condition broken and the filing of a bill to foreclose the mortgage, they not having taken possession or had a receiver appointed." Chancellor Kent states the rule thus: "The mortgagor has a right to lease, sell, and in every respect to deal with the mortgaged premises as owner, so long as he is permitted to remain in possession, and so long as it is understood and held that every person taking under him takes subject to all the rights of the mortgagee, unimpaired and unaffected. Nor is he liable for rents, and the mortgagee must recover possession by regular entry by suit, before he can treat the mortgagor, or the person holding under him, as a trespasser." 4 Kent, Comm. 157. In the case of Sexton v. Breese (N. Y. App.) 32 N. E. 133, where the mortgagor of the land, subsequent to the giving of the mortgage, but before it was due, sold a growing crop of wheat raised on the land, and, subsequently to such sale, delivered possession of the land to the mortgagee thereof, it was held that the vendee of the crop was entitled to the same, as against the mortgagee, and it is said: "If we assume that the plaintiff was in possession of the land as by an actual surrender from the mortgagor, his rights in its use were subject to the previous disposition made of the growing crop of grain by the owner of the land. He had planted the crop, and it was perfectly competent for him to dispose of it while he held the title to the land. Though, in a sense, a growing crop of grain is a part of the real estate, it nevertheless possesses the characteristics of a chattel, and is salable and transferable as other personal property is, and may be taken upon execution, and sold in discharge of a judgment debt." In West v. Conant, 100 Cal. 231, 34 Pac. 705, where the mortgagor remained in possession of the mortgaged land after the foreclosure sale, and received all the rents, issues, and profits therefrom, it was held that he was entitled to hold such premises until the expiration of the period of redemption, and that the purchaser at the sale was not entitled to a receiver to take possession of crops of hay and grain growing upon the land intermediate the sale and the expiration of the equity of redemption. In the recent case of Freeman v. Campbell, 42 Pac. 35, decided by this court, where the conveyance from Anderson, plaintiff's intestate, to defendant, was held to be a mortgage, and where defendant had taken possession of the land and received the rents thereof, it was held that the administrator of Anderson, the mortgagor, was entitled to recover the amount of the rents received by Campbell as money had and received, belonging to the estate, and it is there said: "The claim that the mortgage included the rents, as well as the land, does not aid the appellant, as under section 2927, Civ. Code, he had no right to the possession of the mortgaged security. His right to the rents was no greater than that to the land. A mortgage is a contract by which specific property is hypothecated (Civ. Code, § 2920), but such contract is independent of the fact of possession, and does not of itself confer the right of possession. If a receiver had been appointed to take possession of the mortgaged premises, the authority of that officer would have included the right to take possession of the rents, as well as the land, and the rents would then have been in the custody of the court, and subject to its direction; but, in the absence of some intervention by the court, the mortgagor has the right to these rents, even though they are included in the instrument of mortgage, and the mortgagee's right to them is limited to their disposition by the court in the judgment, or subsequent thereto." From the principles here declared, it follows that the mortgagor being in possession of the land, and entitled as of right to the crops grown thereon, it was competent for him to sell or mortgage, or otherwise dispose of, them, and convey good title thereto, as against the mortgagee of the land or his assigns, at any time prior to the foreclosure of the latter's mortgage.

It is claimed by respondent that the cases of Montgomery v. Merrill, 65 Cal. 432, 4 Pac. 414, and Treat v. Dorman, 100 Cal. 623, 35 Pac. 86, are in conflict with the doctrine that growing crops can only be mortgaged with the formalities prescribed for the execution of chattel mortgages. But we do not so regard them. In Montgomery v. Merrill no question, as between a mortgagee or vendee of the crop and the mortgagee of the land, arose. In the foreclosure proceedings a receiver was appointed, who took possession of the mortgaged premises and the growing crops thereon. Upon a sale of the land, it brought less than the amount of the mortgage; and it was held that the mortgage was a lien upon the crop then growing upon the premises, and that the proceeds of its sale should be applied to the payment of the deficiency. There is nothing in this inconsistent with what has been said above. The rights of the mortgagor and mortgagee of the land alone were involved. The crop being in the hands of the receiver, and not having been prior thereto sold or disposed of by the owner of the land, the case falls strictly within the limitation of the rule as above stated. In Treat v. Dorman the mortgagee of the crop was made a defendant in an action to foreclose a prior mortgage on the land. In its answer it made no claim of priority over the mortgage on the land, but prayed, in terms, that if any surplus remained from a sale of the crop, "after payment of any deficiency due the plaintiff" (the mortgagee of the land), that such surplus be applied in satisfaction of its chattel mortgage, thus conceding the priority of the real-estate mortgage. The decree gave appellant everything it asked, and the disposition of the case in this court would seem to have been largely influenced by that consideration, the court remarking, "It is not often that a party appeals from a judgment granting him all that he asks, and yet in this case just that thing has happened." The party's subsequent claim on the appeal to a priority of lien on the crop, and to a right to a different judgment, does not appear to have received very favorable or careful consideration, but apparently the case went off largely upon the theory that it had received all it asked in the court below. In what is said as to the respective rights of the two mortgagees, the court does not seem to have had in mind the provisions of the Civil Code here invoked, since no mention is made of them; and, while there are some expressions by the learned commissioner looking in favor of the contention now advanced by respondent, we do not regard them, in view of the record upon which the court was passing, as essential to the conclusion reached, or as binding authority. For these reasons, and what is said in the opinion of the department, we think the judgment should be reversed, and the court below directed to modify it in accordance with the motion of appellant. It is so ordered.

We concur: GAROUTTE, J.; McFARLAND, J.; HARRISON, J.; TEMPLE, J.; HENSHAW, J.

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112 Cal. 215

SHOOBERT et al. v. DE MOTTA. (Sac. 18.)[1]

(Supreme Court of California. March 31, 1896.)

MORTGAGE ON ANIMALS—INCREASE—RIGHT OF MORTGAGEE.

The mortgagee of sheep is not entitled to a lien on their increase, begotten after the execution of the mortgage.

Department 1. Appeal from superior court, Tulare county.

Action by Shoobert and others against De Motta to recover possession of certain lambs. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

Dixon & Phillips, for appellants. Bradley & Farnsworth, for respondent.

HARRISON, J. June 22, 1893, one Cascalia executed a mortgage to the plaintiffs' assignor upon a band of sheep which were then in Kings county, consisting of 1,700 ewes and 1,050 lambs. The sheep were afterwards removed to Tulare county, and in August, 1893, while they were in Tulare county, bucks were put with the ewes, and during the months of January and February, 1894, there were born, as the offspring of the ewes, 1,300 lambs. The court finds that the period of gestation in the case of sheep is about five months. April 18, 1894, Cascalia, in consideration of an indebtedness from him to the defendant, executed to the defendant a bill of sale of these 1,300 lambs; and on the 21st of April the lambs were delivered to the defendant, and taken away by him. The plaintiffs brought the present action to recover the possession of the lambs or their value. Judgment was rendered in favor of the defendant, and the plaintiffs have appealed.

It has been held in some states that the lien of a mortgage of domestic animals extends to the increase of the animals during the life of the mortgage, whether the terms of the mortgage include such increase or not; and, following these decisions, such a rule is stated in text-books upon chattel mortgages. It will be found, however, upon examination of these cases, that the decisions therein are based upon the principle of the common law, which was in force in those states, that, by the mortgage, the mortgagee is vested with the title to the mortgaged property, and becomes the owner thereof; and that in the case of domestic animals, applying another rule of both the common and the civil law, that "the brood belongs to the owner of the dam or mother, partus sequitur ventrem" (2 Bl. Comm. 390), he thereby becomes the owner of such increase; and, being the owner, his title in any action at law must prevail. The earliest application of this rule was in the case of a mortgage of a female slave,—Hughes v. Graves, 1 Litt. (Ky.) 317,—which was decided in Kentucky in 1822, and was afterwards followed in Maryland in 1836, in the case of Evans v. Merriken, 8 Gill & J. 39, which also involved the offspring of a female slave that had been mortgaged; and these cases are cited as the authority upon which cases involving the same question have been decided in other states, in some instances referring also to the principle upon which the rule rests, and in others merely referring to the cases as an authority. Cahoon v. Miers, 67 Md. 573, 11 Atl. 278; Gundy v. Biteler, 6 Ill. App. 510; Ellis v. Reaves, 94 Tenn. 210, 28 S. W. 1098. The rule has also been stated in many other cases in which the question was neither involved nor decided. Kellogg v. Lovely, 46 Mich. 131, 8 N. W. 699; McCarty v. Blevins, 5 Yerg. 195; Gans v. Williams, 62 Ala. 41. And there is still another line of decisions in which it has been sought to uphold the propriety of the rule by holding that the increase which was in gestation at the execution of the mortgage was inferentially included therein, as a part of the mortgaged property. Funk v. Paul, 64 Wis. 35, 24 N. W. 419; Rogers v. Highland, 69 Iowa, 504, 29 N. W. 429; Edmonston v. Wilson, 49 Mo. App. 491. Another line of decisions limits this application of the rule, by holding that the increase is subject to the lien of the mortgage only for so long a time as the young are in a state of nurture from the mother. Rogers v. Gage, 59 Mo. App. 107; Darling v. Wilson, 60 N. H. 59; Forman v. Proctor, 9 B. Mon. 124. The want of logical sequence in this limitation has been felt by the courts, and some of them have sought to place their decision upon the fact that, while the young were following the mother, a purchaser from the mortgagor had notice by that fact that it was her offspring, and subject to the mortgage, and was thus prevented from claiming to be a purchaser in good faith. Placing the decision on this ground is, however, necessarily a repudiation of the principle upon which all the above cases rest; for, if the mortgagee is in fact the owner of the increase, the question of good faith in a purchase from the mortgagor is immaterial. Prior to 1873, the giving of a chattel mortgage in this state vested the mortgagee with the title to the property mortgaged (Heyland v. Badger, 35 Cal. 404); and, while this rule of law prevailed, the foregoing decisions would have been applicable. The Civil Code, however, went into effect at the beginning of that year; and under its provisions the mortgagor is not, by the execution of the chattel mortgage, divested of his title to the property, but still remains its owner, while the mortgagee has only a lien thereon. Civ. Code, § 2888; Bank v. Moore, 106 Cal. 673, 39 Pac. 1071. Consequently, the foregoing decisions cannot be regarded as having authoritative force; but the rights of the parties must be determined upon the general principles controlling the relations between a mortgagor and mortgagee. In the absence of any express agreement upon the subject, the lien created by a mortgage is limited to the property which is described in the mortgage, and does not include other property of the same character which the mortgagor may have afterwards acquired and placed with the mortgaged property. Jones, Chat. Mortg. §§ 138, 154. If the mortgagor retains the possession of the mortgaged property, he is at liberty to deal with and use it as its owner; and whatever income or profit may be derived from such use belongs to him, and not to the mortgagee. See Simpson v. Ferguson (recently decided by this court) 44 Pac. 484. If, in the case of sheep, the use to which he puts the ewes is for breeding lambs, there can be no sufficient reason given why the lambs that are dropped by the ewes should belong to the mortgagee, any more than the wool which is sheared from their backs. We are aware that the supreme court of Texas, in First Nat. Bank of Austin v. Western Mortg. & Inv. Co., 86 Tex. 636, 26 S. W. 488, held that although, by the laws of that state, the mortgagor of personal property remains the owner thereof after the execution of the mortgage, the foregoing decisions control the right of the mortgagee to the increase of domestic animals; but the opinion in which the decision is given merely states the proposition, without presenting any reasoning in its support, and does not meet with our approval. We are not called upon to determine in the present case whether, if the lambs in question had been in gestation at the date of the mortgage, they would have been included as a part of the property mortgaged; but we hold that, inasmuch as they were begotten upon the ewes after the mortgage was executed, the mortgagee has no lien upon them, or right to their possession. The conclusion thus reached renders it unnecessary to consider the rulings of the court upon the offer of the plaintiffs to show that the defendant had knowledge of the mortgage at the time he purchased the lambs. The judgment and order are affirmed.

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[1] Rehearing denied.

We concur: VAN FLEET, J.; GAROUTTE, J.

VENTURA COUNTY v. CLAY, County Treasurer. (L. A. 71.)

(Supreme Court of California. March 24, 1896.)

STATUTES — WHEN CONSTRUED AS PEREMPTORY — REFERENCE TO PREVIOUS ACT—REPEAL—DUTIES OF COUNTY TAX COLLECTOR — LICENSE TAX — POWER OF COUNTY TO EMPLOY LICENSE TAX COLLECTOR—REPEAL BY IMPLICATION.

1. Where a tax collector is authorized to receive license taxes, though by language merely permissive, the exercise of such power may be insisted on as a duty.

2. Where the legislature has defined the duties of an officer by referring to another existing statute, a subsequent repeal of the act so referred to does not affect the act referring to it.

3. County Government Act, § 154, providing that "the tax collector must perform such duties as are prescribed in title nine, part three, of the Political Code" (which requires such officer to receive and collect taxes on property), authorizes him to receive and collect all license taxes required to be paid to him by a valid ordinance of the board of county supervisors.

4. Since the legislature, by County Government Act, § 154, has authorized the county tax collector to receive and collect all license taxes required to be paid to him by valid county ordinance, the board of supervisors has no power to employ another person to perform such duties.

5. St. 1887, p. 208, adding a new section to the county government act, and making it the duty of the tax collector to collect all taxes and licenses imposed by county ordinances, "except where it is by the law otherwise expressly directed," did not, by implication, repeal section 154 of such act, which had already imposed that duty on the collector; and hence the subsequent repeal of the new section did not in any way affect his powers under the old.

Commissioners' decision. Department 2. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by the county of Ventura to enjoin Henry Clay, county treasurer, from paying an auditor's warrant in favor of C. H. Bradley. From a judgment for defendants, plaintiff appeals. Reversed.

H. L. Poplin, for appellant. Blackstock & Ewing, for respondent.

VANCLIEF, C. Action to enjoin the treasurer of Ventura county from paying an auditor's warrant in favor of the defendant Bradley for $240, claimed to be due Bradley for his services in collecting license taxes under an alleged contract with that county, and allowed by the board of supervisors as a valid claim. This action was brought by the district attorney, who contended that the alleged contract of Bradley with the county, and the allowance of Bradley's claim by the board of supervisors, were unauthorized by law; and, therefore, that this action was authorized by section 8 of the county government act. The cause was tried by the court, whose findings and judgment were in favor of defendants; and plaintiff brings this appeal from the judgment on a bill of exceptions.

The material facts disclosed by the record are substantially as follows: On November 7, 1890, the board of supervisors passed an ordinance (No. 48) amending section 2 of a prior ordinance (No. 39) so as to make it read as follows: "Sec. 2. A license shall be granted to any person of good moral character who is a proper person to be entrusted in the business to sell vinous, spirituous, distilled, malt, mixed, or other intoxicating liquors, at any specified place in this county, upon the petition of such person to the board of supervisors. Upon such petition being made by any applicant the board shall consider the same and may hear evidence as to the character of the applicant and as to his being a fit and proper person to be entrusted in such business, and, if the board be satisfied that such applicant is a person of good moral character and a proper and worthy person to be entrusted in such business, such petition shall be granted, and the auditor of the county shall be directed to issue a license to such applicant for the period of one year, upon payment to the tax collector of the county the sum of six hundred dollars for such license, in advance." This ordinance was duly attested, certified, and published, so that it took effect on November 30, 1890, and is admitted by both parties to be a valid ordinance, though neither a copy nor the substance of the ordinance (No. 39) of which it is an amendment appears in the record. From the first Monday in January, 1892, until the trial of this action, A. J. Bell was the duly elected and qualified tax collector of Ventura county, whose salary was $2,000 per annum. On February 24, 1894, he appointed the defendant Bradley his "deputy tax and license collector" for said county; and on the same day Bradley qualified by taking the oath of office, and his appointment had not been revoked at the time this action was commenced. As tax collector, Bell received the liquor license taxes, according to Ordinance No. 48, from the time he took office (January, 1892) until about October 15, 1894, but thereafter refused to receive them, for the alleged reason that it was not his official duty to collect or receive license taxes. On November 9, 1894, the board of supervisors, at the request of the tax collector (Bell) and of Bradley's attorney, made and entered an order that Bradley be employed to collect the license taxes, and thereafter, on December 5, 1894, entered into and executed the following written agreement with Bradley: "Agreement of employment made this December 5, 1894, between the county of Ventura, a body politic and corporate, the party of the first part, and C. H. Bradley, of said county, the party of the second part, in pursuance of an order of the board of supervisors of said county made and entered on November 9, 1894, witnesseth: That said party of the first part does hereby hire and employ the party of the second part to collect for the party of the first part all liquor and other business license taxes due, and to become due, to the party of the first part under the ordinances thereof now in force, or hereafter, during the continuance of this agreement, to be passed, for a compensation or commission, to the party of the second part, of ten per cent. on all sums collected hereunder by him; and said party of the second part, in consideration of the premises and of such commission of ten per cent. upon all sums actually collected by him thereunder, does hereby promise and agree to and with the party of the first part faithfully and diligently to collect all such license taxes, and safely keep the same, and regularly deposit the same at least once in each month with the treasurer of said county; and the commission of ten per cent., above provided, shall be in full payment and satisfaction of the party of the second part for all services rendered by him hereunder. And, as part and parcel of this agreement, the said party of the second part promises and agrees to file with the board of supervisors, on the first day of their meeting in each month, a statement showing all license taxes collected by him hereunder, all moneys therefrom deposited with the county treasurer, and all moneys, if any, remaining in his custody. Compensation of said party of the second part shall not be paid or otherwise retained or allowed, except upon order of the board of supervisors of said county after claim therefor has been regularly presented, as in the case of other county claims. And it is further mutually understood and agreed that this agreement shall be, and is hereby made, terminable at the pleasure of the board of supervisors of said county, with or without notice to the party of the second part." On February 4, 1895, Bradley presented to the board of supervisors his itemized claim for 10 per cent. on $2,400, received by him as license taxes for which four liquor licenses had been issued, each for the term of one year. This claim was referred by the board to the district attorney, for his opinion as to whether it was a legal charge against the county; and he reported to the board that it was not a legal charge against the county for any amount. Nevertheless, the board allowed the claim, and ordered it paid.

The appellant contends that the alleged contract of the county with Bradley, the order of the board of supervisors allowing Bradley's claim as a valid charge against the county, and the auditor's warrant for the payment of said claim, were unauthorized by law. And it is not denied that they were so if it was an official duty of the tax collector to receive the money required to be paid to him by Ordinance No. 48, as a condition precedent to the issuance of a liquor license. Therefore the whole controversy on this appeal may be determined by a decision of the question whether or not it was an official duty of the tax collector to receive the liquor license taxes imposed by the Ordinance No. 48. It is not questioned, nor is it questionable, that the board of supervisors was authorized to impose such license taxes, "for the purposes of * * * revenue, * * * and to provide for the collection of the same by suit or otherwise" (County Government Act, § 25, subd. 27; Const. art. 11, §§ 11, 12; People v. Martin, 60 Cal. 153; Ex parte Mirande 73 Cal. 365, 14 Pac. 888); and, although it had no power to create the office of license tax collector (El Dorado Co. v. Meiss, 100 Cal. 273, 34 Pac. 716; County of Los Angeles v. Lopez, 104 Cal. 257, 38 Pac. 42), it had power to order the liquor license taxes to which the ordinance (No. 48) related to be paid to a county officer having authority to receive them, since in this case the ordinance required nothing more of the tax collector than that he should receive those taxes when voluntarily tendered by applicants for liquor licenses. By no possibility could those taxes become delinquent; and therefore the supervisors properly omitted to provide any mode, "by suit or otherwise," to enforce payment of them. If the tax collector was authorized to receive those taxes when tendered, though only by language merely permissive, or even by implication, it was his official duty to receive them. "Where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty, though the phraseology of the statute be permissive merely, and not peremptory. Mechem, Pub. Off. § 593.

The remaining question, therefore, is, do the statutes of this state authorize the tax collector to receive the license taxes to which the ordinance (No. 48) relates? It may be premised that the act of receiving or collecting license taxes of any kind for county revenue is an official function, to be performed only by county officers invested for that purpose with a part of the sovereign power of the state, derived directly from the legislature (see dissenting opinion of Mr. Justice McKee, in People v. Ferguson, 65 Cal. 288, 4 Pac. 4, so far as adopted by this court in El Dorado Co. v. Meiss, 100 Cal. 273, 34 Pac. 716; also, Rowe v. Kern Co., 72 Cal. 353, 14 Pac. 11; and Mechem, Pub. Off. § 1); the legislature being prohibited by the constitution from delegating its power to create a county office, or to prescribe or regulate the salary or compensation of any county officer. From these premises, it would seem to follow that the board of supervisors of a county has no power to create the office of tax receiver or tax collector, nor to fix or regulate the compensation of the incumbent of such office, under any circumstances, even though the legislature should fail to create such an office; and this conclusion is not controverted by counsel for respondent. Yet they contend that the board of supervisors may by contract employ a person to perform the functions of tax receiver or tax collector, for a specified consideration or compensation, to be paid by the county in case the legislature fail to provide a county officer for that purpose. In what substantial respect does such employment differ from the creating of the office of tax collector, and the fixing of the compensation of the incumbent thereof? I perceive only a difference in words expressing the same meaning. In each case the functionary represents and exercises the same sovereign power of the state. The same thing that is called an "office" in one case is called "employment" in the other. The functionary who in one case is called "officer" is called "employé" in the other. That which, in one case, is called "salary" or "fees of office," is called "compensation of a servant" in the other. It is unnecessary, however, further to extend this line of argument, or to decide whether or not the supervisors of a county have power to supply delinquencies of the legislature in the matter of providing the necessary county officers, and prescribing their duties; since I think the legislature had created the office of tax collector for each county in the state by section 4103 of the Political Code, and, by section 4301 of the same Code had declared that "the tax collector must perform such duties as are prescribed in title IX, part III of this Code;" and the county government act of March 14, 1883, by section 57, had continued that office, and section 154 of the same act provides: "The tax-collector must perform such duties as are prescribed in title nine, part three of the Political Code," this section being a copy of section 4301 of the Political Code, above quoted. Under these sections of the Political Code and county government act, the tax collectors (or ex officio tax collectors, where the office was consolidated with that of sheriff) had collected all kinds of license taxes during a period of more than 20 years immediately prior to the refusal of the tax collector of Ventura county to receive the license taxes required to be paid to him by the ordinances of the supervisors of that county, without questioning their authority to do so; and even the present tax collector of Ventura county did not discover his want of authority to receive such taxes until after he had received them during a period of nearly three years, when he and the board of supervisors were advised that neither he nor any other county officer was authorized to receive license taxes; and thereupon, being careful not to transgress the bounds of his authority, he requested the board of supervisors to employ his then deputy tax collector, Bradley, to collect those taxes.

It is well settled that the legislature may define the duties of an officer by referring to another existing statute; and also that a subsequent repeal of the act so referred to does not affect or change the act referring to it. People v. Whipple, 47 Cal. 592. But it is claimed by counsel for respondent that title 9, pt. 3, of the Political Code, referred to by section 154, of the county government act, as defining the duties of tax collector, requires him to collect or receive only the taxes on property, and does not enjoin upon him the duty of collecting or receiving license taxes.

It is true that license taxes are not mentioned in title 9, part 3, of the Political Code; yet the only duties of the tax collector therein prescribed are those of receiving and collecting taxes, and paying them into the treasury; and section 154 of the county government act provides that "the tax collector must perform such duties" (not those duties), meaning duties "of that kind," and "of like kind," though not necessarily identical. For definitions of the word "such," see Webster's, Century, and Anderson's (Law) Dictionaries. The word "such" relates to and limits the word "duties" to that kind of duties enjoined in title 9, pt. 3, of the Political Code, but does not qualify the word "taxes," or restrict its application to any particular kind of taxes, the word "taxes" not being used in section 154 of the county government act. The kind of duties enjoined upon the tax collector by title 9, pt. 3, of the Political Code, is that of collecting taxes on property; and surely the duty to collect taxes on business (license taxes) is of a like kind, though the taxes collected in the latter case are not the identical taxes collected in the former.

In 1887 the legislature added a new section to the county government act, numbered 110½ (St. 1887, p. 208), as follows: "It shall be the duty of the tax-collector, except where it is by law otherwise expressly directed, to collect all taxes and licenses levied by law, or imposed by ordinance by the board of supervisors, in the manner and subject to the terms of the law or ordinance providing for the same." This new section was expressly repealed by the legislature of 1889 (St. 1889, p. 302); but section 154 of the county government act has never been repealed nor amended, and was re-enacted in the revised edition of that act of 1891 (St. 1891, p. 330). Counsel for respondent contend that the enactment of this new section indicates that the legislature understood that section 154 of the act did not authorize the tax collector to collect license taxes; that the new section was intended merely to supply the deficiency, and had that effect; and that the repeal of the new section, in 1889, left the tax collector without authority to collect license taxes. As to the reason why the new section was enacted, counsel's theory, at first impression, seems plausible; but, if it was understood by the legislature of 1889 that section 154 of county government act did not authorize the tax collector to collect license taxes, why was the new section repealed without enacting a substitute authorizing some officer to collect the license taxes? Is it to be presumed that the legislature intentionally omitted to provide for the collection of those taxes? The only rational answer to these questions would seem to be that the new section was considered superfluous, because the tax collector was authorized to collect those taxes by section 154, and that for this reason alone the new section was repealed. Nor did the enactment of the new section repeal section 154 by implication; since it only purports to authorize the tax collector to collect such taxes as he was not otherwise by law expressly directed to collect, and therefore could not have been intended as a substitute for or revision of any theretofore existing law authorizing the collection of taxes.

From the foregoing considerations it follows: (1) That section 154 of the county government act has never been repealed; (2) that said section authorizes the county tax collector to receive and collect all license taxes required to be paid to him by a valid ordinance of the county board of supervisors; (3) that the employment of the defendant Bradley by the board of supervisors of Ventura county to collect the license taxes for that county was unauthorized by law, and is void; (4) that the claim of Bradley for his services in collecting license taxes under said employment was not a lawful charge against said county, and should not have been allowed by the board of supervisors; (5) that the judgment appealed from should be reversed and the court below directed to enjoin the defendant treasurer of said county, perpetually, from paying the auditor's warrant in favor of defendant Bradley, described in plaintiff's complaint, as prayed for by the plaintiff.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the court below is directed, perpetually, to enjoin the treasurer of Ventura county, defendant herein, from paying the auditor's warrant in favor of the defendant Bradley, described in plaintiff's complaint, as prayed for by plaintiff.

(112 Cal. 311)

SMILIE v. FRESNO COUNTY. (No. 18,434.)

(Supreme Court of California. April 7, 1896.)

COUNTIES — LIMIT OF INDEBTEDNESS — CONTRACTS PAYABLE IN INSTALLMENTS.

Where a county contracts for the erection of a building, the payment to be made in installments each year as the work progressed, the debt or liability created is not the aggregate amount of such installments, but only that which arises from year to year on the separate installments; and, if the installment is within the income each year it is not illegal, under the provisions of county government act of 1891 (sections 5, 36), forbidding counties to incur an indebtedness or liability exceeding in any year the income and revenue provided for that year.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

This was an action on contract brought by Robert Smilie against the county of Fresno. From an order sustaining a demurrer to his complaint, plaintiff appealed. Reversed.

Frank H. Short and Chickering, Thomas & Gregory, for appellant. Firman Church, W. D. Tupper, and C. C. Merriam, for respondent.

BRITT, C. Certain persons, to whose rights plaintiff has succeeded by assignment, entered into a contract with the county of Fresno, whereby they agreed to build additions to the county courthouse and to complete the same within the space of 15 months from the date of the contract, which was December 14, 1891. The county on its part agreed to pay them therefor the sum of $99,387 "in gold coin or county warrants"; 75 per cent. thereof in monthly installments according to the stage of advancement of the work, and the remainder within 35 days after completion of the structure. The building was not finished until November 8, 1893, but this delay was within certain saving clauses of the contract, and was assented to by defendant, and on the day last mentioned the county accepted the work as fully completed in accordance with the contract. A balance of $6,708.62 remains unpaid on the said contract price, and to recover such balance is the object of this action. Plaintiff's complaint averred the facts above stated, and also set forth, among other matters, the following: "That the said defendant, by the execution of said contract, did not incur any indebtedness or liability exceeding in any year of the performance of the same the income and revenue provided for it for such year. That the income and revenue of said defendant provided for the year 1892 was sufficient to meet all payments under such contract as fell due in 1892 under the terms thereof, and all other obligations of said defendant falling due in 1892, and that the income and revenue of said defendant provided for the year 1893 was sufficient to meet all payments under said contract as fell due in 1893 under the terms thereof, and all other obligations of said defendant falling due in 1893." A demurrer to this complaint for want of facts sufficient to constitute a cause of action was sustained by the court, and, plaintiff declining to amend, judgment passed for defendant. No brief has been filed for respondent, and we are not informed of the particulars in which the complaint was held obnoxious to the demurrer. From the argument for appellant, however, we infer that the court considered the total indebtedness incurred on the part of the county by the execution of the contract to be in excess of the revenue and income of the county for each of the years 1892 and 1893 singly, and hence was void in virtue of the prohibition contained in section 18, art. 11, of the constitution, and the similar provisions of the county government act of 1891 (sections 5, 36), by which a county is forbidden to "incur any indebtedness or liability in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year," etc. Whatever doubt may have formerly existed in this state regarding the effect of that clause of the constitution on such contracts has been removed by the late decision of this court in McBean v. City of Fresno (filed March 26, 1896) 44 Pac. 358, where the court, per Mr. Justice Henshaw, having in view its previous decisions and the course of adjudication elsewhere, declared the law to be "that at the time of entering into the contract no debt or liability is created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed." In the present case the plaintiff has alleged that the income and revenue of the county provided for the years 1892 and 1893, respectively, was sufficient to meet the payments falling due under the terms of the contract in those years, and to discharge the other current obligations of the county. It is thus shown that each year's revenue was adequate to pay each year's indebtedness, and the case is brought within the principle of McBean v. City of Fresno. The judgment should be reversed, and the court below directed to overrule the demurrer to the complaint.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below is directed to overrule the demurrer to the complaint.

(112 Cal. 197)

BERNSTEIN v. DOWNS. (L. A. 47.)[1]

(Supreme Court of California. March 30, 1896.)

ACTION FOR STREET IMPROVEMENT—SUFFICIENCY OF PETITION—ASSIGNMENT OF CONTRACT—EVIDENCE.

1. In an action against an abutting owner for the amount of an assessment for street improvements, the petition alleged that defendant appealed from the assessment to the board of trustees, claiming that the work was not done in compliance with the specifications, pending which he promised the contractors that, if they would do certain other work in addition to the work already done, he would waive all defects in the assessment, and pay them the full amount thereof; that the board dismissed the appeal, but ordered the contractors to make certain additions to the work; that the contractors did all the work which they agreed with defendant to do, and also that directed by the board to be done; and that defendant saw that the work was being done, and made no objection to it. The assessment was admitted to be void. *Held*, that the petition stated a cause of action, as against a general demurrer, though the value of the additional work done at defendant's instance was not alleged.

2. Defendant could not avoid the contract on the theory that the doing of the extra work was malicious mischief, under Pen. Code, § 602, because it would be "digging" in a street without proper license, and therefore unlawful, under Civ. Code, § 1667.

3. In an action against an abutting owner for the amount of a void street assessment, the complaint alleged that the work was done with defendant's knowledge and consent; that it directly benefited his property, and that he received the benefit thereof; that the sum assessed and sued for was the reasonable value of the work, and was also the "value of the said benefit to defendant's said property." *Held*, that a sufficient consideration for defendant's promise to pay the sum assessed was alleged.

4. In an action against an abutting owner for the amount of a void street assessment which he promised to pay the contractor, it was proper to admit in evidence the written assignment to plaintiff by the contractor of the assessment, as tending to show an assignment of the obligation sued on.

5. An exception "to the instructions asked for and allowed by the court on the part of the plaintiff" does not sufficiently specify the particulars in which the instructions are erroneous, within the meaning of the Code.

6. The complaint in an action for the amount of a void street assessment against an abutting owner, who agreed to pay the same, alleged that the contractors assigned to plaintiff the whole cause of action, including the personal obligation of defendant to pay the amount of the assessment, and was verified by one of the contractors, and, as subsequently amended, was verified by the other contractor. *Held*, that a judgment for plaintiff would not be reversed on account of failure to sufficiently prove the assignment of the obligation sued on.

7. In an action on a promise to pay money, there was no affirmative plea of payment, and all denials in the answer that any sum remained unpaid were coupled with denials that any sum ever was due; nor was any pretense made on the trial that defendant ever paid anything, but the defense was that there was never anything due. *Held*, that a judgment for plaintiff should not be reversed, whether or not proof of an existing indebtedness is sufficient to make a prima facie case of nonpayment.

Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by Samuel Bernstein against John W. Downs. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Chas. R. Gray, for appellant. Finlayson & Finlayson, for respondent.

McFARLAND, J. This action was brought to recover $432.25 for work and material furnished by plaintiff's assignors in making improvements on the street and sidewalk in front of defendant's lot. This sum of money was the amount originally fixed as a street assessment; but the assessment, on account of a certain irregularity, became void, and the action is founded upon defendant's promise to pay the amount so assessed. Judgment went for plaintiff, and defendant appeals.

Appellant's main contention for a reversal is that the complaint does not state facts sufficient to constitute a cause. This contention cannot be maintained. The complaint is a lengthy one, and has three counts; but the main facts stated are, briefly, these: Appellant owned a lot fronting on Second street, between D and E streets, in the city of San Bernardino; and he and certain other owners of lots on said Second street, between D and E, petitioned the board of trustees of said city to cause certain street work to be done on that part of said street. In response to said petition, the trustees duly adopted a resolution of intentions to order certain described work to be done on said Second street, from the east line of D street to the east line of E street; and such proceedings were regularly had that a contract was awarded to respondent's assignors, Ramish & Marsh, who did the work; and the assessment for work against appellant's lot was, in the first instance, $435.69, but upon appeal by appellant and others to the board of trustees, on account of some incidental expenses charged, to which they objected, the board reduced the total amount somewhat, so that the amount assessed against appel-

[1] Rehearing denied.

lant's lot was $432.25. Appellant and the other said lot owners took another appeal to the board, in which they objected that the work was not well enough done, and not in compliance with the specifications, and also made some technical objections; as, for instance, that the contractors employed men on the basis of ten instead of eight hours as a day's work. While this appeal was pending before the board of trustees, the appellant and the other appealing lot owners and the contractors all went together to the part of said Second street where the work had been done, for the purpose of examining it. After the investigation, the defendant promised the said contractors that if they would do certain other described work, which consisted of certain alterations of and additions to the work already done, he would waive all defects in the assessment, and pay them the full amount of said assessment, of $432.25. The board dismissed the appeal, but made an order that the contractors make certain additions to the work; and said contractors, in consideration of said promise of appellant, did do all the work which they had agreed with appellant to do, and also the work ordered by said board to be done. The appellant knew of all these facts and circumstances, knew and saw that the work was being done, and made no objection except as hereinbefore stated. The cause of action was assigned by Ramish & Marsh to respondent. It is admitted that the assessment could not have been legally enforced, on account of some mishap in getting an order extending the time for the completion of the work.

The foregoing are the main facts averred in the first count of the complaint, although it contains many details not here given; and we think that it sufficiently shows a cause of action. A lot owner, without any order from the municipal government, can make a valid contract with another person to have the street and sidewalk in front of his premises improved, provided he can get permission to do so from the proper authorities; and when, as in the case at bar, he says to a person who for any reason had already done such work, "If you will now complete this work in a certain way, I will pay you for what you have already done," such promise to pay is a valid promise made upon sufficient consideration, and enforceable like any other legal obligation. The fact that the value of the additional work in money was not alleged does not make the complaint insufficient, particularly as against a general demurrer. Whatever its exact value (and the value was proven at the trial without objection), it was a detriment to the contractor, and a benefit to appellant, and therefore a valid consideration. Neither is there anything in the point that appellant can avoid his contract upon the theory that the doing of the extra work would be malicious mischief under section 602 of the Penal Code, because it would be "digging," etc., in a street without proper license, and therefore declared unlawful, under section 1667 of the Civil Code. The extra work contracted for was not within the enumeration of acts prohibited by the said section of the Penal Code. It was clearly not malicious. The facts show that the trustees permitted it; and, as the facts averred do not state an unlawful contract, its unlawfulness, if any, was a matter of defense.

As, however, there are three counts in the complaint, and the jury returned a general verdict for the amount prayed for, it is contended by appellant that the verdict and judgment cannot stand if any one of the counts is insufficient, because it cannot be known upon which count the verdict was rendered. This proposition seems to be violative of the principle that an appellant must affirmatively show error, and all intendments are in support of the judgment; but the general rule, as contended for by appellant, seems to have been announced by former decisions. Hunt v. San Francisco, 11 Cal. 258; Barron v. Frink, 30 Cal. 486. Whether or not this rule should be applied to a case like the one at bar, where it is apparent that each count is upon the same identical cause of action, it is not necessary to determine; for we think that each of the second and third counts is sufficient as a pleading against a general demurrer, and there is no special ground except that there is an improper uniting of two causes of action.

The objection urged against the second count is that it does not state a sufficient consideration for appellant's promise to pay the said amount of $432.25. But it is alleged that the work was done with appellant's knowledge and consent; that it directly benefited appellant's property, and appellant received the benefits thereof; that said sum of money was the reasonable value of said work, and was also "the value of the said benefit to defendant's said property." This was a sufficient consideration for appellant's alleged promise to pay said sum of money, under the principle stated in section 1606 of the Civil Code.

The two objections urged to the third count —that the value in money of the additional work is not stated, and that the contract was unlawful—are the same as those urged against the first count, and, as before stated, are not tenable.

With respect to alleged errors occurring at the trial, the court did not err in allowing in evidence the written assignment to respondent by the contractors Ramish & Marsh of the assessment hereinbefore mentioned. The contention is that as the action is founded upon a promise to pay, and not upon a valid assessment, therefore an assignment of the assessment, diagram, warrant, etc., was of no consequence, and was properly objected to "on the ground that it was incompetent." But this assessment was the thing which appellant promised to pay, and the assignment of it was certainly not incompetent as evidence, while it certainly tended in some degree to show an assignment of the obligation sued on.

Appellant contends that some of the instructions given to the jury were erroneous. They mostly involve those general features of the case which are noticed in other parts of this opinion; but the preliminary objection of respondent that there are no sufficient specifications of the particulars in which they are alleged to be erroneous must be sustained. The only exception shown in the record on the subject is the following statement by counsel for the defendant: "We except to the instructions asked for, and allowed by the court on the part of the plaintiff." This, upon its face, certainly does not "specify the particular upon which the party will rely," within the meaning of the Code. It does not specify any particular error. There are some decisions of this court founded on an expression in the opinion rendered in Robinson v. Railroad Co., 48 Cal. 425, in which more liberality is shown to exceptions to instructions given at the request of a party than to instructions given by the court on its own motion; but, taken altogether, they do not condone the extreme generality of the exception in the case at bar. There certainly should be at least an exception to each of the instructions by number or other designation; otherwise, the attention of the court is not called to any one particular alleged error. See cases cited at pages 948–951, 2 Enc. Pl. & Prac. The latest notice of the subject by this court to which our attention has been called was in Joyce v. White, 95 Cal. 239, 30 Pac. 524, in which it seems to have been held that an exception in these words, "The court erred in giving to the jury instructions asked by plaintiff," was not sufficient. Certainly, such an exception as the one at bar would be insufficient if any part of the instructions excepted to en masse is free from error.

It is contended that there was no sufficient proof of the assignment to respondent of the cause of action sued on. It is true that the written assignment of the "assessment" does not clearly express the intent of carrying with it the promise of appellant to pay it; but this assignment and the conduct of the assignors and assignee, together, show that such was the intent. Moreover, appellant is not now in a position to question respondent's character as assignee. There is no pretense that appellant has any defense which he might have made against the assignors which he cannot make with equal force against the respondent. In such a case, clear proof of the assignment is important to a defendant only in order that a judgment against him may be full protection against any suit that might be brought on the same demand by the assignor. In White v. The Mary Ann, 6 Cal. 471, where a similar defense was pleaded, the court said: "It is also beyond question that a recovery will bar another action for the same cause; and, whenever a defendant is thus protected, he has no right to make the objection which is here set up." In Burrows v. Stryker, 47 Iowa, 477, there was some question of the sufficiency of the assignment of the cause of action; but the plaintiff had, by an amendment to his complaint, brought in the assignor (a company), who had appeared and admitted the assignment, and the court said: "An admission of the assignment having been made of record by the company, and a decree against the company having been rendered in favor of the plaintiff, the appellant cannot now question the plaintiff's title." Now, in the case at bar, the assignors, Ramish & Marsh, are estopped by their acts of record from denying the assignment; and appellant is fully protected from any subsequent claim which they might set up to the cause of action sued on. In the complaint there is a complete averment that Ramish & Marsh assigned the whole cause of action, including the personal obligation of appellant to pay the amount of the assessment; and the complaint is verified by Ramish, who stated in his verification that the respondent was absent from the country, that all the facts alleged were within his (Ramish's) knowledge, and that they were true. Afterwards there were some amendments made to the complaint, and it was again verified by the other assignor, Marsh. In fact, it appears that, substantially, the action was brought and maintained by the assignors in the name of the assignee. Our conclusion upon this point is that the judgment should not be reversed on account of the alleged failure to sufficiently prove the assignment.

The only other contention of appellant necessary to be noticed is that there was not sufficient proof by respondent of nonpayment of the demand sued on. With respect to this point it is sufficient to say that there is no affirmative plea of payment in the answer, and that the denials that any sum remains unpaid are all coupled with denials that any sum was ever due; so that the denials might be true, upon appellant's theory of no indebtedness, although no payment had ever been made. Nor is there anything in the record (as claimed by appellant) showing that the case was tried upon the theory of a sufficient averment of payment, or a sufficient denial of nonpayment. In fact, there was no pretense that appellant ever paid anything. The defense was that there was never anything due. This makes it unnecessary to discuss the question whether proof of an existing indebtedness is not sufficient to make a prima facie case of nonpayment. The evidence upon all other issues was sufficient to justify the verdict. The judgment and order denying a new trial appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

112 Cal. 230

RIVERSIDE WATER CO. v. SARGENT et al. (No. 19,427.)

(Supreme Court of California. April 1, 1896.)

IRRIGATION—ACTION TO DETERMINE WATER RIGHTS—JUDGMENT.

In an action against a ditch company, where the issue was the right of the defendant to take water from a river, the findings and judgment of the court must determine the quantity of water allowed to the party whose claim is paramount; and a finding that defendant is entitled to take water to the full capacity of its ditch, and, during the irrigating season, to the extent of all the water in the river, when only 1,000 inches is claimed in the pleadings, is erroneous.

Commissioners' decision. Department 2. Appeal from the superior court, San Bernardino county; John C. Campbell, Judge.

This action was brought by the Riverside Water Company against the Timber Ditch Water Company for diverting from the Santa Ana river, in San Bernardino county, water belonging to plaintiff company. There was a judgment for defendant, and plaintiff appealed. Reversed.

Curtis, Oster & Curtis (R. E. Houghton, of counsel), for appellant. Chas. J. Perkins and Goodcell & Leonard, for respondents.

BRITT, C. This action concerns the relative rights of the plaintiff, a corporation, and the defendant Timber Ditch Water Company, also a corporation, to the use (acquired by appropriation) of water flowing in the Santa Ana river, in San Bernardino county. Each share of the stock of said Timber Ditch Company represents the right of the holder thereof to use, for a definite time, all the water owned or controlled by the company, and the interest of the other defendants arises from their ownership of shares of such stock, and consequent right to an apportionment of the water. It is alleged in the complaint that plaintiff is the owner of all the water of the river at the point where defendants, by means of a dam and ditch, diverted therefrom "a large amount of water belonging to plaintiff, to wit, upward of one thousand inches, measured under a four-inch pressure." Defendants, by their answers, denied that plaintiff is the owner of all the water of the river, and averred a superior right in the Timber Ditch Company to divert such water, by means of said dam and ditch, "to the extent of one thousand inches measured under a four-inch pressure, in constant flow, for the use and benefit of its stockholders," and that any right of the plaintiff to the water is subject to such priority of the ditch company. It is thus apparent that the controversy is whether the ditch company has any right to take water from the river, and, if it has, how much. It was proved at the trial that above the head of said ditch the river is divided into two channels, called, respectively, the "North Channel" and the "South Channel," and that the ditch proceeds from the former of these, the South channel being at that point about half a mile distant. The court found that plaintiff is the owner of all the water flowing in the river at the point where the dam complained of was constructed, "except so much thereof as defendants are entitled to take and use, as hereinafter stated"; that the defendant the Timber Ditch Water Company had, for more than six years before the commencement of the action, continuously diverted water from the river by means of said dam and ditch, and has the right to take the water by those means "to the extent of the full capacity of said ditch, and * * * during the irrigating season, * * * to wit, from the 15th day of April to the 15th day of September of each year, * * * to the extent of all the water being and flowing in said river at the place of said diversion." The judgment was in substantial accord with said findings. Plaintiff appeals.

The decisions of this court establish that in cases like the present the findings and judgment must fix the extent of the superior right, viz. the quantity of water to be allowed to the party whose claim is paramount; otherwise, the judgment fails to attain the certainty necessary to an estoppel upon the main subject of the litigation. Dougherty v. Haggin, 56 Cal. 522; Water Co. v. Richardson, 72 Cal. 604, 605, 14 Pac. 379; Ditch Co. v. Crane, 80 Cal. 182, 22 Pac. 76; Barrows v. Fox, 98 Cal. 63, 32 Pac. 811; Lillis v. Ditch Co., 95 Cal. 553, 30 Pac. 1108. See, also, Stewart v. Taylor, 68 Cal. 7, 8 Pac. 605. In this instance the court has not found the disputed quantity, nor data from which it may be calculated. In view of the fact, well known, that the carrying capacity of a water ditch is subject to rapid changes, being affected by the nature of the soil through which it passes, the rapidity and consequent scouring force of its current, the care it receives, and other matters more casual, the finding here seems well devised, as said in Ditch Co. v. Crane, 80 Cal. 186, 22 Pac. 76, to "lead to future disputes and litigation." The finding that during the irrigating season the ditch company is entitled to all the water flowing in the river at the point of diversion does not obviate the difficulty. By their pleadings the defendants claim for the ditch company no more than 1,000 inches of water; and if the quantity flowing in the river during that season should exceed such amount, as sometimes it did, then the plaintiff is admittedly entitled to the excess, and the finding in that respect is unauthorized by the pleading. Again, since the court found, in effect, that the right of the ditch company exists in consequence of the diversion of the water by means of said ditch, and to the capacity of the ditch, it necessarily follows that the limit of the right is the carrying capacity of the ditch. Defendant could have no lawful claim to more water than it had means to divert. Then, for the time not included in the so-called "irrigating season" (April 15th to September 15th), no measure at all of the right of the ditch company is found, except the undetermined capacity of its ditch; and whether, under the clause of the judgment giving it, during the period mentioned, all the water flowing in the river at the place of diversion, it can claim the flow of both channels of the river, is a question upon which counsel for defendants themselves seem to differ. The pleadings make an issue upon the quantity of water appropriated by the ditch company measured by inches under four-inch pressure, and the objections we have noted could not have arisen had the findings and judgment been responsive to the pleadings in that particular.

Defendants suggest that the judgment may be so modified as to restrict the water awarded to the ditch company to 1,000 inches, and affirmed as modified; this on the strength, as we understand the argument, of the allegation in plaintiff's complaint that defendants, by means of said dam and ditch, have diverted that amount of water from the river, and the admission of such averment in the answers of the defendants, it being claimed that the pleadings thus fix the capacity of the ditch. But the water to which an appropriator is entitled is not the quantity he diverts, but the quantity which is or may be applied to a beneficial use, allowance being made for necessary loss in transit (Barrows v. Fox, 98 Cal. 63, 32 Pac. 811); and from the fact that a ditch has dimension to divert 1,000 inches from a stream it does not necessarily follow that it has dimension to carry that quantity, or any part of it, to the place of use.

The remaining matters discussed by counsel relate mainly to the sufficiency of the evidence to justify the findings that all the water flowing into the ditch during the irrigating season is used and required for use upon the lands of the ditch company's shareholders. If the ditch supplies to them the quantity claimed by defendants, and the area of land irrigated is no greater than the record seems to show (less than 150 acres), then it would appear that the absorptive quality of the land is amazing, though, of course, not impossible. This circumstance, however, addresses itself chiefly as a monitory consideration to the trial court, which, no doubt, will take care that no unnecessary waste of the element is permitted. Barrows v. Fox, 98 Cal. 63, 32 Pac. 811; Milling Co. v. Morgan, 106 Cal. 409, 39 Pac. 802; Roeder v. Stein (Nev.) 42 Pac. 867. In this court, there being no finding fixing the extent of the appropriation and use, there is little advantage in considering the effect of testimony tending to show what the finding might have been. It should be said, however, that appellant mistakes in assuming, as it apparently does, that the ditch company can defend only for the interests of those of its shareholders who appear and make proof of their several claims. Its right, as trustee for all the shareholders, is to establish its claim to all the water owned and controlled by it for their benefit, whether the individuals to whom the water is apportionable are before the court or not.

We recommend that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

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112 Cal. 236

STOCKTON SAVINGS & LOAN SOC. v. PURVIS, Sheriff. (No. 18,368.)

(Supreme Court of California. April 1, 1896.)

LANDLORD AND TENANT — LIEN ON CROPS FOR RENT—RIGHTS OF CREDITORS OF LESSEE.

Under an oral contract for lease of a farm at an annual cash rental, with the agreement that title to crops raised thereon should be in the landlord, that the crops should be stored in his name, and sold by him, and the proceeds applied first to pay the rent reserved, the surplus being paid over to the lessee, the landlord acquired merely a lien on the crops for the rent, and not title thereto as against creditors of the lessee.

In bank. On rehearing. Reversed.
For former report, see 42 Pac. 441.

GAROUTTE, J. Plaintiff, as the owner of a certain tract of land, entered into a contract with one Dallas, whereby it let the said land to Dallas for the term of one year, upon the oral understanding and agreement that Dallas should during said year farm the same at an annual cash rental of $2,140; and it was understood and agreed between the parties that the title to said crops raised thereon during said term was to remain in said plaintiff, it being further understood and agreed that the said crop was to be hauled to the nearest warehouse, and stored in the name of plaintiff, and that from the sale of said crops plaintiff was to receive as rent aforesaid the sum of $2,140 cash, and the overplus, if any, was to go to and be the property of said Dallas, and that no part of such crop should be in any way subject to the disposal of said Dallas. Under the aforesaid contract Dallas entered into the possession of the land, and planted a crop of wheat thereon. While said wheat was growing, and prior to the harvesting thereof, Eppinger & Co., a creditor, attached the growing crop as the property of Dallas, and this action is brought by the plaintiff, the lessor, against the attaching officer, the sheriff, for the conversion of the property, plaintiff claiming under the aforesaid contract to be the owner of the entire crop.

The legal soundness of plaintiff's claims is wholly dependent upon the true construction of this contract of lease, and the general rules of law for the interpretation of contracts are applicable here. The fact that it is a contract between a lessor and a lessee of land for the farming thereof in no wise proves it an exception to the application of the general rules of interpretation; and the first and controlling rule for such interpretation is, what was the intention of the parties at the time of the making of the contract? Another rule of interpretation equally controlling and binding is that such intention must be gathered from the contract taken as a whole, considering all its provisions together, and not from any one clause considered as standing alone. Plaintiff insists that the title to this growing crop was in it, and points to the clause of the contract to support its contention, which provides: "It is understood and agreed between plaintiff herein and said Robert Dallas that the title to said crops raised thereon during such term is to remain in said plaintiff." Testing this contract by this clause alone, plaintiff's position is impregnable. Closing our eyes to all other provisions, we would be bound to hold the title to be in plaintiff. But this court is not authorized by the rules of law to measure the intentions of these contracting parties in any such manner. No clause in a contract in terms locating the title to the property forming the subject-matter of the contract in one of the parties is controlling upon a court, as against the provisions of the contract, taken as a whole, locating the title in the other party. There is nothing in the name given an instrument which will be in any way binding or controlling upon the court. Calling a contract a lease or a sale will not make it a lease or a sale. The agreement, whatever it may be, when coming before a court, will be named according to its provisions, and any technical christening of it by the parties cannot control its true interpretation. As was said in Parke & Lacy Co. v. White River Lumber Co., 101 Cal. 39, 35 Pac. 442, referring to a certain written instrument: "This paper was not a lease. Calling it a lease did not establish the fact. This is peculiarly a case where there is nothing in a name, for the contents of the paper determine its true character." Again, in Heryford v. Davis, 102 U. S. 235, in speaking as to the true construction of a contract, the court said: "The answer to this question is not to be found in any name which the parties may have given to the instrument, not alone in any particular provision it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account." In Putman v. Wise, 1 Hill, 246, the court quotes from Woodfall's Landlord and Tenant, where the author says: "The most proper and authentic form of words may be overcome by a contrary intent appearing in the deed of demise." Keeping the foregoing principles in view, let us weigh and measure this contract by considering all its parts together. Plaintiff leased this land for a cash rent of $2,140. There was an express promise to pay this amount of money, and its payment was in no way dependent upon the raising of any crop. There was an independent personal liability. The crops may have proved a total failure, and still the money called for by the contract was a present binding liability. There is not even a provision in the contract that the title to the crops should return to the lessee upon the payment of the rent money. Under plaintiff's contention this money may have been paid within a few days after the execution of the lease, and still the crops would have remained the lessor's property. According to plaintiff's construction of the contract, it owned both the money demanded for the rent and the growing crop. It could have sold the demand for full value, and at the same time have mortgaged the crop, or even sold it, giving perfect title to both demand and crop. Plaintiff may have transferred or collected its claim, and still the crop of growing grain might have been sold under an attachment, and execution issued at the hands of its creditors. All these things could have happened if plaintiff's contention be true. We think that such was not the intention of the parties, certainly not the intention of the lessee. Where a person pays cash rent for the exclusive use of a tract of farming land, with the intention and for the express purpose of raising crops of grain thereon, it would seem that such crops would belong to the lessee. Certainly that should be the construction of the contract unless reasons for a different construction stand out in bold relief upon its face, and they do not present themselves here.

It further appears that the grain was to be hauled to a certain warehouse when harvested, and thereupon sold by plaintiff, and the proceeds applied first to the payment of its cash rent of $2,140, and the balance, if any, to go to the lessee. It would be a peculiar construction of this contract, and even an absurd one, to hold that plaintiff was to sell his own crop of grain, and apply the proceeds to the payment of a claim owned and held by it against its lessee. This clause of the contract plainly indicates an attempt by the lessor to hold the crop, when harvested, as security for the rent. Taking the whole contract together, it clearly indicates the purpose of these parties was to create a lien upon the growing crop to secure the payment of the cash rent; and any direct statement in the contract itself that such was not the purpose, or that the title to the crop was to remain in the lessor, must go down as against the plain intention of the parties, as evidenced by the entire contract when held before us, by its four corners for consideration. In the examination of the question here presented we are not at all loath to arrive at the conclusion reached. Under the law of this state there is no reason why a transaction of the character here presented should ever have been entered into. It was secret in every respect. It was not even in writing. As indicated by the amount of rent to be paid, the lessee was farming a large tract of plaintiff's land. It undoubtedly appeared to the public that he had an interest at least in the crops which he was cultivating. Under this contract of lease, as plaintiff asks to have it construed, the dealer who furnished the sacks to sack the grain, and the man who furnished the labor and machinery to harvest it, could not attach it for the labor and materials furnished. The public should not be dealt with in this way, and the law is not favorable to any such secret transactions. Again, there was no honest excuse for it, for the plaintiff could well have taken a chattel mortgage upon the growing crop to secure his rent, and thus the world would have had notice of the financial standing of the lessee, and could have dealt with him in the light of day with open eyes. By reason of the opportunities for fraud presented by this character of contract courts are inclined to scrutinize them closely, and, as we have stated, will not be concluded from such scrutiny by any name given the instrument, or by any single provision contained therein. It is the legal effect of the contract as an entirety that points our judgment. The language of this court in Palmer v. Howard, 72 Cal. 293, 13 Pac. 858, is full of meaning, and sheds a flood of light upon this question of construction. It is there said: "But in applying this rule it must be remembered in general that the policy of the law is against upholding secret liens and charges to the injury of innocent purchasers or incumbrancers for value, and in particular that mortgages of personal property are permitted only in certain specified cases, and then only upon the observance of certain formalities, designed to secure good faith, and to give notice to the world of the character of the transaction. These provisions as to mortgages cannot be evaded by any mere shuffling of words. When it is clear from the whole transaction that for all practical purposes the ownership of property was intended to be transferred, and that the seller only intended to reserve a security for the price, any characterization of the transaction by the parties, or any denial of its legal effect, will not be regarded. The question, it is true, is one of intention; but the intention must be collected from the whole transaction, and not from any particular feature of it." See, also, Walls v. Preston, 25 Cal. 63. For the foregoing reasons we conclude this contract was an attempt to obtain the advantages of a chattel mortgage without complying with the provisions of the statute upon that subject.

As a condition precedent to the beginning of this action plaintiff made a demand upon the attaching officer for the return of the property attached. It is now claimed by defendant that the demand was materially defective; but, without passing upon that question, we are able to say the written demand is pregnant with meaning, as showing the interest claimed by plaintiff in this grain. In that demand it is clearly shown what plaintiff considered the status of this property to be, and also the construction put upon this contract by it. In its demand upon the sheriff plaintiff did not even claim to be the owner of the property, but simply asserted a lien thereon. The demand asserts that said crops "were and are now subject to the lien of the Stockton Savings and Loan Society for rent reserved, to the amount of $2,140." Above every one else, the plaintiff should know what its own intentions were in entering into this contract. There are some cases which would seem to be opposed to the views here expressed, notably Smith v. Atkins, 18 Vt. 461; Edson v. Colburn, 28 Vt. 631; and Andrew v. Newcomb, 32 N. Y. 417. With those cases we will not here deal. Possibly, to a large degree, those decisions were made from necessity, by reason of the absence of any chattel mortgage act; but we pass them by, and come to a consideration of the cases found in our own reports upon this question. The first and principal case in this state, and which at first glance seemingly looks the other way from the views we have expressed, is Howell v. Foster, 65 Cal. 169, 3 Pac. 647. The conclusion there arrived at is based upon the decisions we have cited from other states; but, whatever the court might do if another case with identical facts to those there shown was presented before it, it is unnecessary to say, for this case is different in material respects from Howell v. Foster. That was not a case of cash rent. Indeed, there is no agreement to pay any rent whatever. The word "rent," or its equivalent, is not found at any place in the contract. It is practically a contract for hiring, the wages of the man performing the labor and cultivating the land to be paid by three-fourths of the grain raised upon the land, delivered to him by the owner, after deducting certain moneys for advances previously made. Wentworth v. Miller, 53 Cal. 9; Sunol v. Molloy, 63 Cal. 369; and Blum v. McHugh, 92 Cal. 497, 28 Pac. 592,—which are cited in respondent's brief, are not in point upon the question here involved. For the foregoing reasons, the judgment is reversed and the cause remanded.

We concur: HARRISON, J.; VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

112 Cal. 274

REID v. REID. (Sac. 7.)

(Supreme Court of California. April 2, 1896.)

DIVORCE—CRUEL TREATMENT—EVIDENCE—COMMUNITY PROPERTY—DISTRIBUTION—REVIEW—SEPARATE PROPERTY—JURISDICTION OVER.

1. In an action for divorce the uncorroborated testimony of one of the parties is insufficient to warrant a finding of cruel treatment.

2. In an action for divorce the court has no jurisdiction over the separate property of the wife.

3. All right to waters flowing from a well pass with a deed of land on which the well is located, unless reserved by the deed.

4. Funds belonging to either party individually on marriage, when commingled with community property, so that they cannot be traced and segregated therefrom, become community estate.

5. Under Civ. Code, § 148, authorizing the appellate court to revise the distribution of property made by the trial court in a divorce action, the distribution may be reversed without disturbing other portions of the judgment.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Sarah A. Reid against William C. Reid for divorce, for cruelty and nonsupport. Defendant filed a cross complaint for divorce, for cruelty and for desertion. From a judgment for defendant on his cross complaint, and partitioning the property, plaintiff appeals. Divorce affirmed. Partition reversed.

John C. Duel and Frank H. Short, for appellant. E. D. Edwards, for respondent.

McFARLAND, J. This is an action for a divorce, brought by the wife against the husband, upon the statutory grounds of extreme cruelty and willful neglect to provide the common necessaries of life. The defendant, in his answer, denied the material averments of the complaint, and, in a cross complaint, charged against the plaintiff willful desertion and extreme cruelty, and upon these grounds prayed for a decree of divorce in his favor against her. The court found against plaintiff's charges of extreme cruelty and neglect, and found that plaintiff was guilty of both desertion and extreme cruelty, decreed a divorce in his favor on both said grounds, awarded the custody of the children to him, and disposed of the community property as hereinafter mentioned. The plaintiff appeals from the judgment, and from an order denying her motion for a new trial.

The evidence shows some unamiable conduct on the part of both husband and wife, but it is not sufficient to show extreme cruelty by either. If the statements of appellant on the witness stand could, taken together, be considered as showing facts sufficient to constitute in law extreme cruelty, still it was entirely uncorroborated. What respondent testified to did not constitute extreme cruelty by appellant; and he, also, was uncorroborated. Therefore the finding that respondent was not guilty of extreme cruelty is sustained by the evidence, but there is no sufficient evidence to support the finding that appellant was guilty of extreme cruelty. There was no evidence sufficient to support appellant's charge of willful neglect, and therefore the finding against such neglect was right. There was, however, sufficient evidence to support the finding of willful desertion by appellant; and therefore, on that ground, the part of the judgment which decrees a divorce must be affirmed. We think, also, that under the circumstances shown by the evidence, which need not here be stated, the court did not abuse its discretion in awarding the custody of the children to respondent; and therefore that part of the judgment which awards such custody to respondent must be affirmed. But all that part of the judgment which purports to dispose of and partition the property of the parties must be reversed, and a new trial ordered on the whole subject of property and the issues thereto appertaining.

In the first place, it is not clear whether or not the court dealt with the subject upon the theory that, under the erroneous finding of extreme cruelty, it could assign the property to the parties "in such proportions as the court, from all the facts of the case and the condition of the parties, may deem just," under subdivision 1 of section 146 of the Civil Code. The judgment must stand upon the finding of desertion; and in such case "the community property shall be equally divided between the parties." In the second place, the only property awarded to the appellant was 20 acres of land which was her separate property, and as to it the court had no jurisdiction. This land had been conveyed by the respondent to appellant's father, and by the latter to the appellant, some time before the parties separated; and it was clearly her separate property. There was an artesian well on this 20 acres, and the court decreed that respondent should have three-fourths of all the water flowing from it; but there was no reservation whatever in the conveyance of the land by respondent, and the well went to appellant as part of the land. The court also decreed to respondent "a right of way 40 feet in width across the north end" of said 20 acres; and this was clearly beyond the power of the court to do. There was considerable community property, and none of that was awarded to appellant, while she should have been awarded one-half of it. Whether or not the division of the property sought to be made by the court would have been equitable and just if there had been power to make it, as in cases of extreme cruelty or adultery, is not a question before us.

That part of the judgment which deals with property rights will have to be reversed, and a new trial ordered on that subject; and it will be the duty of the trial court to determine, upon such proper evidence as may be offered, what community property the parties have, and to divide it equally between them. If partition is not practicable, the community property may be ordered sold, and the proceeds, after the satisfaction of any liens which may be on it, divided equally between the parties. Civ. Code, § 147. We observe that the court finds that certain described property is community property, "except twelve hundred dollars' worth, which amount defendant had in cash when he married plaintiff, and upon which defendant operated," etc. It also appears that after the trial of the case had closed, and it had been taken under advisement, appellant asked to have the case opened, so as to allow her to introduce evidence that she had advanced to respondent about $4,700, which she had received from her father, and which he had put into the property; and there are affidavits of herself and her father to the same effect introduced on the motion for a new trial. At another trial this evidence would, of course, be as admissible as would be evidence of respondent that he put $1,200 of his money into the common funds; but it is apparent that neither of these sums of money can be now considered as separate property, unless it can be in some way traced and segregated from the mass of community property as it now exists.

Under section 148 of the Civil Code,[1] this court can deal separately with that part of a decree in a divorce case which disposes of the community property, without disturbing other parts of the decree. We could modify the decree in the case at bar by a special direction to the court below to now amend its judgment so as to award one equal half of the community property to each of the parties, if the findings clearly showed what the community property is. Strozynski v. Strozynski, 97 Cal. 189, 31 Pac. 1130; Brown v. Brown, 60 Cal. 579; Eslinger v. Eslinger, 47 Cal. 62. But the findings are not clear on that subject, and it will be necessary for the court below to retry the issue as to community property (unless the parties can agree about it), determine definitely what the community property is, and amend the decree by adjudging that it be equally divided between the parties; and it will not be necessary to change any other part of the judgment.

It is ordered that all of the judgment and decree appealed from granting a divorce and the custody of the children to respondent, which includes all of said judgment from the first word thereof down to and including the words "be visited by said plaintiff at all reasonable and proper times," on page 28 of the printed transcript, be and the same is hereby, affirmed, and as to said part of said judgment the order denying a new trial is affirmed; and it is further ordered that all of said judgment which disposes of the property and property rights of the parties hereto, and which includes all of said judgment from the words above quoted on page 28 of the printed transcript, down to and including the words "be compelled to pay," which appear on page 30 of the printed transcript, be, and the same is hereby, reversed, and as to the said part of said judgment the order denying a new trial is reversed; and the cause is remanded, with directions to the court below to hear evidence, and dispose of the community property of the parties to this action in accordance with this opinion.

We concur: TEMPLE, J; HENSHAW, J.

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112 Cal. 279

LYNCH et al. (PLUNKETT et al., Interveners) v. ROONEY et al. (S. F. 228.)

(Supreme Court of California. April 3, 1896.)

VOLUNTARY TRUSTS—JUDGMENT—COLLATERAL ATTACK.

1. On distribution of intestate's estate, defendant was declared the distributee, as grantee of her mother, who was declared sole heir. Afterwards, in a letter written to an aunt, she stated that, "some time after [intestate's] property was deeded to me, I heard that P. [another heir] was still living; and I resolved that he should have half the estate, though the law does not compel the division. Still, I feel that, in justice, it belongs to both." *Held*, that under Civ. Code, § 2221, the letter created a voluntary trust in favor of P. and his heirs, as to an undivided share in intestate's property.

2. Upon the distribution of the estate of an intestate, defendant's grantor was, by decree, declared sole heir and distributee. An action having been brought by another heir to establish a voluntary trust, a third heir intervened, and sought to have established an involuntary trust, on the ground that the decree of distribution was erroneous, in declaring defendant's grantor the sole heir, when there were, in fact, other heirs. *Held*, that the intervention was in the nature of a collateral attack upon the decree of distribution, and, as such, could not be maintained.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

This action was brought by Margaret Lynch and others, as heirs of defendant's intestate, Bryan Lynch, against Mary Rooney and John Rooney, to establish a voluntary trust in land. Nancy Plunkett and others, also heirs of intestate, intervened, and sought to establish an involuntary trust in the land. There was a judgment for plaintiffs and interveners, and defendants appealed. Affirmed as to plaintiffs. Reversed as to interveners.

McKune & George (Chamberlain & Wheeler, of counsel), for appellants. T. Z. Blakeman, for respondents. J. H. G. Weaver, for interveners.

GAROUTTE, J. This is an action to establish a trust in certain land. A decree to that effect was rendered by the trial court, and an appeal has been taken to this court from that decree, and from the order denying the motion for a new trial. The facts may be briefly stated as follows: One Bryan Lynch, residing in Humboldt county, was the owner of certain land situated therein. He died intestate, leaving no wife or children, but leaving a sister, Catherine Clark, living in this state. At her request the court appointed the son of Mary Rooney, her daughter, administrator of the estate. During the administration, Catherine Clark conveyed the realty to Mary Rooney, in consideration of love and affection; and upon final distribution, the court having found as a fact that Catherine Clark was the only heir, the property was distributed to Mary Rooney, by virtue of the aforesaid deed. It may be conceded that the distributee, Mary Rooney, occupies no more advantageous position, as to this litigation, than would her grantor, her mother. Some time after the decree of distribution was had, and the estate settled, this action was brought by the children of one Patrick Lynch, a brother of Bryan Lynch, who was living in Ireland at the date of the distribution of the estate, but since deceased. The children of Nancy Plunkett, a deceased sister, who were living in Brooklyn, N. Y., at the date of distribution, intervened, and asked that one-third of the land be adjudged to be theirs, and that Mary Rooney be declared a trustee to that extent. The relief prayed for by the complaint, and also by the complaint in intervention, was granted; and Mary Rooney was adjudged to hold an undivided one-third of this land, each, respectively, as the trustee of the heirs of Patrick Lynch and Nancy Plunkett.

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[1] Code Civ. Proc. § 148, authorizes the appellate court to revise the distribution of property made by the trial court in a divorce action.

Two grounds are put forth on the part of respondents to support the soundness of this decree of the trial court: (1) It is claimed that an express trust was declared and created in writing by Mary Rooney; and (2) that Mary Rooney was an involuntary trustee, to the extent of an undivided two-thirds of the land, by reason of a mistake of fact and law committed by her, the administrator of the estate, and the sister of Bryan Lynch, Catherine Clark, whereby the court was misled into finding as a fact, upon the hearing for distribution, that said Catherine Clark was the only heir of Bryan Lynch, deceased, and entitled to the whole of the estate. It is not contended by the interveners that any express trust stands in their favor, and, if there is any express trust existing in favor of plaintiffs, it was declared and created by a certain letter written by Mary Rooney to Margaret Lynch, of Ireland, widow of Patrick Lynch, deceased, after the distribution of the estate; and, if there is any express trust created or declared by this letter, it must be found in the following statements taken therefrom: "My Dear Aunt: I deeply regret that I did not write long before Uncle Patrick's death, because it would have been such a consolation to him and mother to hear directly from each other. Their deaths were not far apart. Mother died September 26, 1884. I have heard from you occasionally through our letters from Dublin. My chief object in writing now is to explain about Uncle Bryan's property, though I hope our correspondence will continue after that point is settled. Uncle Bryan died in the autumn of 1879, leaving no will. At that time, through some mistake, we thought that Uncle Patrick was dead. At mother's desire, my son was appointed administrator; and the court soon gave the property over to her, she being the nearest relative that presented a claim. Mother had been living with me some time, and shortly after she got the property she deeded it to me, not deeming it worth while to divide so little among all the heirs. Some time after Uncle Bryan's property was deeded to me I heard that Uncle Patrick was still living, and I resolved that he should have half of the estate, though the law does not compel the division. Still I feel that in justice it belongs to both of them. If the property was bringing an income, I would not have delayed writing so long, but it does not. Hence I do not feel that I have defrauded you of anything. * * * I have not sold my part, because I hoped my sons would make use of it some day. * * * I think I will likely rent my share in that way, in preference to having it idle and an expense. There are —— acres in the place, and I do not know if there is any difference in the land, with the exception of the seventeen acres that are cleared. You can talk over the matter among yourselves, and see what you wish to do. Anything that is in my power to do for you in regard to the matter I am willing to do, and any further information you wish I will give you as honestly as I can. * * * Your affectionate niece, Mary Rooney." This letter is a "written instrument" under section 852 of the Civil Code. The question then presents itself, was a trust created and declared by this writing? For, if a trust does exist, it was not only declared, but created, by this letter, as nothing went before it in any way creating any express trust. It is provided by section 2221 of the Civil Code: "Subject to the provisions of section 852 a voluntary trust is created as to the trustor and beneficiary by any words or acts of the trustor indicating with reasonable certainty: (1) An intention on the part of the trustor to create a trust; and (2) the subject, purpose, and beneficiary of the trust." Upon a careful consideration of this letter, we are satisfied that an intention upon the part of Mary Rooney to create and declare a trust appears therefrom with reasonable certainty. The subject of the trust is disclosed by the letter to be the land. The purpose is to acknowledge an undivided interest therein in fee in the beneficiaries, and the beneficiaries are the heirs of Patrick Lynch, deceased. The only matter left in any uncertainty is as to the interest the heirs take under the trust. There is no question but that Mary Rooney is an honest woman. This is evidenced by every line of her letter, for from that letter it is apparent that she desired and intended to do what was fair and just towards her absent relatives. Those intentions are disclosed by the entire history of this litigation, and we think the differences arising between these parties could well have been amicably settled without invoking the aid of courts, by the exercise of a little diplomacy upon the part of the attorneys retained by the respective parties. As will be seen hereafter, mistakes of fact and law occurring at the time of the distribution of this estate were the first and primary cause of the present litigation; and, at the date of this letter, Mary Rooney still labored under the mistaken idea that Patrick Lynch and her mother were the sole heirs of Bryan Lynch at the date of his death, when in fact the interveners in this case were also heirs, being children of a deceased sister. When Mary Rooney wrote this letter she recognized the fact that a moral obligation rested upon her to give the heirs of Patrick Lynch that portion of the estate which would have gone to him by the decree of distribution, if Mary had known that he was then in life; and it was to satisfy this moral obligation resting upon her that, as an honest woman, she desired Patrick's heirs to have his interest in the estate. She declared this trust for that reason, and with that end in view; but when she made the writing she thought Patrick's interest was one-half of the estate, when, in truth and in fact, it was but one-third. Hence the moral duty which she desired and intended to perform was performed, and the moral obligation which she desired and intended by the letter to pay was paid, when these heirs were given a one-third interest in the property. Incidentally, by the letter, she described the interest as a one-half interest; but, as we have seen, this was occasioned by a mistake of fact upon her part, and those words are controlled and overthrown by her actual intention, which is clearly manifest from every other line of the letter. That intention was to give Patrick's heirs what the law should have given Patrick in the first instance, to wit, an undivided one-third interest in the realty. We therefore hold that the letter declares and creates a trust in the land in favor of the plaintiffs to that extent.

The interveners were not in the mind of Mary Rooney when she wrote the letter to her aunt in Ireland, and hence they get no relief from its terms. As to them, it is claimed that Mary Rooney is an involuntary trustee, holding an undivided one-third of the land for their benefit. And their contention is based upon the provisions of section 2224 of the Civil Code, which provide, "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person, who would otherwise have had it." It is substantially claimed that upon Mary Rooney's evidence, given upon the hearing of the application for the decree of distribution, the court found as a fact that her mother was entitled to the whole estate, as the only heir; that Mary Rooney was mistaken as to the fact of her mother being the only heir, inasmuch as there were other heirs, and that by reason of her mistake of fact in so testifying the court rendered a wrong judgment; and that Mary Rooney thereby gained the entire estate by a mistake of fact, and should be declared to be an involuntary trustee of two-thirds thereof, as provided by the terms of the section just quoted. It is insisted that the interveners, in asking this relief, are not attacking the decree of distribution, but are seeking relief thereunder. Many cases are cited to support this contention, but they fall short of the mark, and present no question similar to the one here involved. The court, in hearing the petition for the distribution of the estate of Bryan Lynch, deceased, upon legal and proper notice to the entire world, took evidence as to who were the heirs of his estate, entitled to take the same, and thereupon made a finding of fact that Catherine Clark was a sister and the only heir, and, as a conclusion of law, held that said Catherine Clark was entitled to the entire estate. That decree has never been modified, nor even assailed, and, as far as any collateral attack is concerned, it must stand forever as binding and conclusive upon the question of heirship. Whatever counsel may say as recognizing the validity of the decree, and claiming under it, is not strictly true, for that decree declares, as a fact, that Catherine Clark is the only heir of Bryan Lynch; and, to give the interveners the relief here sought, that finding must be first set aside as untrue in fact, and that cannot be done in this action. If such a thing could be done, the stability of judgments and decrees would be a thing of the past. Decrees of distribution would be as unstable as the sands, for omitted heirs from such decrees would be seeking to have involuntary trusts declared thereon at most inopportune times, and in direct opposition to the law as declared by section 1908 of the Code of Civil Procedure, pertaining to the conclusiveness and finality of judgments and decrees. For the foregoing reasons the judgment and order denying a new trial as to the plaintiffs are affirmed, and the judgment and order denying a new trial as to the interveners are reversed, and as to them the cause is remanded.

We concur: HARRISON, J.; VAN FLEET, J.

(112 Cal. 288)

JOHN A. ROEBLING'S SONS CO. v. HUMBOLDT ELECTRIC LIGHT & POWER CO. et al. (S. F. 265.)[1]

(Supreme Court of California. April 4, 1896.)

MECHANICS' LIENS—WHO ARE CONTRACTORS.

The seller, in a contract whereby he agrees to furnish the "purchaser" the electrical machinery for an electric power house under construction by the purchaser, who was to furnish the motive power and connections necessary to connect the electrical machinery with the motive power, title to the electrical machinery to remain in the seller until paid for, is not an "original contractor" (Code Civ. Proc. §§ 1183, 1184), but is merely a material man, though he is required to place the machinery in position, such work requiring the construction of foundations for the dynamos and other technical work necessary to the proper installation of the machinery; and one furnishing the seller with materials is entitled to no lien.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by the John A. Roebling's Sons Company against the Humboldt Electric Light & Power Company and others to enforce a mechanic's lien. From a judgment for plaintiff, defendants appeal. Reversed.

J. N. Gillette, for appellants. Wall J. Tuska, for respondent.

VAN FLEET, J. The contract between the Pacific Electrical Storage Company and the Humboldt Electric Light & Power Company did not constitute the former corporation an "original contractor" for the construction of the electric light works of the latter company, within the meaning of the provisions of the Code relating to liens of mechanics and others. That contract, in effect, simply provided for the furnishing and setting up, complete and ready for use, by the Pacific Electrical Storage Company, in a building to be provided by the purchaser, of certain specified "electrical apparatus and machinery" necessary to be used in the construction of such electric light works; this apparatus, consisting of dynamos, convertors, switch board, lamps, etc., with the necessary wiring and connections, constituting in technical parlance an "electrical plant." The Humboldt Electric Light & Power Company was itself constructing the works, and such machinery or plant was simply purchased by it for use therein. This is expressly contemplated by the contract, which provides by its terms that the last-named corporation, which is therein designated the "purchaser," shall erect the necessary building to receive such plant, build a power house, and furnish the required motive power, including all necessary shafting, belts, pulleys, etc., for connecting the power with such electrical machinery; and construct the pole line required in transmitting and distributing the light. And it also provides that the title to the plant shall not pass to the purchaser "until it is fully paid for as per contract." Under such a contract it is clear that the relation of the Pacific Electrical Storage Company was that of a material man, and nothing more. Hinckley v. Cracker Co., 91 Cal. 136, 27 Pac. 594; Sparks v. Mining Co., 55 Cal. 392; Donahue v. Cromartie, 21 Cal. 80. In the first case above cited, where the party was employed under a contract not essentially different from the one before us to manufacture and furnish a steam plant consisting of boiler, engine, feed pipes, etc., and put such machinery in place in a building belonging to the purchaser for the purpose of converting the premises into a factory, it was held that the one so employed was a material man, and not a contractor, within the provisions of sections 1183 and 1184 of the Code of Civil Procedure. The same principle is upheld by the other cases cited. The fact that the party furnishing the machinery and apparatus was to put in the foundation upon which to set the dynamos, and furnish the skilled labor necessary for that and the further purpose of setting up and connecting the machinery and installing the incandescent lamps, in no way alters the nature of the contract, or makes it any less one for furnishing materials. The only way the appliances and apparatus could be made available for use was to have them properly installed and set up, and the fact that certain technical work was required for that purpose did not change this contract into one for construction. As suggested in Hinckley v. Cracker Co., supra: "The work done by them on the premises of defendants in placing them in position was only the completion of their contract to deliver such finished machinery, and did not convert them into contractors for the erection of the factory, or any part of it, within the true intent of the statute. The contract was essentially one to furnish materials for the factory, and not a building contract." The plaintiff, who sold to the defendant Pacific Electrical Storage Company certain wire, part of which was used by the latter in fulfilling its contract to furnish said plant, and the balance of which the storage company sold to the electric light company to construct its pole line, has sued herein to enforce a lien claimed by it upon the premises and works of the defendant Humboldt Electric Light & Power Company for the value of such wire, upon the theory that its vendee was an original contractor for the construction of said electric light works, and plaintiff therefore entitled to a lien thereon as a material man; and this view was taken by the court below, and judgment given for plaintiff. But, as we have seen, the theory upon which plaintiff's case proceeds is erroneous; and, as the statute makes no provision for a lien in favor of one who simply sells materials to another who is himself but a material man, the plaintiff's case has no proper foundation upon which to rest. Sparks v. Mining Co., supra. While the court found in terms that the Pacific Electrical Storage Company was an original contractor, the findings disclose that this is but a conclusion drawn from an erroneous construction of the contract referred to, and, this being so, the conclusion must be held unsupported by the facts. The findings therefore do not warrant the judgment, and the latter cannot stand. Judgment reversed, and cause remanded.

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[1] Rehearing denied.

We concur: HARRISON, J.; GAROUTTE, J.

112 Cal. 292

In re CLARY'S ESTATE. (S. F. 150.)

(Supreme Court of California. April 6, 1896.)

ADMINISTRATORS—FAILURE TO DISTRIBUTE ASSETS—JURISDICTION OF PROBATE COURT—INTEREST—BILL OF EXCEPTIONS.

1. Under Code Civ. Proc. § 1697, an administrator is not entitled to his final discharge until after payment and delivery of all the property of the estate to those entitled, and in the meantime the probate court has jurisdiction to compel him to comply with the order of distribution.

2. The probate court proceeds in accordance with the principles of equity, and, having jurisdiction of a cause for one purpose, may afford complete and adequate relief in the premises.

3. Where the petition states all the elements of a bill in equity for an accounting, and is answered on the merits, and without objection to the form of proceedings, the fact that it was entitled in an estate, instead of being in form an independent action, is immaterial.

4. Where, after the order of distribution, an administrator has wrongfully retained money belonging to a minor heir, and used it in his own business, and it is not found that a higher rate was realized from such use, legal interest should be awarded from the date of the appropriation, compounded annually.

5. An order of a judge granting an extension of time, after the expiration of the statutory period, within which to propose a bill of exceptions, is ineffectual and void.

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Application, in the estate of John A. Clary, deceased, to require the administrator to pay over to one of the heirs her distributive share of the estate. From an order to pay over the amount, with interest, and from an order refusing to settle a bill of exceptions, the administrator appeals. Affirmed.

C. W. Eastin, for appellant. Albert C. Aiken, for respondent.

VAN FLEET, J. The administrator, upon distribution, took the share of the estate, consisting of money, distributed to an heir, and appropriated and used it in his own business through a series of years, concealing from the heir, a minor residing in his household, any knowledge that there was anything coming to her from the estate. In due time, after arriving at the age of majority, and discovering her rights, the heir applied to the probate court, the administrator not having been discharged of his trust, to require the latter to pay over to her such distributive share, with interest. The court ordered the administrator to pay over the amount, with legal interest from the date of its appropriation, compounded annually. From this order, and an order refusing to settle a bill of exceptions, the administrator appeals.

There is nothing in the point that the probate court lost jurisdiction in the premises upon the rendition of the decree of distribution, and that the only remedy of the heir was by civil action against the administrator. Jurisdiction by the probate court over an administrator or executor does not cease until his final discharge (McCrea v. Haraszthy, 51 Cal. 146; Dohs v. Dohs, 60 Cal. 255; Ex parte Smith, 53 Cal. 204); and it is only after the payment and delivery of all the property of the estate to those entitled, and production of satisfactory proof of the fact, that he is entitled to his final discharge. Code Civ. Proc. § 1697. Until such final discharge the probate court retains jurisdiction, not alone of the administrator, but of the property of the estate in his hands, and may compel the proper disposition of the latter, in accordance with its decree, by punishing the delinquent trustee, if necessary, as for contempt. Ex parte Smith, supra; Wheeler v. Bolton, 54 Cal. 302.

It is urged, however, that, even if the court could require the delivery of the property distributed, this power is limited to the specific property or amount awarded by the decree, and the court is without authority to take an accounting, or award interest according to equitable principles, as that can only be done in an action for an accounting. This position is not tenable. Jurisdiction being conceded for the one purpose, it follows necessarily for the other. The awarding of the interest is but an incident to the right to award the principal; and proceeding, as it does, in accordance with the principles of equity (Estate of Moore, 96 Cal. 522, 31 Pac. 584; In re Clos' Estate [Cal.] 42 Pac. 971), the probate court must be held to have jurisdiction to afford complete and adequate relief in the premises, since equity does nothing piecemeal. See Hyland v. Baxter, 98 N. Y. 610; Verdier v. Roach, 96 Cal. 478, 31 Pac. 554. If this were not true, however, the objection could not obtain in this case, within the principles stated in Re Thompson's Estate, 101 Cal. 349, 35 Pac. 991, and 36 Pac. 98, 508, and Re De Leon, 102 Cal. 537, 36 Pac. 864. As in those cases, the petition here states all the elements of a bill in equity for an accounting, and was answered on the merits, and without objection to the form of the proceeding. The fact, therefore, that it was entitled in the estate, instead of being in form an independent action, can make no difference. "The petition, under these circumstances, may be regarded as a petition in equity, addressed to the equitable powers of the superior court, and the form of its title is immaterial." In re Thompson's Estate, supra.

The other points require no particular notice. The basis upon which interest was allowed was the correct one in an instance such as this, where the trustee has used the funds in his own business, and it is not found that a higher rate of interest was realized from such use. Estate of Cousins (Cal.) 44 Pac. 182, and cases therein cited. There is no element of estoppel in the facts found, which facts, we think, are fully within the issues; and the statute of limitations, even if available, was not pleaded. The court below was clearly right in refusing to settle the proposed bill of exceptions, as it was not prepared within the time allowed by the statute (Code Civ. Proc. § 650), or any authorized extension thereof, and the appellant's right to have it settled was thereby lost. Haynes, New Trials & App. 773. The order of the judge granting an extension of time after the expiration of the statutory period within which to propose a bill was ineffectual and void, and was properly ignored by the court as conferring no authority upon it to settle the bill. The orders appealed from are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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112 Cal. 306

GEURKINK et al. v. CITY OF PETALUMA et al. (S. F. 250.)

(Supreme Court of California. April 7, 1896.)

MUNICIPAL CORPORATIONS—CHANGING COURSE OF NATURAL STREAM—LIABILITY—INJUNCTION—PARTIES—JOINDER.

1. A city is liable for damages to property caused by its changing the course of a natural stream flowing within its limits so as to make it flow along a public street on which the property abuts, in such a manner as to prevent free access to it.

2. A city will be enjoined from changing the course of a natural stream flowing within its limits so as to make it flow along a public street in such a manner as to impair free access to property abutting thereon, where compensation for damage to such property has not, as required by Const. art. 1, § 14, been first made or paid into court for the owners.

3. Owners of separate tracts of land which will be permanently injured by a contemplated public improvement may unite in an action to enjoin the improvement.

4. Owners of separate tracts of land must sue separately to recover damages to their respective tracts caused by the same public improvement.

Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by B. W. Geurkink and another against the city of Petaluma and others. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Reversed.

Lippitt & Lippitt, for appellants. J. P. Rogers (W. B. Haskell, of counsel), for respondents.

GAROUTTE, J. This is an action for a permanent injunction against the city of Petaluma, brought by two owners of lots abutting upon Eighth and G streets of that city, respectively. Relief was denied them in the trial court, and this appeal comes to us from the judgment, and also from an order denying a motion for a new trial.

The facts material to a consideration of this question may be succinctly stated as follows: Edwards creek has been from time immemorial a natural water channel passing over Eighth street, and thence across the city to tide water. Some few years past the city blocked the channel of this stream where it crossed Eighth street, and attempted to take care of its waters by a sewer leading from this point down F street. During heavy rains this sewer proved entirely inadequate to carry the waters coming from the mountains via the stream, and F street was flooded as the result, the natural fall of the land tending that way. The plaintiffs' property was situated a block or more distant and east from the point of obstruction; Geurkink's lot being upon Eighth street, and facing north, and the lot of his co-plaintiff facing east upon G street. The land covered by Eighth street between F and G streets was higher than at the point where the sewer connected with the stream, and, if any water ever did pass over Eighth street to G street prior to the time when the work of the city here complained of was inaugurated, the amount was slight; for, as we have seen, the lay of the land forced it north down F street. Under the conditions just stated the city of Petaluma, by its board of trustees, adopted a scheme to take care of the waters coming from this creek which could not be carried away by the aforesaid sewer. This scheme included the enlargement of a culvert at F and Eighth streets, the digging of a large gutter or channel upon the south side of Eighth street to G street, a culvert across Eighth street at this point, and a gutter channel down G street upon the west side thereof to Seventh street. The work mapped out by this scheme was in active operation when the plaintiffs began the present litigation, and a temporary restraining order was issued. These facts cannot be disputed by the record, and neither can it be successfully disputed that from the evidence the completion of the scheme would result in great damage to plaintiff's property.

The facts being plainly outlined before us, the application of the law to these facts is not difficult, and at the outset of this investigation it must be borne in mind that the principles of law appertaining to waters in natural channels are different, to a considerable degree, from those applicable to the control of surface waters. That a city has much greater powers and less liabilities respecting surface waters than it has respecting highways of natural channels cannot be questioned. Reduced to its smallest compass, the fact is that the city of Petaluma is engaged in changing the natural course of the waters of Edwards creek, and such change, if made, will damage the property of these plaintiffs by preventing a free use of the same. Is defendant liable for such action upon its part, and is the proceeding of injunction by a court of equity the proper remedy? When this work has been completed, and the damage actually done, there can be no question but that a remedy at law for such damages could be invoked. Abutting owners have a right to the full use of the street for the purpose of coming and going to and from their property, and any unlawful interference with that use is a trespass upon the rights of such owners, whether that interference be occasioned by an individual, a corporation, or the municipality itself. It is said in Eachus v. Railway Co., 103 Cal. 614, 37 Pac. 750: "The right of the owner of a city lot to the use of the street adjacent thereto is property, which cannot be taken from him for public use without compensation; and any act by which this right is impaired is to that extent a damage to his property. * * * Such easement is a right of property incident to the lot itself, and any damage sustained by the owner in its destruction or impairment is a damage peculiar to himself, and independent of any damage sustained by the public generally. For the purpose of determining this damage, it is immaterial whether he has a fee in the street, or only an easement for its use. In either case it is property, for an injury to which he is entitled to relief,"—citing cases. See, also, Bigelow v. Ballerino (Cal.) 44 Pac. 307.

Respondent also insists that compensation to an abutting owner by the city for an interference in the use of the street need not be made before the damage has taken place. But article 1, section 14, of the constitution expressly provides that compensation must be first made or paid into court for the owner; and in the Ballerino Case, last cited, this court said: "But, where there is no such benefit, the property owner may rest secure in the protection which the constitution affords him, that his property shall not be taken or damaged without compensation first made. It is not incumbent upon him to demand that the authorities shall respect his rights. The duty is theirs to work no unlawful invasion of them." And again: "It would matter little whether the authorities first compensated the property owners, and then declared the alley closed, or first declared it closed and then made compensation, provided it be distinctly understood that in the latter case, which is the case at bar, no rights attach or are lost, no invasion of the property rights of a nonconsenting owner may be worked, and no substantial impairment of his easement result, until compensation has been made to him in the constitutional mode."

It is also claimed that injunction is not the proper remedy, but, in view of what has already been said, that remedy fits the case. A threatened permanent injury to a party's realty may be enjoined, and such is this case, as disclosed by the record. In Brown v. City of Seattle, 5 Wash. 44, 31 Pac. 313, and 32 Pac. 214, it is held that injunction is the proper remedy in a like case; and the court, in speaking to that point, said: "We can foresee many difficulties, and perhaps much litigation, likely to ensue from the faithful enforcement of our constitutional requirement that damages be first paid; but we have no choice in the matter, and these difficulties, as well as many others, must be met and dealt with as they arise. It will not be every case in which the property owner deems himself likely to be injured that will justify an injunction, and the courts of the state will undoubtedly do their duty in this particular, and grant no preliminary restraining order or injunction until it is made to appear with legal probability or certainty that damages will be incurred by the grading of the streets." Until compensation was made the city had no right to damage the plaintiffs' property. Payment of such damage was a condition precedent to the creation of the right; and, until payment, the city was a trespasser. In such a case injunction is the plain, ordinary, and best remedy. See Schaufele v. Doyle, 86 Cal. 107, 24 Pac. 834.

A demurrer was filed to the complaint upon the ground of misjoinder of parties plaintiff, and misjoinder of causes of action. As the case is returned to the lower court for a new trial, it becomes proper to suggest that the demurrer should have been sustained. As to the relief sought by injunction, the plaintiffs were properly joined, but as to damages there was a misjoinder. If damages are sought for the acts of defendants, the plaintiffs must sue separately. Foreman v. Boyle, 88 Cal. 290, 26 Pac. 94. The judgment and order are reversed, and the cause remanded, with leave to the plaintiffs to amend their complaint as they may see fit.

We concur: HARRISON, J.; VAN FLEET, J.

(112 Cal. 314)

PACIFIC MUT. LIFE INS. CO. v. SAN DIEGO COUNTY. (No. 19,407.)

(Supreme Court of California. April 7, 1896.)

TAXES—PAYMENT UNDER PROTEST—SUIT TO RECOVER.

Pol. Code, § 3819, as amended by St. 1893, p. 32, providing for actions against counties to recover illegal taxes paid under protest, does not authorize an action against a county for taxes collected by it for the use of a school district within the county. 41 Pac. 423, affirmed.

In bank. On rehearing. For the opinion in department No. 1, see 41 Pac. 423.

PER CURIAM. A re-examination of the questions presented in this case serves but to confirm the reasoning and conclusion reached in the department opinion. The judgment is reversed, and the trial court directed to sustain the demurrer to the complaint.

BEATTY, C. J., not participating.

112 Cal. 316

ELBERG v. SAN LUIS OBISPO COUNTY.

(No. 19,548.)

(Supreme Court of California. April 7, 1896.)

TAXES—PAYMENT UNDER PROTEST—SUITS TO RECOVER.

Pol. Code, § 3819 (St. 1893, p. 32), providing for actions against counties to recover illegal taxes paid under protest, does not authorize an action against a county for taxes collected by it for the use of a school district, and placed in the treasury to the credit of the school fund, as the county has no interest in or control over the fund.

In bank. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Mark Elberg against the county of San Luis Obispo. From a judgment for defendant, plaintiff appeals. Affirmed.

For former report, see 41 Pac. 475.

Wm. Shipsey and Graves & Graves, for appellant. F. A. Dorn, for respondent.

PER CURIAM. In the department opinion rendered in this case (41 Pac. 475) it was decided that the judgment appealed from entered after a general demurrer to the complaint had been sustained should be affirmed. This was upon the ground that no cause of action was stated against the defendant county, which was not a proper party defendant, and against which plaintiff had no claim or demand. The point, however, had not been presented in the briefs of counsel, and it was urged that the decision worked a hardship upon appellant, who had thus been given no opportunity to argue the question. The rehearing was therefore ordered. Upon a second examination we are satisfied with the department opinion. Appellant is in the unfortunate position of claiming a cause of action against B. which he seeks to prosecute against A. He has stated no cause of action against B., and could not amend to substitute A. for B. His only course would be to institute a new suit against the true defendant. The reasoning and authority in support of the conclusion that the county is not a proper defendant will be found set forth more at length in Pacific Mut. Life Ins. Co. v. San Diego Co. (No. 19,407; this day decided) 44 Pac. 571. The judgment is affirmed.

BEATTY, C. J., not participating.

112 Cal. 260

IONS v. HARBISON. (No. 19,590.)

(Supreme Court of California. April 2, 1896.)

ADMINISTRATOR—SALE OF HOMESTEAD—VALIDITY —GIVING OF BOND—EQUITABLE ESTOPPEL.

1. The superior court having been given jurisdiction over the homestead of a deceased husband or wife for some purposes, by Code Civ. Proc. § 1475, a sale of the homestead of a deceased wife as a part of her estate, by order of the court, on application of the husband as administrator, and where the record did not disclose the homestead character of the property, though erroneous, is not void, and cannot be collaterally attacked by the husband or his subsequent grantee.

2. While Code Civ. Proc. § 1388, requires one to whom letters testamentary or of administration are directed to issue to execute a bond before receiving them, the failure of an administrator to give bond until after issuance of his letters will not invalidate his acts after his bond is filed and approved.

3. A husband who, as administrator of the estate of his deceased wife, asked and obtained an order for the sale of the wife's homestead as a part of her estate, and applied the proceeds to the payment of incumbrances on the property and other debts, though in reality the title to the homestead vested in him on his wife's death, and both he and the purchaser acted under a mistake of law, is estopped to recover the property without reimbursing the purchaser; and a grantee from him, with knowledge of the facts, stands in no better position.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by P. N. Ions against D. F. Harbison. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Cassius Carter and Withington & Carter, for appellant. McNealy & Whitehead, for respondent.

HAYNES, C. Action to quiet title. The plaintiff had judgment, and the defendant appeals therefrom, and from an order denying a new trial. The property in question is the N. E. ¼ of the N. E. ¼ of section 35, township 14 S. of range 3 W., S. B. M., containing 40 acres, situated in San Diego county. On February 10, 1888, Charles U. Bell, being the owner of said premises, conveyed them to his wife, Mary E. Bell, by a grant deed duly executed, for the consideration of $850. On October 12, 1888, Bell and wife executed to one Flagg a mortgage upon said land, to secure their promissory note for $250, due six months after date, with interest at 2 per cent. per month. On January 28, 1890, said Mary E. Bell declared a homestead thereon for the benefit of herself and husband. C. U. Bell's title was by patent from the United States, dated November 24, 1890, and which inured to his wife under his prior grant. All these instruments were recorded at or about their date. Mary E. Bell died July 1, 1890, seised of said premises. The marriage relation continued to that date, and said land continued to be occupied by the husband and wife as a homestead. After the death of Mrs. Bell, Mr. Bell was appointed, and on September 10, 1890, qualified, as the administrator of her estate. In the inventory and appraisement of the estate returned on September 12, 1890, the only property alleged to belong to her estate was said land, appraised at $400, and $12 in money, received as rents therefrom. On September 22, 1891, the administrator petitioned the court for an order to sell said land at private sale, and set out in his petition the several items of liabilities, including said mortgaged debt, expenses of last sickness and funeral, and expenses of administration accrued and estimated, amounting in all to $737, and alleging that said land and money was the only property of said estate, that said mortgagee was threatening to foreclose said mortgage, that he could only realize from the sale of the land the sum of $700, and that a foreclosure of the mortgage would involve large additional costs and expenses. An order of sale was granted, and the land in question was sold to the defendant, Harbison, for said sum of $700. Said sale was confirmed on February 12, 1892, the money paid, and said mortgage satisfied, which then amounted, with interest, to $560, and the administrator conveyed the premises to the defendant, and his deed was recorded. On June 12, 1894, the plaintiff offered said Charles U. Bell $5 for his personal quitclaim deed of said land, and, that offer being declined, $10 was offered and accepted; and a quitclaim deed was thereupon executed and delivered to plaintiff, and this action was commenced June 14, 1894, to quiet plaintiff's title under said deed. The facts in the case were stipulated by the parties, and there is therefore no conflict in the evidence.

By the deed from Bell to his wife, she presumptively became seised of the land as of her separate estate (Taylor v. Opperman, 79 Cal. 468, 21 Pac. 869; Burkett v. Burkett, 78 Cal. 310, 20 Pac. 715; Carter v. McQuade, 83 Cal. 274, 23 Pac. 348); and, she having filed thereon a declaration of homestead, upon her death the title thereto vested in her surviving husband, subject, however, to the mortgage to Flagg, which was executed by both to secure a promissory note, also executed by both prior to the declaration of homestead. Under these circumstances, the plaintiff contends that the property in question was not subject to administration, and that, therefore, the court "had no jurisdiction of the subject-matter administered upon." But section 1475, Code Civ. Proc., provides that "if the homestead selected and recorded, prior to the death of the decedent, be returned in the inventory appraised at not exceeding $5,000 in value, or was previously appraised as provided in the Civil Code, and such appraised value did not exceed that sum, the superior court must, by order, set it off to the persons in whom the title is vested by the preceding section," and also provides for the payment of existing liens thereon. It is therefore clear that the court has jurisdiction over the homestead for some purposes; and it seems to follow that if the court, from ignorance of the fact that it was a homestead, or by inadvertence, or mistake of law, made an order not authorized by the statute, its proceedings, however erroneous, would not be without jurisdiction, and hence would be valid as against a collateral attack. Indeed, the record of the probate proceedings does not disclose the fact that there ever was a declaration of homestead; and therefore, upon the face of the record, the superior court had jurisdiction. It follows that if the administrator, having failed to disclose his interest in the property under the declaration of homestead, had appealed to this court upon the record of that case, assuming that all other proceedings were sufficient, the jurisdiction of that court must have been affirmed; and, if so, he could not now question it.

But plaintiff (respondent here) further contends that there were jurisdictional defects in the proceedings prior to the petition for the sale of the land, and thereunder specifies several particulars. Only one of these need be noticed, as the sufficiency of the petition for letters of administration, and of the notice of hearing, are not attacked. That objection is that the letters were issued and the oath of office taken by the administrator on September 6th, while his bond was dated the 10th, and approved on the 11th. Section 1388, Code Civ. Proc., provides that "every person to whom letters testamentary or of administration are directed to issue must, before receiving them, execute a bond," etc. It is true, an administrator is not authorized to act until he has given bond, but the mere order of time in which the act of receiving the letters and the act of giving the bond are performed will not affect the validity of his appointment, nor of any act performed by him after giving the bond, especially where no official act was performed or attempted to be performed in the mean time. None of the cases cited by respondent sustain his contention that in such case new letters of administration must issue after the bond is given. It is not claimed that any official act was performed by Bell before his bond was made and approved.

It is also insisted that the petition for the sale of the land was insufficient to give the court jurisdiction to order the sale; that the order first made was vacated, and the order under which the land was sold was afterwards entered, without a new order to show cause, or any continuance entered; and that the bond required by the statute was given under the first order, and none under the second. It is not necessary to discuss the nature or source of the jurisdiction of the superior courts in such cases, nor to restate the requirements of section 1537, Code Civ. Proc., in reference to petitions for the sale of real estate by an administrator. These questions, as well as the other objections above specified, were fully considered and decided by this court in bank in the recent case of Burris v. Kennedy, 108 Cal. 331, 41 Pac. 458; and, upon the authority of that case, the jurisdiction of the court in this case to order the sale must be sustained. There were many errors and irregularities in the proceeding, but as was said in Burris v. Kennedy, supra, "if the court had jurisdiction, errors in the exercise of it, however gross, would not render the decision invalid."

But conceding, for the sake of the argument, that the court had no jurisdiction, and that the sale was void, it would seem to be beyond question that Bell would have been estopped to claim title to the land as against the defendant; and, if so, the plaintiff, claiming under Bell, with knowledge of the facts, is equally estopped. Bell asserted in a solemn judicial proceeding that the title to the property was in the estate of his deceased wife, and not in himself. He received the purchase money, and applied it to the payment of the mortgage debt, which was a valid lien upon the land for which he, as well as the estate, was liable, and to the payment of the funeral expenses and costs of administration which he had incurred, and, having conveyed the property to the defendant, put him in possession. There was no surplus arising from the sale. He was the sole beneficiary, and, upon respondent's theory, the sole owner. To retain these benefits resulting from the payment of the purchase money by the defendant, and at the same time recover the property from him, would be a fraud which a court of equity will not permit. He had full knowledge of all the facts affecting his title. His mistake was one of law, as was that also of the defendant; but to permit Bell to retain the purchase money and the property too is to give him a very profitable relief from his mistake, while it would visit upon the defendant a severe penalty for the same mistake. It may be that, upon the discovery of his mistake, he could have rescinded the sale; but, if so, it could only have been upon full restoration of the purchase money.

It is conceded in the stipulation of facts that the defendant saw an abstract of title of the property, and therefore had the means of knowing the true state of the title; but he was not a lawyer, and his good faith is not questioned He knew that Bell had taken out letters of administration upon the estate of his deceased wife; that this was the only property claimed to belong to the estate; and that the court had recognized it as such in making the order of sale. Under these circumstances, it would be going far to say that he was guilty of negligence in relying upon what laymen would ordinarily regard as a judicial determination that the land in question was the property of the estate. Indeed, the court itself seems to have relied upon the solemn representation of Bell that it was the separate estate of his wife. Bell was not injured. There is no pretense that he did not receive the full value of the property, nor has either he or the plaintiff offered to return to the defendant the purchase money paid. It was not the receipt of the money under a mistake of law, but the retention of it while assuming to convey the land to another by Bell, and the assertion of title by the plaintiff with knowledge of the facts, that constitute the fraud upon the defendant and creates the estoppel. In Goodman v. Winter, 64 Ala. 410, a tenant for life sold and conveyed the premises, the sale and conveyance purporting to pass the fee. It was held (page 434) that the alienation passed only the particular estate, and had no operation on the estate in remainder; but it was held that "if the remainder-men were adults, and accepted a part of the purchase money as compensation for the estate in remainder, they would in a court of equity be estopped from asserting their legal estate, and the court would compel them to convey to the purchaser, or bar them from asserting their legal title against him. The acceptance of a part of the purchase money as compensation for the remainder would be a ratification and adoption of the unauthorized alienation and conveyance. * * * It is a plain principle of justice, of right, and of law that a man cannot accept the benefits and reject the burdens of a transaction." A stronger case in some of its circumstances than the one at bar is that of Robertson v. Bradford, 73 Ala. 116. There the intestate died seised of the premises, leaving as his only heir at law a daughter, then a minor of tender years. The administrator obtained an order to sell, and sold the house and lot, and applied the proceeds to payment of the debts of the decedent and the maintenance of the child. The order directing the sale was void for want of jurisdiction. The daughter, while a minor, married, and by her husband, as next friend, brought an action of ejectment to recover the premises; whereupon the grantee of the purchaser, the daughter having then attained majority, filed a bill to enjoin the prosecution of the ejectment case. It was held that the sale was a nullity, but the purchaser having paid the value of the premises, and the proceeds having been applied to the payment of debts against the estate and the maintenance of the appellant in her helpless infancy, thus relieving the personal estate, and restitution not having been tendered, or intended, she was estopped in a court of equity from asserting her legal title, to the prejudice of the purchaser or his privies The court further said: "There is no principle of law better settled, or resting on wiser considerations of public policy and higher considerations of justice, than that no person who has received and retains the fruits of a judicial proceeding can be heard to assail it, either for irregularity or illegality, to the prejudice of others who have in good faith relied and acted upon it as valid. In the application of this principle, it is not of importance that the proceeding is void because of a want of jurisdiction in the court entertaining and sanctioning it. The foundation of the principle is that parties cannot act upon and adopt such parts of a transaction as may be favorable and beneficial to themselves, and at the same time repudiate it so far as it may involve them in corresponding duties to others who have yielded the right and advantage to them." In Deford v. Mercer, 24 Iowa, 118, it was held (Dillon, C. J., writing the opinion) that where heirs, after arriving of age, with full knowledge of all the facts, and in the absence of fraud or mistake of fact, receive and retain the purchase money arising from the sale by their guardian of their interest in certain lands, they are thereby estopped from questioning the validity of such sale, and that this principle is not limited to cases of voidable sales, but extends to those that are void. See, also, Freem. Jud. Sales, § 50, and cases there cited. These cases are clearly distinguishable from Boggs v. Mining Co., 14 Cal. 279, 368, and Davis v. Davis, 26 Cal. 23, cited and relied upon by respondent. There the effect, if the alleged estoppel had been sustained, would have been to deprive the party of his property without compensation, because of acts or declarations made in ignorance of their rights, and upon which the opposite party should not have relied. Those were cases of estoppel, strictly so called; while the case at bar and the other authorities before cited are treated of by Bigelow as "quasi estoppels"; or as stated by Mr. Justice Field, in Brant v. Iron Co., 93 U. S. 326, 336: "There are undoubtedly cases where a party may be concluded from asserting his original rights to property in consequence of his acts or conduct in which the presence of fraud, actual or constructive, is wanting, as, where one of two innocent persons must suffer from the negligence of another, he through whose agency the negligence was occasioned will be held to bear the loss; and, where one has received the fruits of a transaction, he is not permitted to deny its validity whilst retaining its benefits. But such cases are generally referable to other principles than that of equitable estoppel, although the same result is produced." The second of these cases, the learned justice says, "is the application of the doctrine of ratification or election."

That the plaintiff, having purchased with knowledge of the facts, is in no better situation than his grantor, requires neither discussion nor citation of authorities. He was expressly informed by Bell that the defendant had bought and paid for the property, and that he (Bell) would prefer to give him a deed if he knew where to find him. He was not a purchaser in good faith. The price paid for the quitclaim, though sufficient as a consideration between him and Bell, indicates very clearly that he was speculating in a small way upon the supposed misfortunes of another. He understood he was purchasing this lawsuit, which he commenced two days thereafter; and, having had such enjoyment as it afforded, he cannot reasonably complain if he gets no more.

The first finding is "that all and singular the allegations of the complaint are true." These allegations are that plaintiff is the owner, and that defendant's claim is without right. But all the facts were embodied in a stipulation; and, in the second finding, the court, by reference, adopted the stipulation as a finding. This stipulation set out the probate proceedings, and admitted that plaintiff had notice of all the facts alleged by the defendant, except as to personal representations as to title made to him by the administrator and his counsel. The first finding was therefore not justified by the evidence, if it be regarded as a finding of fact. But the facts being conceded by the plaintiff, and all embodied in the findings, the conclusions that the plaintiff is the owner, and that the defendant's claim is without right, are conclusions of law. For example, if a jury be called, and the parties, instead of calling witnesses to prove disputed facts, present a written stipulation containing all the facts, the jury would be dismissed, because there is no disputed fact to be determined by them; the sole question being one of law, arising upon the conceded facts. In Niles v. Edwards, 90 Cal. 10, 13, 27 Pac. 159, it was said: "There is a finding that defendant did not at any time convert the stock. This is evidently a conclusion of the court from the special facts found. If there had been no other finding, this would probably be regarded as the ultimate fact; but, in the connection in which it is here found, it is simply conclusion of law, and must be so held."

The judgment and order appealed from should be reversed, with directions to the court below to enter judgment for the defendant upon the findings, enjoining the plaintiff from asserting title to the premises under his said quitclaim deed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, with directions to the court below to enter judgment for the defendant upon the findings, enjoining the plaintiff from asserting title to the premises under his said quitclaim deed.

(5 Cal. Unrep. 327)

ELLIS v. TULARE COUNTY. (Sac. 70.) [1]

(Supreme Court of California. April 7, 1896.)

COUNTIES—SUPERVISORS AS ROAD COMMISSIONERS—COMPENSATION.

By Pol. Code, §§ 2641, 2645, as amended by St. 1893, p. 113, county supervisors are made ex officio road commissioners in their respective districts, and their compensation for such services is therein fixed, "when not otherwise provided by law." By the county government act (St. 1891, p. 295, § 173, subsec. 15), the compensation of supervisors in counties of the eleventh class is fixed at six dollars per day for actual service, and certain mileage; and section 216 provides that the salaries and fees provided in the act shall be in full compensation for all services rendered, either as officers or ex officio officers. *Held*, that the compensation of supervisors in counties of the eleventh class, while acting as road commissioners, is provided for by the county government act, and fixed at six dollars per day, and is therefore not affected by the provisions of Code, § 2645.

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[1] Rehearing denied.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; Justin Jacobs, Judge.

Action by John G. Ellis against Tulare county. Judgment for plaintiff, and defendant appeals. Affirmed.

F. B. Howard, for appellant. Lamberson & Middlecoff, for respondent.

BELCHER, C. During the year 1894, John G. Ellis, the plaintiff, was a supervisor and ex officio road commissioner for supervisor district No. 5 in Tulare county. As such road commissioner, he performed services in his district for payment of which he in January, 1895, presented a claim to the board of supervisors of the county for allowance. The claim was properly itemized and verified, and was for 117 days' services, at $6 per day. The board rejected the claim, and thereupon he commenced this action to recover the sum of $702, alleged to be due him for the services so rendered. The case was tried by the court, upon a stipulation as to the facts; and on June 25, 1895, the court rendered its decision, and ordered judgment in favor of the plaintiff for the amount claimed. Judgment was accordingly so entered, and from it the defendant appeals, without any statement or bill of exceptions.

In 1894, Tulare county was a county of the eleventh class, and the only question is, was the plaintiff, under the law as it then stood, entitled to the compensation demanded for his services as road commissioner? Prior to 1891 the Political Code contained the following provisions: Section 2641 declared that "each supervisor shall be ex officio road commissioner of the several road districts in his supervisor district, * * * provided that no member of the board of supervisors shall receive any compensation for any services whatever performed by him, or required of him, under any of the provisions of this chapter, other than his salary or per diem and mileage as a supervisor." Section 2642 provided for the election or appointment in the several counties of the state of road overseers; and section 2645 prescribed the duties of road overseers, and the compensation to be paid for their services. In 1891 these sections were amended by an act of the legislature which was passed March 31st, and took effect on the Monday after the 1st day of January, 1893. St. 1891, p. 474. As amended, section 2641 omits the clause as to compensation. Section 2642 abolishes the office of road overseer; and section 2645 imposes upon the road commissioner the duties which had been performed by the road overseer, and provides that, "when not otherwise provided by law, he shall receive for his services as such road commissioner twenty cents per mile one way for all distances actually traveled by him in the performance of his duties, provided that he shall not in any one year receive more than three hundred dollars." In 1893 sections 2641 and 2645 were again amended by an act of the legislature, which was passed March 9th, and took effect from and after its passage. St. 1893, p. 113. These amendments consisted chiefly in the transfer from the last to the first named section of the provision as to compensation. On March 31, 1891, a county government act was passed, which took effect from and after its passage, "except as prohibited by the constitution," and was in force during the year 1894. St. 1891, p. 295. The act contained the following provisions: Section 173: "In counties of the eleventh class the county officers shall receive, as compensation for the services required of them by law or by virtue of their office, the following salaries, to wit: * * * (15) Supervisors, each six dollars per day for actual service, and forty cents per mile while traveling from his place of residence to the county seat: provided, that no more than one mileage in any one monthly term shall be allowed." Section 216: "The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers or ex officio officers, their deputies and assistants, unless in this act otherwise provided." By this act the counties of the state were divided into 53 classes, and as to each class it was provided that "the county officers shall receive, as compensation for the services required of them by law or by virtue of their office, the following salaries, to wit." As to a few of the classes special provision was made for the compensation of the supervisors as such and as road commissioners. For example, the provision as to the fourth class was: "Supervisors, twelve hundred dollars each per annum, and five hundred dollars per annum as road commissioners." In the provision, however, as to most of the classes, no special mention was made of "road commissioners"; but the supervisors were allowed in some cases a gross sum, and in others a per diem and mileage.

It is contended for appellant that, as no special provision was made for the compensation of road commissioners in counties of the eleventh class, the plaintiff was not entitled to recover for his services as such commissioner the per diem allowed supervisors, and that his right to recover was limited to the mileage provided for by section 2645 of the Political Code, as amended in 1891, and by section 2641, as amended in 1893. This contention cannot, in our opinion, be sustained. The plaintiff was a supervisor of the county, and there is no denial that the services for which he seeks to recover were actually performed by him as road commissioner. This being so, it must be assumed that the services were "required of him by law or by virtue of his office," and that he was entitled to the compensation which the statute provided a supervisor should receive in such case.

It is not necessary to consider the other questions discussed by counsel. The judgment should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(112 Cal. 296)

CALKINS' ESTATE et al. v. CALKINS et al.

(No. 19,588.)

(Supreme Court of California. April 7, 1896.)

PROBATE—APPEAL—NOTICE—UNDUE INFLUENCE—EVIDENCE—DECLARATION OF TESTATOR—INSTRUCTIONS.

1. An appeal from a judgment refusing to admit a will to probate will not be dismissed on motion of heirs at law of testatrix, who did not appear or become parties to the proceedings in the court below, for failure of appellant to serve them with notice of appeal.

2. In the contest of a will, on the ground of undue influence, declarations of testatrix as to statements and acts of those by whom it is alleged that she was induced to make the will are inadmissible to prove such statements or acts.

3. Declarations of testatrix after the execution of the will, showing her dissatisfaction therewith, and a desire to execute a new will, are inadmissible to show that the former was executed under undue influence.

4. Evidence that the person who was alleged to have exerted the undue influence was a penurious woman is inadmissible to show that she used such influence in favor of her son, the husband of testatrix.

5. In the contest of a will on the ground of undue influence, an instruction, discoursing on the difficulty of proving undue influence when resorted to by an adroit and crafty person, and stating that the more cunning the person exerting such influence, and the more helpless and secluded the testatrix, the less plainly defined are the badges which usually denote it, is erroneous; there being no evidence to show that the persons alleged to have exerted the undue influence were crafty, or that testatrix was secluded.

6. An abstract instruction, though correct, is misleading when there is no evidence in the case to warrant it.

Department 1. Appeal from superior court, Santa Barbara county.

Contest of a will by De La Cuesta against J. W. Calkins and others. From a judgment for contestant, proponent and another appeal. Reversed.

Wright & Day, S. J. Parsons, William Gardner, and A. A. Oglesby, for appellants. Garber, Boalt & Bishop and Boyce, Taggart & Wheeler, for respondent.

HARRISON, J. A document purporting to be the last will and testament of Pilar Calkins, deceased, by which she gave all of her property to her husband, Albert C. Calkins, and appointed his father, J. W. Calkins, the executor thereof, was presented for probate to the superior court of the county of Santa Barbara by said J. W. Calkins. Prior to the day set for hearing the application for its probate, Eduardo De La Cuesta, a brother of the deceased, filed written grounds of opposition to its probate, to which the proponent made answer, and the issues presented by this contest were afterwards tried by a jury. When the cause came on for trial, upon motion of the contestant the names of Mrs. J. W. Calkins, Albert C. Calkins, and Mrs. Lily B. Parsons were added as defendants in the proceeding, the last two of whom filed a disclaimer of any interest therein. At the close of the testimony, all of the issues except those upon the claim of undue influence, menace, and fraud were waived by both parties, and the following special issue was submitted to the jury: "Did the said Pilar Calkins, at the time of signing the instrument here offered for probate, sign or acknowledge the same under undue influence, duress, or menace of the defendants, or any or either of them?" To this issue the jury replied in the affirmative. The court thereupon rendered its judgment denying probate to the will. A motion for a new trial was made by the proponent and the defendant, Albert C. Calkins; and, having been denied by the court, an appeal has been taken by them from both the judgment and the order denying a new trial.

1. The appeal from the judgment was not taken until more than 60 days after its entry, and for that reason must be dismissed. A motion has also been made on behalf of certain heirs at law of the deceased, who did not appear or become parties to the proceeding in the court below, to dismiss the appeal from the order denying a new trial, upon the ground that no service of the appeal has been made upon them; but, upon the authority of Ryer's Estate (Cal.) 42 Pac. 1082, this motion must be denied.

2. We are of the opinion, however, that the evidence fails to sustain the verdict of the jury, and that the order denying a new trial must be reversed. We find in the record no evidence tending to show that the testatrix was subject to any menace, duress, fraud, or undue influence in the execution of her will, or that the document presented for probate is not in all respects the expression of her own volition. There is no evidence that any person ever spoke to her in reference to the manner in which she should make her will, or gave her any suggestions in reference thereto. The will was drawn by Mr. Wright, an attorney in Santa Barbara, at the request of the testatrix, and in accordance with instructions given him by her, and it does not appear that he had ever seen her before she came to his office for the purpose of having her will prepared.

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[1] Rehearing denied.

On the day before it was executed, while she was on her way to his office for the express purpose of having him prepare it, she met him, and requested him to do so. Upon his asking her how she wished it prepared, she said to him that she desired to will all of her property to her husband, and gave him his name. An appointment for the execution of the will was then made between them for the next day. On the next day she visited his office, and the will was read to her, and her attention drawn to the fact that she had not designated any person as executor, and that a blank had been left in the draft of the will for his name. When Mr. Wright asked her whom she desired to have as executor, she asked him if her husband could be executor; and, as he started to write her husband's name in the will, she stopped him, and, after a moment's reflection, said, "I think I will have father Calkins for executor," and directed him to put in the name of J. W. Calkins. Mr. Wright then wrote the name of the proponent in the place left in the draft for that purpose, and the testatrix signed and executed the will in his presence and that of Mrs. Parsons, who thereupon signed their names as witnesses. Mrs. Parsons, the other witness to the will, is a sister of the testatrix's husband, and, at the time the will was prepared, was visiting at the house of her father, where the testatrix was then also visiting. In pursuance of an arrangement therefor, made at the instance of the testatrix on the previous evening, Mrs. Parsons took her to town in a buggy on the morning that she first saw Mr. Wright, and, while on the way to his office, they met him in the street. Mrs. Parsons then got out of the buggy, and withdrew from hearing until the testatrix and Mr. Wright had finished their interview. On their way home, the testatrix, of her own accord, and without any inquiry upon the subject, informed Mrs. Parsons that she had given directions that her husband should have her property, and requested Mrs. Parsons to be a witness to the will. On the next day, Mrs. Parsons accompanied the testatrix to Mr. Wright's office, where the will was executed. Mrs. Parsons testified that she said nothing to the testatrix in reference to the will, and had no conversation about it with her. After its execution the will was placed in an envelope by Mr. Wright, and given to the testatrix, and in the evening the testatrix gave the will to the proponent, and requested him to take care of it, and, at his direction, placed it in a drawer in his room. The will remained in his custody until after her death. He testified that she never spoke to him about making a will, and that he had never spoken to her upon the subject, and had never heard her say anything on the subject, or heard any one say anything to her in his presence, and that he did not know the contents of the document until after her death. Mrs. J. W. Calkins testified: "A few days before she went home, she said: 'Mother, I want to make a will. What lawyer had I better go to?' I said: 'I guess Judge Wright. He is a good man, and gentle. He won't tire you. Signify your want, and it will be sufficient.' She said nothing about the kind of a will she wanted to make. I did not ask her. She never after mentioned a will to me, or I to her. I never in any way sought to influence Pilar in the making of a will. She returned to Zaca ranch about May 6th, and the conversation was a few days before. She had spoken to me before that time. Just after Mrs. Bergeron was married, she said: 'Mother, I want to make a will. My sisters, after they were married, made their wills to their husbands, and I would like to.' I simply answered as far as politeness required. I made some general remarks on the subject of wills,—that some people felt nervous about a will; that they did not need to; and the subject dropped." There is no evidence of any attempt on the part of her husband to influence her in the disposition of her property, or that he had any knowledge of her purpose or of the fact of making the will, until long after its execution. The claim of the contestant that the testatrix had no affection for her husband would rebut any presumption of undue influence on his part, as would also the claim that the testatrix had a hearty dislike for Mrs. J. W. Calkins.

The respondent does not claim that there is any direct evidence in support of the verdict outside of the evidence of certain declarations of the testatrix. The evidence chiefly relied upon by him consists of certain declarations made by her, which were admitted in evidence over the objection of the proponent. To the extent that these declarations, at or prior to the making of the will, afforded any evidence bearing upon the state of the testatrix's mind at the time of the execution of the will,—her mental capacity, the condition of her mind towards the objects of her bounty, as well as towards the persons by whom she was surrounded, and the correspondence of her acts with the feelings and purposes entertained by her at the time she executed the will,—they were properly admitted, and were entitled to consideration by the jury; but to the extent that they purported to be declarations of the acts of others, or of her own acts, they were but matters of hearsay merely, whose truth rested in the veracity of the utterer, and upon which there was no opportunity of cross-examination or of explanation by the party who had uttered them, and were not entitled to any weight by the jury, and cannot be considered for the purpose of sustaining their verdict. Shailer v. Bumstead, 99 Mass. 112; Potter v. Baldwin, 133 Mass. 427; Bush v. Bush, 87 Mo. 480; Jones v. Roberts, 37 Mo. App. 163; Waterman v. Whitney, 11 N. Y. 157; Marx v. McGlynn, 88 N. Y. 357; In re Palmateer, 78 Hun, 43, 28 N. Y. Supp. 1062; Griffith v. Diffenderffer, 50 Md. 466.

In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such undue influence has been exercised, but also that it has produced an effect upon the mind of the testator, by which the will which he executes is not the expression of his own desires. The external facts constituting the exercise of undue influence must be established by other evidence than the declarations of the testator. His declarations are incompetent to show either that the influence was exercised, or that it affected his actions, and are inadmissible, except as they may illustrate his mental state and give a picture of the condition of his mind contemporaneous with the declarations themselves. Whenever the condition of the mind is a fact which it is desirable to prove, it may be established by such evidence as is competent for that purpose. The mental condition of an individual is made manifest to others by his statements, declarations, conversations, as well as by his conduct; and, when the state of a testator's mind at the time of executing the will is the fact to be shown, his contemporaneous declarations or statements furnish the most satisfactory evidence of that fact. His statement of the effect that an act or suggestion of another produced upon him at some previous time is, however, only hearsay; while his statement of his feeling or disposition at the time of making the statement is but the expression in words of his condition at that time, and, so far as it produces a picture thereof, is admissible. "Whenever the mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are original evidence." 1 Greenl. Ev. § 102. This subject and the cases bearing upon it received an exhaustive examination in Waterman v. Whitney, 11 N. Y. 157; and the rule there laid down is that where a will is disputed on the ground of fraud, duress, imposition, or other like cause, not drawing into question the testator's mental capacity at the time of its execution, neither his prior nor subsequent declarations are competent evidence. The same principle is also stated in Marx v. McGlynn, supra; Griffith v. Diffenderffer, supra; and Boylan v. Meeker, 28 N. J. Law, 274. There is no evidence in the present record that the testatrix was weak in mind, or unduly susceptible to the influence of others. On the contrary, the evidence in this respect shows her to have been possessed of full faculties, and capable of exercising her own will; and, by the consent of the parties, all contest upon the ground of mental incapacity was withdrawn from the consideration of the jury.

The court should not have permitted evidence to go to the jury of any declarations of testatrix regarding the statements or acts of those by whose influence it is alleged that she was induced to make the will. Her account of the circumstances attending the execution of the will, as well as her statement to Gates, about two weeks before her death, that Mrs. Calkins refused to let her go to the ranch until she had made her will, were incompetent for the purpose of showing the facts stated by her, and did not in any respect throw light upon her mental condition at the time of its execution, or the manner in which she wished to make disposition of her property. The most that could be claimed for it is that it showed her dissatisfaction with the will, but not that it had been made through any undue influence. A testator cannot, after the execution of his will, impeach its validity by any statements of facts connected therewith, any more than can the maker of any other instrument thus impeach its validity. Jackson v. Kniffen, 2 Johns. 31; Stevens v. Vancleve, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; Mallery v. Young, 94 Ga. 804, 22 S. E. 142.

The court also erred in permitting the witness Mrs. Dudden to testify that, in her opinion, Mrs. J. W. Calkins was a penurious woman, and that she knew that she was penurious. The character of Mrs. Calkins in this particular was immaterial to the issue for the purpose of showing whether she had exercised any undue influence over the testatrix, and the only effect of the evidence would be to prejudice the jury against her in determining the issue they were called upon to decide. So, too, the reasons given by Eduardo for not carrying out the wishes of his sister when she asked him to prepare another will, and what he said to her about revoking her will, were irrelevant to the issues before the court, and should have been excluded. By permitting this testimony to be considered by the jury, the court would naturally lead the jury to think that a desire to change her will was evidence in support of the contestant's claim that it had been originally made through undue influence; whereas it may have resulted from a change of purpose formed at the time of the conversation. The declarations of the testatrix with reference to her husband's treatment of her were also improperly admitted, inasmuch as these declarations did not indicate her feelings in reference to him, except as the jury might be led by inference to conclude that such treatment ought to make her unfriendly to him.

The court instructed the jury as follows: "The exercise of undue influence need not be shown by direct proof. It may be inferred from circumstances, but the circumstances must be such as to lead justly to the inference that such undue influence was employed, and that the will did not express the real wishes of the testator." This instruction correctly embodies a rule for the application of evidence, but, as applied to the evidence in the present case, was misleading to the jury, and permitted them to substitute conjecture or suspicion for inference to be drawn from circumstances which were in evidence before them. The language used by Mr. Commissioner Temple, in Re McDevitt, 95 Cal. 33, 30 Pac. 101, is peculiarly applicable here: "Circumstantial evidence is sufficient. It must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator. I think there is nothing beyond suspicion shown here. There is no proof. Circumstances have been proven which accord with the theory of undue influence, none of which are inconsistent with the hypothesis, that the will was the free act of an intelligent mind. This does not amount to proof, and many circumstances are shown which are wholly inconsistent with the hypothesis of undue influence; and the presumption of law, in the absence of all proof in a contest, is in favor of the will."

The court also gave to the jury the following instruction: "Undue influence is that degree of importunity which deprives a testator of his free agency, which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act. It is closely allied to actual fraud; and like the latter, when resorted to by an adroit and crafty person, its presence often becomes exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, and the more helpless and secluded the victim, the less plainly defined are the badges which usually denote it. Under such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be looked for, the situation of the party taking benefits under the will towards the one who has executed it, and their antecedent relations to each other, together with all the surrounding circumstances and the inferences legitimately deducible from them, furnish, in the absence of direct evidence, and often in the teeth of positive testimony to the contrary, ample ground for concluding that fraud or undue influence has been resorted to and successfully employed." This language of the court would be unobjectionable for the purpose of instruction in a treatise upon the various modes in which undue influence may be exerted, or the different conditions under which its exercise may be looked for; but it was not proper to be given to the jury in the present case, for the purpose of enabling them to render a correct verdict upon the evidence before them. There was no evidence before them from which they were authorized to find that any of the persons charged with exercising undue influence over the testatrix were adroit or crafty, or that the testatrix was helpless or secluded; and the court did not obviate the error in this instruction by afterwards saying to the jury that they were not to presume that the court suggested that such was the fact, but that whether any fact existed which was referred to in the instruction was a question for the jury alone. The concluding portion of this instruction, in which they were told: "Under such conditions, the results accomplished, the antecedent relation of the parties, the inferences legitimately deducible therefrom, furnish, in the absence of direct evidence, and in the teeth of positive evidence to the contrary, ample grounds for concluding that fraud and undue influence had been resorted to and successfully employed,"—in effect told the jury that they were at liberty, under the circumstances of this case, to find that the will under investigation had been executed by reason of undue influence, although there was no direct evidence of the fact, and in the teeth of positive evidence to the contrary. A court should adapt its instructions to the evidence which is to be considered by the jury, and, instead of giving to them definitions of abstract propositions of law, should so connect its instructions with the facts or evidence to which they are applicable as to lead them to make the proper application thereof. "In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists; and, when the evidence is not sufficient to justify such inference, the court should refuse to submit the question to the jury." Janin v. Bank, 92 Cal. 14, 27 Pac. 1100; Comptoir D'Escompte de Paris v. Dresbach, 78 Cal. 15, 20 Pac. 28; Razzo v. Varni, 81 Cal. 289, 22 Pac. 848. The court should have pointed out to the jury the circumstances which would justify such conclusion, and left for them to determine whether that character of circumstances existed in the case.

The appeal from the judgment is dismissed. The order denying a new trial is reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(112 Cal. 319)

CITY OF LOS ANGELES v. TEED. (S. F. 176.)[1]

(Supreme Court of California. April 9, 1896.)

MUNICIPAL CORPORATIONS—REFUNDING INDEBTEDNESS—CONSTITUTIONAL LAW.

1. Pol. Code 1880, §§ 4445–4449, as amended in 1881, authorizing the board of trustees or municipal council of any city having an outstanding indebtedness on January 1, 1880, evidenced by bonds or warrants thereof, to fund or refund the same by a two-thirds vote of the members of such board or council, apply to all cities, whether organized before or after the adoption of the Codes.

2. Pol. Code 1880, §§ 4445–4449, as amended in 1881, authorizing the board of trustees or municipal council of any city having an outstanding indebtedness on January 1, 1880, evidenced by bonds or warrants, to fund or refund the same by a two-thirds vote of such board or council, are not in conflict with Const. art. 11, § 18, forbidding any city to incur any indebtedness or liability in any manner, exceeding in any year the

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[1] Rehearing denied.

income and revenue provided for it for such year, "without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose"; since to fund or refund an existing debt is not to incur an indebtedness or liability. Doon Tp. v. Cummins, 12 Sup. Ct. 220, 142 U. S. 366, disapproved.

3. Const. art. 11, § 18, forbidding any city to incur an indebtedness or liability in any manner or for any purpose, exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors voting at an election to be held for that purpose, does not apply to the funding of any indebtedness existing at the time the constitution was adopted.

4. Act March 15, 1883 (St. 1883, p. 370), authorizing the governing body of every municipal corporation, "other than cities of the first class," to fund or refund "any" indebtedness of the corporation by a vote of four-fifths of their members, and the issue of bonds to be exchanged for any existing indebtedness, or to be sold for money to be applied to the payment of such indebtedness, does not violate the provision of the constitution against special legislation.

5. Nor is such act unconstitutional in failing to provide for submitting to voters the question whether the bonds shall be issued, where authority is expressly given by other statutes to hold such an election.

6. Act March 15, 1883 (St. 1883, p. 370), authorizes the governing body of every municipal corporation other than cities of the first class to fund or refund any indebtedness by a vote of four-fifths of their number, and the issue of bonds to be exchanged for any existing indebtedness, or to be sold for money to be applied to the payment of such indebtedness. Act March 1, 1893 (St. 1893, p. 59), amends such act by requiring in all cases a submission of the question to the voters, and one-fortieth instead of one-twentieth of the principal to be paid each year, and authorizes the bonds to be made payable either at the office of the city treasurer or at a bank in San Francisco, New York, Boston, or Chicago. *Held*, that the latter act was not invalid as special legislation.

7. But such act, in so far as it authorizes the bonds to be made payable at a place other than the city treasury, is in conflict with Const. art. 11, §§ 13, 16, providing that the legislature shall not delegate to any private corporation, company, or individual the right to interfere with or control any county, city, or municipal money, and that the public moneys shall be deposited with the treasurer.

Original application by the city of Los Angeles for a writ of mandate to require Freeman G. Teed, as president of the council of such city, to sign certain bonds alleged to have been authorized by such council and the voters of the city. Defendant demurs to the petition. Demurrer sustained, and writ dismissed.

W. E. Dunn and Albert Crutcher (Chas. H. McFarland and E. A. Meserve, of counsel), for plaintiff. John S. Chapman, for defendant. Francis J. Thomas, amicus curiæ.

VAN FLEET, J. This is an original application to this court for a writ of mandate to require the defendant, as president of the council of the city of Los Angeles, to sign certain bonds alleged to have been authorized by said council and the voters of the city. The defendant demurs to the petition, on the grounds that the acts of the legislature under which the bonds are attempted to be issued are unconstitutional; that the same have been repealed; and that the proceedings prescribed by law for the issuance of the bonds have not been taken by the council. The case has not been as fully argued as its importance requires; and some points, absolutely indispensable to a decision, have not been at all referred to by counsel. This is especially to be regretted, as the questions involved are of great public importance, which we ought not to be asked to examine without the fullest assistance from counsel. We have, nevertheless, given the matter careful consideration, and are of opinion that the demurrer must be sustained.

The facts alleged in the petition as amended are, in substance, these: On February 26, 1895, the city of Los Angeles had outstanding certain bonded indebtedness, amounting to $396,000, of which $76,000 would become due August 1, 1895, and the remainder was payable at any time at the option of the city. It does not appear distinctly when any of these bonds were issued, nor when any of the indebtedness thereby represented was incurred. No sinking or other fund sufficient to pay the bonds has been provided, and the amount necessary to pay or refund them is too large to be paid from the ordinary annual income or revenue of the city. The total indebtedness of the city is less than $2,000,000. On February 26, 1895, the city council adopted an ordinance calling an election of the qualified voters of the city, to be held on a day therein named, at which was to be submitted the question whether or not refunding bonds, to the amount of $396,000, should be issued. The ordinance provided that, in case two-thirds of the qualified electors voting should vote in favor of the issuing of said bonds, the same should be issued. The bonds were to be serial in character, one-fortieth of the whole amount to be paid each year, bearing interest at 4½ per cent. per annum (which was less than the rate borne by the outstanding bonds), and payable at the Chemical National Bank, in the city of New York. A sinking fund was, by the terms of the ordinance, provided for the payment of the principal and interest. The ordinance prescribed the manner of conducting the election, and named the voting precincts, polling places, and officers of election. It concluded as follows: "The city clerk shall certify to the passage of this ordinance, and cause the same to be published for ten days in the Los Angeles Evening Express, and thereupon and thereafter it shall take effect and be in force." The ordinance was accordingly published for 10 days; but, as the day fixed for the election was only 16 days from the approval of the ordinance, the last publication was less than 10 days before the election. The election was held, and much more than two-thirds of the qualified electors voting thereat voted in favor of issuing the proposed bonds. Thereupon a further ordinance was adopted, directing the issue of the bonds, and requiring the same to be signed by the president of the city council, who is the defendant here. The defendant refused to sign the bonds. It is further alleged that none of the holders of the outstanding bonds have refused to exchange the bonds held by them, nor have any of them deposited any of their bonds with any depositary for redemption, and the city has made no effort to exchange the proposed refunding bonds for the outstanding bonds.

Assuming an election by the voters to be necessary, the defendant contends that the 10-days notice of the election was not given as required by law. We do not think this objection well taken. The ordinance was, in terms, a notice of the election, containing everything necessary for such notice. The fact that it was to "take effect and be in force" only at the expiration of the 10-days publication did not lessen its effect as a notice. The manifest intention of the council was that the election should take place on the day named; and the language referred to, though not aptly chosen for the purpose, does not obscure that intention. It is sufficient that notice was given, and that at the time appointed for the election there was an ordinance in force authorizing it.

But the really serious questions to be determined are as to what statute governs the case, and as to the effect of the provisions of the constitution on the subject. The first legislation on the subject is contained in sections 4445 to 4449 of the Political Code, enacted in 1880, and amended in 1881. Those sections authorized "the board of trustees or municipal council of any city having an outstanding indebtedness on the first day of January, 1880, evidenced by bonds or warrants thereof," to fund or refund the same by a two-thirds vote of the members of such board or council. The effect of these sections has not been discussed by counsel, it being apparently assumed on both sides that under the decision in Ex parte Simpson, 47 Cal. 127, these sections are not applicable to cities organized before the adoption of the Codes. But we think that the rule laid down in that case does not apply to these sections, and that they are applicable to all cities. It is true that they are a part of title 3 of part 4 of the Political Code, and that it was held in that case that none of the sections of that title were applicable to any existing city. But the sections now in question were added to the Code long after that decision, and it is manifest from their terms that they were intended to apply to all cities, without exception. The officers therein mentioned are given designations not corresponding to those used in the "system or plan under which cities may," under the preceding sections, "be organized and governed." They are designated by general terms, studiously chosen, so as to include cities of diverse forms of government, and organized in a manner different from that provided for in the preceding sections of the title. The language so used unmistakably negatives any intention to confine the operation of those sections to cities organized under the Code. But, beyond this, these sections can have no effect whatever, unless they apply to cities formed before the adoption of the Code. These provisions relate only to cities having an outstanding indebtedness on January 1, 1880. We are bound to take judicial notice of the fact that no city was ever organized under the Code; and, as no such organization could take place except by act of the legislature (section 4356), we presume that the legislature was aware, when it enacted the sections in question, that no such organization had been had. We cannot suppose that the legislature intended to pass an act which never could have any effect whatever; and we must therefore hold that these sections apply to all cities, without exception.

The argument of counsel as to certain other statutes (to be presently referred to) raises the question whether these sections are not in conflict with section 18 of article 11 of the constitution, which forbids any city to "incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose." But we do not think there is any such conflict. It is true that the sections in question do not provide for obtaining the assent of the voters, but no such assent was necessary. The only indebtedness authorized by these provisions to be funded or refunded is such as existed prior to the time when the constitutional provision in question took effect; and merely to fund or refund an existing debt is not to "incur an indebtedness or liability." A bond is not an indebtedness or liability; it is only the evidence or representative of an indebtedness. And a mere change in the form of the evidence of indebtedness is not the creation of a new indebtedness within the meaning of the constitution. Opinion of Justices, 81 Me. 602, 18 Atl. 291; Hotchkiss v. Marion, 12 Mont. 218, 29 Pac. 821; Board of Com'rs v. Board of Com'rs, 26 Kan. 181, 201; City of Poughkeepsie v. Quintard, 65 Hun, 141, 19 N. Y. Supp. 944. The case of Doon Tp. v. Cummins, 142 U. S. 366, 12 Sup. Ct. 220, appears to be opposed to this view; but we are unable to assent to the reasoning of the majority of the court in that case, and think that the correct rule is stated in the dissenting opinion. Moreover, the state had no more power, by adopting a constitution, to impair the obligation of the contracts by which cities had previously incurred indebtedness than it had to impair it by a mere statute. It is true that to take away a remedy previously allowed does not always impair the obligation of a contract. But a reasonably efficient remedy must be left; and in a majority of cases the only way in which municipalities can pay their debts is by issuing funded bonds. Even then, if the state had power to forbid the funding of a prior indebtedness, except upon new and perhaps impossible conditions (a concession which we are not prepared to make), it certainly will not be presumed, in the absence of a clear and explicit declaration to that effect, that the framers of our state constitution intended such a result. The clause in question does not necessarily require such an interpretation; and we are of opinion that it does not apply to the funding of any then existing indebtedness. It follows that, as to any indebtedness of the city of Los Angeles outstanding on the 1st day of January, 1880, sections 4445 to 4449 of the Political Code provide the method to be pursued in funding or refunding the same. The petition in the present case, however, does not allege that any of the indebtedness in question was outstanding on that day; and we cannot presume, in favor of the pleader, that such was the fact. It is therefore necessary to inquire whether the bonds in question are authorized by any other statute.

On March 15, 1883, an act was passed (St. 1883, p. 370) authorizing the governing body of every municipal corporation, other than cities of the first class, to fund or refund any indebtedness of the corporation by a vote of four-fifths of their number. That act authorized the issue of bonds, to be exchanged for any existing indebtedness, or to be sold for money to be applied to the payment of such indebtedness.

It is contended that this act violates the provisions of the constitution against special legislation. But there can be no question that the act classifying municipal corporations is constitutional (Prichett v. Stanislaus Co., 73 Cal. 310, 14 Pac. 795), and that in matters pertaining to municipal organization the legislature may make different regulations for the different classes so created (City of Pasadena v. Stimson, 91 Cal. 249, 27 Pac. 604). The subject-matter of the act in question (the funding of municipal indebtedness) is "peculiarly a matter pertaining to municipal organizations, and still more peculiarly a matter as to which cities of large population require different provision from that suitable to cities or towns of small population." The act is therefore not obnoxious to that objection.

It is also contended that the act is unconstitutional in failing to provide for submitting to voters the question whether the bonds shall be issued. It is true that as to any new indebtedness incurred after January 1, 1880, such a submission must be had; but it does not necessarily follow that any act of the legislature on that subject must contain that requirement. It is, we think, sufficient that, by any legislation, authority is given to the municipal government to call such an election, and that the election is actually called and held. Such authority is expressly given by sections 40, 197, 198, 199, and 200 of the charter of Los Angeles (St. 1889, p. 455); and, as we have seen, a valid election was actually called and held in this case. Indeed, it is probable that the constitutional provision requiring such election is, of itself, sufficient authority to the municipality for holding it, at least when read in connection with such an act as the one of 1883 here in question.

On March 1, 1893, an act was passed (St. 1893, p. 59) amending the act of 1883. By this amendment, a submission to the voters was required in all cases, one-fortieth (instead of one-twentieth) of the principal was required to be paid each year, and authority was given to make the bonds payable either at the office of the city treasurer or at a bank in San Francisco, New York, Boston, or Chicago.

It is contended that this act also is invalid, as special legislation; but what we have said as to the act of 1883 on this question applies equally to this act. It is also claimed that the legislature could not authorize a debt payable in 20 years to be refunded into a debt payable in 40 years; but we fail to discover any force in this contention, and no reason is suggested or authority referred to supporting it.

It is also contended that the provision authorizing payment of the bonds at a place other than the city treasury, and especially out of the state, is in contravention of sections 13 and 16 of article 11 of the constitution,[1] and therefore invalid. This provision, it is true, is severable, and its invalidity would not affect the rest of the act. But, as the bonds here in question are made payable at the Chemical National Bank in New York City, and as the ordinance authorizing them provides that they shall be so payable, it is necessary to examine that objection.

The sections of the constitution referred to were construed in Yarnell v. City of Los Angeles, 87 Cal. 603, 25 Pac. 767; and it was there held that the provision in the charter of that city authorizing the council to appoint a bank in that city, as a depositary of the public funds, was a violation of those sections, and wholly invalid. We are unable to distinguish that case from the present one, and we think the reasoning there employed applies with at least equal force to this case. If the principal and interest of these bonds is to be paid at a bank in the city of New York, that thing can be accomplished only in one of two ways,—either the city treasurer must go in person to New York, carrying the money with him, and there pay it out, or he must remit the money by express, draft, or some other mode to that bank, and authorize that bank to make the payment. There is certainly no law which authorizes the city treasurer to go to New York (in the present case semiannually), and take with him the public moneys; and, in the absence of such a law, he certainly has no such power. Even if it be conceded (which is not clear) that the legislature is competent to authorize any officer to perform any part of his duties without the state, it has not attempted to confer any such authority in this instance; and there is therefore no other alternative than to remit the money to the bank in New York, and make that bank the agent of the city to pay the bonds and coupons. But this is precisely what is forbidden by the constitution, and is, as we regard it, a graver infraction of its provisions than that considered in the Yarnell Case. We are therefore of opinion that the bonds in question, and the ordinance authorizing them, are clearly invalid, and that the defendant cannot be required to sign them.

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[1] Const. art. 11, §§ 13, 16, provide as follows: "Sec. 13. The legislature shall not delegate to any special commission, private corporation, company, association or individual, any power to make, control, appropriate, supervise, or in any way interfere with any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever."

"Sec. 16. All moneys, assessments, and taxes belonging to or collected for the use of any county, city, town, or other public or municipal corporation, coming into the hands of any officer thereof, shall immediately be deposited with the treasurer, or other legal depositary, to the credit of such city, town, or other corporation respectively, for the benefit of the funds to which they respectively belong."

This conclusion renders it unnecessary to consider the effect of the amendment of 1895 (St. 1895, p. 203) to section 1 of the act of 1893. The questions arising under that act are important, and have not been adequately presented by counsel; and we therefore leave them for consideration in some case in which they are properly involved.

The demurrer to the petition is, for the reasons suggested, sustained, and the writ dismissed.

We concur: McFARLAND, J.; GAROUTTE, J.; TEMPLE, J.; HENSHAW, J.

HARRISON, J. I concur in the judgment, and also in that portion of the opinion of Mr. Justice VAN FLEET in which he discusses the effect of the provision in the ordinance making the interest upon the bonds payable out of the state. I am of the opinion, however, that the recitals in the ordinance of the bonds which are to be refunded sufficiently show that a portion thereof were issued prior to the year 1880, and another portion subsequent to that year. It is unnecessary, therefore, to determine whether section 4445 of the Political Code is still in force, as that section by its terms authorizes the issue of bonds for the sole purpose of refunding an indebtedness which existed on the 1st day of January, 1880, while the bonds sought to be issued by the proceedings under consideration are for the purpose of refunding an indebtedness of which the greater portion did not exist at that date. The act of 1883, as amended in 1893 (St. 1893, p. 59), and under which the proceedings were had, was again amended in 1895 (St. 1895, p. 203). The effect of this amendment was to deprive the city council of all power to issue refunding bonds, except in accordance with its terms; and the latter act is the sole authority by which to determine the power of a municipality to issue any refunding bonds, as well as the mode in which that power is to be exercised. This act was adopted March 27, 1895, and took effect immediately; and although the election by the voters of Los Angeles was held March 21, 1895, the vote was not canvassed until April 1st, and the ordinance for the issue of the bonds was not adopted until April 8th. As no contract had been entered into, and no vested right had accrued by reason of the steps that had been taken for the issuance of these bonds, the effect of the act of 1895 was to repeal all the provisions for their issuance that were not preserved in the amended act, and to render nugatory all the steps that had been taken by virtue of those provisions. Lamb v. Schottler, 54 Cal. 319. Under the act as thus amended, no election by the voters is required as a preliminary step, but the governing body of the city is empowered to refund the outstanding indebtedness, and issue bonds therefor, "by a vote of four-fifths of its members." The validity of the election is therefore not involved, and as the act confers no authority to sell the bonds when issued, except in special instances, there can be no additional liability created by the mere issue of the bonds.

To entitle the petitioner to the writ of mandate against the respondent, it was necessary to set forth in its petition all the facts which rendered it his duty to sign the bonds. This duty did not exist unless the ordinance for their issuance had been adopted by a vote of four-fifths of the members of the city council; and the petition should have so stated. As the adoption of an ordinance for the issuance of bonds would not give any validity to the bonds, or authorize their issuance, unless the ordinance was adopted by the requisite vote, the mere averment that the city council "adopted an ordinance providing for the issuance of said bonds" does not sufficiently show that the ordinance was passed in accordance with the requirements of the statute, or that it was incumbent upon the respondent to sign the same.

112 Cal. 341

ROSE v. ROSE. (S. F. 278.)

(Supreme Court of California. April 11, 1896.)

DIVORCE — PLEADING — EVIDENCE — DIVISION OF PROPERTY.

1. The objection that the complaint is insufficient in its statement of the cause of action is waived by a failure to demur to it.

2. In an action for divorce, a paper signed by defendant, in which he offered to divide the property, and described it as community property, was admissible on the sole issue as to the character of the property, though the paper was an offer of compromise.

3. A division of the property between parties to a divorce case rests primarily with the trial court, and will not be disturbed except for a palpable abuse of discretion.

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Maria M. Rose against Manuel M. Rose for divorce. From a decree in favor of plaintiff, and from an order denying him a new trial, defendant appeals. Affirmed.

E. M. Gibson and Welles Whitmore, for appellant. Dodge & Fry, for respondent.

VAN FLEET, J. Action for divorce on the ground of extreme cruelty and habitual intemperance. The decree was in favor of plaintiff, granting her a divorce on both grounds, and awarding her the larger share of the community property. Defendant appeals from the judgment and an order denying him a new trial.

A careful review of the record discloses no substantial merit in the points urged in behalf of appellant. The objection that the complaint is insufficient in its statement of the cause of action for intemperance is untenable. Assuming that it would be obnoxious to a special demurrer on the ground of uncertainty, no demurrer was interposed, and in its absence the pleading cannot be held bad. Reading v. Reading, 96 Cal. 4, 30 Pac. 803.

Nor is there any merit whatsoever in the point that the finding as to the habitual intoxication of defendant is unsupported by the evidence. Whatever may be said as to the apparent preponderance of the evidence on that issue, as disclosed by the record, it presents a very sharp and substantial conflict, and leaves no room for the claim that there was not evidence to sustain the view expressed in the finding of the court below.

The declarations of the wife, made to and in the presence of her husband and the witness, as to acts of ill treatment and cruelty towards her by her husband, and the latter's conduct and declarations in response thereto, were proper evidence on the issue of cruelty. 1 Rice, Ev. p. 424.

The court did not err in admitting, on the issue as to the character of the property, the paper signed by defendant, in which he offered to divide the property, and described it as community property. It was admitted solely on the question as to whether the property was community or separate, and for this purpose it was proper as a declaration by the defendant, even conceding that the paper is to be regarded as an offer of compromise. The declaration as to the community character of the property was not essential to the purposes of the compromise, and is therefore not to be regarded as a concession made for that purpose. While, therefore, it would not be competent to admit an offer of compromise, as such, the declaration therein of facts involved in the controversy which are not mere concessions made for the purpose of such offer, but are statements of independent facts, is admissible against the party making them. The rule is thus stated by Mr. Rice: "It is never the intention of the law to shut out the truth, but to repel any inference which may arise from a proposition made, not with a design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made because it is a fact, the evidence to prove is competent, whatever motive may have prompted to the declaration. But if the party admits a particular item in an account, or any other fact, meaning to make the admission as being true, this is good evidence, although the object of the conversation was to compromise an existing controversy." The several other rulings on evidence, complained of, need not be discussed in detail. We have examined them, and are satisfied that they involved no error.

The complaint made as to the inequitable division of the property between the parties would appear, from all the evidence presented, to possess, possibly, some just foundation in fact, if the discretion rested primarily with us, since, to our minds, the defendant would seem to have been treated, perhaps, a little harshly by the court below. But it is a question committed to the justice and discretion of that court, whose opportunity to judge of the equities, by reason of seeing and hearing the witnesses, is superior to our own, and whose determination of the question we are not at liberty to disturb, except for a palpable abuse, which certainly the record before us does not enable us to declare. The judgment and order are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

112 Cal. 503

SAN BERNARDINO COUNTY v. DAVIDSON et al. (No. 19,419.)

(Supreme Court of California. April 11, 1896.)

COUNTY RECORDER — FEES — RECORDING NOTICES OF MINING LOCATIONS.

A county recorder is not liable to the county for fees earned in recording notices of location of mining claims, the work being outside his official duties. Such records are not known to the statute, being regulated entirely by the mining districts; and a county recorder is not compelled to keep them.

In bank. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by the county of San Bernardino against Alonzo S. Davidson and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank F. Oster, for appellant. Rolfe & Rolfe, for respondents.

McFARLAND, J. This is an action on the official bond of defendant Davidson as county recorder of the county of San Bernardino. A general demurrer to the complaint was sustained by the court below, and, plaintiff declining to amend, judgment was rendered for defendants. Plaintiff appeals from the judgment.

The demurrer was properly sustained, and the judgment is right. By this action it is sought to hold Davidson and his bondsmen liable to the county for certain money paid to him during his term of office by miners for recording certain notices of locations of mining claims. But the statute concerning county recorders makes no provision for the recording of notices of locations of mining claims, and such recording is not within the purview of his official duties as county recorder. In certain mining districts there is a custom which requires a notice of location to be recorded with some one selected as a mining recorder, and in some of these districts the county recorder is so selected. The purpose of the recording is to show a compliance with the mining customs; but this purpose, and the whole scheme, is entirely distinct from the statutory system of recordation, by which parties are permitted to have transfers of property and certain other written instruments recorded in the county recorder's office, so as to give constructive notice thereof, and the county recorder is required to record the same, when presented, properly acknowledged or authenticated as provided by statute,—each kind of instrument to be recorded in a book to be kept for that purpose. A notice of a mining location in a recorder's book is "the original notice, not a record or copy of an independent original." Pralus v. Mining Co., 35 Cal. 36. A statutory county recorder could no more be required to record a miner's notice of location than he could be required to furnish a miner with a pick or shovel. If he chooses to do so, he may transcribe such notice of location in a book, or collection of sheets of paper, which he has procured for that purpose; but, if he do so, he does it, not as a county recorder elected by the people, but as a person selected by the miners to do an act not provided for by the recordation laws of the state; and any moneys which they may pay him for such services are not fees, for which he and his bondsmen are accountable to the county.

The cases of Placer Co. v. Astin, 8 Cal. 304, McKee v. Monterey Co., 51 Cal. 275, and People v. Bunker, 70 Cal. 215, 11 Pac. 703, are not in point. In the first of those cases a tax collector undertook to retain money, which he had received as such tax collector, upon the ground that the taxes had been illegally levied; in the second case the defendant, as treasurer of Monterey county, had received certain moneys by the allowance of the comptroller, and sought to retain them upon the ground that the comptroller had exceeded his authority in making the allowance; and in the third case it was held that a commissioner of irrigation, "having assumed to act under a statute of the state, and having collected moneys according to the letter of that statute, cannot be heard to say that the statute was in conflict with the constitution of the United States," and that, therefore, he was not bound to pay them over. In those cases the officers received the money as agents of the state or county, upon the assumption that it was money belonging to the state or county; and they were decided upon the principle that one to whom money has been paid by another for the use of a third person cannot, as against the third person, set up any illegality in the payment. But such was not the fact in the case at bar. The respondent did not receive the money upon the pretense that he was collecting it as the official agent of the county. He was not ex officio mining recorder, for there is no such officer created by the statute. And it is quite clear that the demurrer fully presents the question under review. The averment of the complaint is that, during Davidson's term of office, "there existed a general custom and rule among the miners of said county to file for record with the recorder of said county, notices of location of mining claims," and that he knew of such custom. This presents the whole question, and the averment that he received the fees "as such recorder" does not change either the fact or the law. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.; HENSHAW, J.; TEMPLE, J.

112 Cal. xvii

SAN BERNARDINO COUNTY v. DAVIDSON et al. (No. 19,420.)

(Supreme Court of California. April 11, 1896.)

In bank. Appeal from superior court, San Bernardino county; John L. Campbell, Judge. Action by the county of San Bernardino against Alonzo S. Davidson and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank F. Oster, for appellant. Rolfe & Rolfe, for respondents.

PER CURIAM. Upon the authority of San Bernardino Co. v. Davidson (No. 19,419; this day decided) 44 Pac. 659, the judgment is affirmed.

BEATTY, C. J., not participating.

115 Cal. 16

HERRIMAN et al. v. MENZIES et al. (No. 15,991.)

(Supreme Court of California. April 10, 1896.)

APPEAL—NOTICE—WHO ARE ADVERSE PARTIES—MOTION FOR NEW TRIAL.

1. A person who is joined as a defendant, and answers without objection from other parties, and whose rights in the subject-matter of the action are favorably adjudicated by the decree, is an adverse party to any other party attacking such decree, either by motion for new trial or by appeal, and must in either case be served with notice, under section 659 or section 940, Code Civ. Proc., without regard to whether originally a proper party or not.

2. An appeal from an order overruling a motion for new trial will not be dismissed because of a failure to serve notice on a party to the action, but who was not a party to the motion.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by A. H. Herriman and others against Stewart Menzies and others. Decree for plaintiffs, and defendants appeal from the decree, and from an order overruling a motion for new trial. Appeal from decree dismissed. On appeal from order, affirmed.

H. N. Clement, for appellants. T. C. Coogan, for respondents.

PER CURIAM. This action was brought to dissolve a partnership known as the "Master Stevedores Association," and for an accounting. The association was composed of a number of firms and individuals, and among the firms was Allen & Young, of which Theodore H. Allen and Thomas Young were the sole members. The association was governed by a written agreement, by the terms of which it was to continue from July 1, 1886, to July 1, 1891. The several firms and individuals were to severally conduct the business of stevedoring, to charge therefor the prices fixed by the association, and to pay into the association the profits derived at stated periods, to be divided as in the agreement specified. Its business was settled in consonance with this agreement up to December, 1890, and this action was brought to compel a settlement for the remaining seven months, viz. from December, 1890, until the expiration of the term of the agreement, July 1, 1891. Theodore H. Allen, of the firm of Allen & Young, died testate February 28, 1891, and the defendant Emma J. Taylor is the duly-appointed executrix of his last will. As such executrix she is made a party defendant, and it is sought to have her account for the business done from said December 1, 1890, until the date of the death of Allen, viz. February 28, 1891. Young continued to carry on the same business up to July 1, 1891, and he was also made a party defendant. Said defendants Young and Emma J. Taylor filed separate answers. The answer of Emma J. Taylor, among other things, avers the interest of her testator in the association, the realization of profits, etc., and joins with the plaintiffs in demanding an accounting, not only with defendants, but between herself, as executrix, and the other defendants. An interlocutory decree was entered dissolving the association, and adjudging "that an account be taken of all of the stevedoring business done, and of all the dealings and transactions had in relation thereto, by plaintiffs and the defendants Menzies and McCracken, from the 1st day of July, 1890, to and including the 1st day of July, 1891, and by the defendant Young and one Theodore H. Allen, deceased, his successor in interest being defendant Emma J. Taylor, as executrix of his last will and testament, from the 1st day of December, 1890, to and including the 28th day of February, 1891 (the date of Allen's death), and by defendant Young from the date last above named to and including the 1st day of July, 1891." A referee was appointed to take an account, and reported, showing the amount of money in the hands of Young, collected from December 1, 1890, to February 28, 1891, to be $514.53. Thereupon the court made findings showing the amount of money in the hands of each of the defendants, except the defendant Taylor, concerning whom the court found as follows: "The defendant Emma J. Taylor, as executrix of the last will of Theodore H. Allen, deceased, has no money or property in her hands belonging to plaintiffs." The court also found that Theodore H. Allen died on the 28th day of February, 1891, and that the partnership of Allen & Young was then dissolved. A final decree was entered dissolving the association, and awarding judgment against the defendants severally for the sums of money found due from them to the plaintiffs. The name of defendant Emma J. Taylor does not appear in the decree. The appeal is by defendants Stewart Menzies, Arthur McCracken, and Thomas Young from the interlocutory decree, from the final decree, and from an order denying their motion for a new trial.

Plaintiffs move the court to dismiss the appeal upon the ground that the notice thereof was not served upon the defendant Emma J. Taylor, executrix of the last will of Theodore H. Allen, or upon A. Heyneman, her attorney; that she is a respondent herein, an adverse party to appellants, interested in the judgment, and will be affected by the result of the appeal, etc. The motion is supported by the certificate of the clerk of the court below, and by affidavit showing that said defendant Emma J. Taylor appeared separately by said A. Heyneman, as her attorney, and that the notice of appeal was not served upon her or upon her said attorney. Defendants show, by counter affidavit, that the separate answer of defendant Taylor was not served upon them or their attorney, and that the interests of the firm of Allen & Young, were represented by Henry N. Clement, who was the attorney of all the defendants except Emma J. Taylor, and that said Taylor did not appear in the case except by answer. A notice of appeal must be served upon every "adverse party" (Code Civ. Proc. § 940), and adverse parties are those who are "interested in the judgment and would be affected by its reversal" (O'Kane v. Daly, 63 Cal. 319). "Every party whose interest in the subject-matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an adverse party within the meaning of these provisions of the Code, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervener." Senter v. De Bernal, 38 Cal. 637. The above is taken literally from the opinion of McFarland, J., in Lancaster v. Maxwell, 103 Cal. 67, 36 Pac. 951. Butte Co. v. Boydstun, 68 Cal. 189, 8 Pac. 835, is to like effect. If the position of a party on the record makes him adverse, he must be so considered for the purposes of an appeal from the judgment thereon. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103. See, also, Williams v. Association, 66 Cal. 195, 5 Pac. 85, and In re Castle Dome Mining & Smelting Co., 79 Cal. 246, 21 Pac. 746.

It is urged by appellants that Emma J. Taylor, as executrix of the last will of Theodore H. Allen, deceased, was not a necessary or even proper party defendant in the action; that upon Thomas Young, the surviving partner of the firm of Allen & Young, devolved the sole duty of accounting with the association, etc. The answer is: Emma J. Taylor, as executrix, was made a party defendant, answered, and no objection was made to her as a proper party defendant. The interlocutory decree ordered an accounting from her and Young, and the court found that there was no money or property in her hands as executrix belonging to plaintiffs. The appeal is from the whole judgment, and from the order denying a new trial. If the judgment is reversed, non constat but that upon another trial it may be shown that the estate represented by her is indebted to the plaintiffs. To this extent she is interested, and an adverse party to the appellant, and hence should have been served with notice of appeal from the judgment.

Upon an appeal from an order denying a new trial, only the parties to the motion upon which the order was made are necessary parties to the appeal. Watson v. Sutro, 77 Cal. 609, 20 Pac. 88; In re Ryer's Estate (Cal.) 42 Pac. 1082. In the present case the plaintiffs did not serve their notice of intention to move for a new trial upon Mrs. Taylor, nor was she a party to the proceedings in the superior court upon that motion. The appeal from the order denying a new trial, therefore, cannot be dismissed for failure to serve her with the notice of appeal. Section 659, Code Civ. Proc., however, requires that the party intending to move for a new trial shall "serve upon the adverse party a notice of his intention." The "adverse party" upon whom this notice is to be served is determined by the same rules as is the "adverse party" upon whom a notice of appeal is to be served, viz. every party whose interest in the subject-matter of the motion is adverse to or will be affected by the granting of the motion, or changing the former decision of the court; and a failure to serve such adverse party with the notice of an intention to move for the new trial will be attended with the same consequences as a failure to serve an adverse party with a notice of appeal from the judgment. The superior court can have no jurisdiction to re-examine an issue of fact that it has tried, and change its decision thereon, unless all the parties to the issue and former decisions are properly before it. In the present case the plaintiffs sought a recovery against Mrs. Taylor, and upon the trial of the issues involving her liability the court made certain findings of fact in her favor, and determined that she was under no liability to account for any moneys that she had received. The action is for an accounting by all of the defendants as partners in the enterprise, and it is evident that an adjustment of their several rights and obligations growing out of the partnership venture cannot be had unless all of the parties to the transactions are before the court. The effect of granting a new trial would be to vacate the former findings of fact, and compel Mrs. Taylor to again litigate a controversy which had been decided in her favor. A new trial of these issues cannot be had without affecting her interests, and, as she had not been brought before the superior court at the hearing of the motion for a new trial, that court had no jurisdiction to grant the motion, and its order denying the same was properly made.

The appeal from the judgment is dismissed. The order denying a new trial is affirmed.

5 Cal. Unrep. 330

TULARE IRRIGATION DIST. v. KAWEAH CANAL & IRRIGATION CO.

(Sac. 66.)

(Supreme Court of California. April 7, 1896.)

CORPORATION — EFFECT OF PURCHASING ITS OWN STOCK—SALE OF ITS PROPERTY.

1. The purchase by a corporation of a part of its own stock, until it is reissued, in effect reduces its stock to that extent.

2. The sale by a corporation of all its property and franchises, except its corporate franchise, does not carry with it shares of its own stock, which it had bought in for delinquent assessments, and had not authorized to be reissued.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; W. W. Cross, Judge.

Action by the Tulare irrigation district against the Kaweah Canal & Irrigation Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. W. Davis, for appellant. Bradley & Farnsworth and Pringle, Hayne & Boyd, for respondent.

HAYNES, C. This cause was tried by the court, and findings and judgment were for the defendant; and the plaintiff appeals from the judgment and an order denying its motion for a new trial.

The plaintiff is a corporation, organized under the act of the legislature known as the "Wright Act," for the purpose of supplying water for irrigating the lands within the district so organized. The defendant is a corporation organized under the general statute, and owned certain water rights, dams, canals, ditches, real estate, etc., from which the Tulare irrigation district could be supplied with water for the purposes for which it was organized. Under these circumstances plaintiff and defendant entered into an agreement whereby the defendant sold and conveyed said property to the plaintiff in consideration of the sum of $150,000, payable in the bonds of the plaintiff at par. The deed executed by the defendant to the plaintiff, after describing certain lands, water rights, canals, etc., as to which there is no controversy, concluded the description of property and rights conveyed, as follows: "Also all right, title, and interest of the first party (the defendant) in and to all dams, headgates, and drops used or maintained in connection with the ditch or ditches of the first party, or any of them; also all tools, scrapers, plows, implements, and personal property of the first party, except its office furniture, books, and papers; also all franchises, rights, and privileges now owned or enjoyed by the first party, except its corporate franchise to exist and transact business as a corporation in accordance with its articles of incorporation."

Prior to this sale the defendant purchased 35 shares of stock in its own corporation, at a sale thereof for a delinquent assessment, and which stock had been transferred to the defendant corporation upon its books, and had not been reissued. Twenty-five thousand dollars of the bonds received from the plaintiff were applied in part to the payment of an indebtedness to an individual, and in part as a commission for negotiating the sale. Another portion of the bonds was set aside to meet other liabilities of the defendant, and the remainder of the bonds were distributed to its stockholders as a dividend, the amount of the dividend being $200 per share. This action was brought by the plaintiff to compel the delivery to it of said 35 shares of stock in the defendant corporation, and to recover the dividend thereon of $200 per share, payable in the bonds received from the plaintiff, together with the interest paid by the plaintiff thereon, claiming that said stock was personal property belonging to the defendant at the time of the sale, which was not excepted therefrom, and which, by the sale, passed to it under the general clause of the conveyance above quoted.

The judgment for the defendant was right. Stock in a corporation of the character of the defendant represents an interest in the property of the corporation, and is evidence that the lawful holder is the owner of an interest in the property of the corporation in the proportion that his shares bear to the whole number of shares issued and held by the stockholders. The legal title to the property represented by the stock is vested in the corporation for the benefit of the stockholders. When these 35 shares were bought by the corporation for the unpaid assessment, the amount so paid was charged up as a liability, to be met by the remaining stockholders, and the remaining stock represented the entire property of the corporation. The 35 shares could not be liable for assessments, nor participate in dividends, nor be voted at elections. These shares were dormant, and could only be resuscitated by selling them and placing the selling price in the treasury for the benefit of the stockholders. Robinson v. Mining Co., 72 Cal. 32, 13 Pac. 65. But, conceding that the defendant corporation could have sold these shares, it would require corporate action to authorize it, either by the stockholders or by the directors, and we see no evidence of any intention to do so; and appellant's contention, if carried to its practical result, demonstrates that it could not have been within the intention of either party.

Suppose the property which the defendant concedes was sold, conveyed, and delivered to the plaintiff was of the actual value of $150,000, no more and no less. If all the stock of the defendant corporation had been in the hands of individual stockholders, the plaintiff would have acquired no stock, but would have property the exact equivalent in value of the money or bonds paid. If we now suppose that, at the time of the purchase, one-half of the stock of the defendant corporation was in its treasury, having been purchased, as these 35 shares were, at sales for delinquent assessments, it would follow, upon plaintiff's theory, that, though it got, under its purchase, $150,000 worth of other property, it would also have acquired one-half its stock, and would be entitled to participate in a dividend of $200 per share, to be paid out of the identical bonds they paid for the property, thus getting back into plaintiff's treasury one-half of the purchase price paid, as well as property of the value of $150,000. In other words, they would practically get defendant's entire property and one-half its stock for $75,000, or one-half of that which it agreed to pay, and did in fact pay, while the individual stockholders, whose stock alone, at the time of the sale, represented all the property of the corporation, whether in the treasury or out of it, would realize from the sale but half its value. We find no evidence in the record which indicates that such a result was contemplated or intended by either party during their negotiations, nor does the language used in the conveyance permit such construction. "If a corporation has power to reduce its capital stock, it has been held it may do so by purchasing and retiring a portion of its shares." Cook, Stock & Stockh., § 282. But whether the defendant had power to permanently reduce its stock, or not, the effect of the purchase was to reduce its stock temporarily and until it should be regularly reissued. So long as it remains in the treasury, it represents no part of or interest in the property of the corporation. It was as though it had never been issued; and in Brewster v. Hartley, 37 Cal., 15, 30, it was said: "The capital stock of a corporation, previous to its being issued, cannot, in any proper sense, be called the property of the corporation." And that is true as to the stock in question here. It is true that "the language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Civ. Code, § 1638. The appellant's contention, carried to its logical result, would involve an absurdity, inasmuch as its effect would be to return to it $7,000 of the money paid, with the right to participate in any future dividends that might be declared by the defendant.

It is also contended that defendant ratified the sale. The ratification of the sale is clear, but the ratification did not extend to anything not included in the conveyance, and therefore did not reach the stock. Appellant discusses several rulings of the court upon questions of evidence, but these alleged errors were not specified in its statement on motion for a new trial. However, we have examined them, but find therein no ground for a reversal. These questions went to the point whether during the negotiations any mention was made of these shares. Upon the face of the agreement and conveyance, we are obliged to hold that the stock in question did not pass, and the appellant, therefore, could not be prejudiced by evidence that no mention was made of it during the negotiations resulting in the sale. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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112 Cal. 333

PEOPLE v. SMITH. (Cr. 86.)

(Supreme Court of California. April 10, 1896.)

COMPLAINT AND INFORMATION—VARIANCE—DESIGNATION OF OWNERSHIP OF STOLEN PROPERTY—THEFT OF STEER — WHAT CONSTITUTES GRAND LARCENY.

1. Where the complaint before a magistrate charged the stealing of a steer "belonging to, and being owned by, the estate of W. C. Elledge, deceased," and an information for grand larceny recited that the steer was "owned by Joseph Elledge and Mrs. M. J. Elledge, as executor and executrix of the estate of W. C. Elledge, deceased," the variance was not fatal, since Code, § 956, provided that, where an offense for a private injury is described with sufficient certainty to identify the act, an erroneous allegation as to the person injured is not material.

2. Pen. Code, § 487, subd. 3, making the felonious stealing and carrying away of a steer grand larceny, means a live steer; and if a third person killed the animal, and defendant did not believe it was the property of such person, but assisted in carrying away the meat, he was not guilty of grand larceny, unless the meat taken by him was of the value of $50.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county.

O. L. Smith was convicted of grand larceny, and appeals. Reversed.

J. C. Ruddock and W. G. Poage, for appellant. Atty. Gen. Fitzgerald, for the People.

BELCHER, C. The defendant was charged by information with the crime of grand larceny, committed in the county of Mendocino, in the month of December, 1894, by stealing a brindle steer, which "was then and there the personal property of another, belonging to and being then owned by Joseph Elledge and Mrs. M. J. Elledge, as executor and executrix of the estate of W. C. Elledge, deceased." He was found guilty as charged, and the judgment was that he be punished by imprisonment in the state prison for the term of four years. From that judgment, and an order denying his motion for a new trial, he has appealed.

There was no error in denying the defendant's motion to set aside the information, or in overruling the demurrer interposed to it. The motion was based upon the theory that the defendant had not been legally held to answer for the offense charged, because in the complaint filed with the committing magistrate the steer alleged to have been stolen was described as "belonging to, and being owned by, the estate of W. C. Elledge, deceased"; and in support of this theory the case of People v. Hall, 19 Cal. 425, is cited. But whatever may have been the law in 1861, when that case was decided, such a description cannot be held insufficient now, under the provisions of our Penal Code. Section 956 of that Code provides, "When an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material." And in People v. Leong Quong, 60 Cal. 107, it is said: "The name of the owner of property stolen is not a material part of the offense charged. It is only required to identify the transaction so that the defendant, by proper plea, may protect himself against another prosecution for the same offense." The case of People v. Wallace, 94 Cal. 497, 29 Pac. 950, cited by appellant, is not in point. In that case the defendant was charged in the complaint filed before the magistrate with the larceny of "three certain steers, the property of Joseph Wright and E. J. Jones," while in the information he was charged with stealing "the personal property of one Joseph Wright, to wit, two certain steers." It was held that this variance was fatal, the court saying, "It is manifest that there is such a variance between the offense described in the complaint and that charged in the information that the one cannot be deemed the same as the other." In this case there was no substantial variance in the offense, as charged in the complaint and in the information. In each the offense was described with sufficient certainty to identify the act, and the alleged ownership was, in effect, the same, namely, in the estate of W. C. Elledge, deceased. The demurrer was based upon the same grounds as the motion, and what has already been said sufficiently disposes of the objections to the ruling upon it.

At the trial one Andrew Spoerner was called as a witness for the prosecution, and his testimony was practically all that was given on that side of the case. He testified, in substance, as follows: Defendant was living, with his family, at Low Gap, in Mendocino county. He was occupying a piece of land for the purpose of securing it as a homestead. In December, 1894, witness went to defendant's place, and was asked by him to stay there a couple of months, and help put up a house and make some improvements. During the month of December, defendant told witness that he had some stock—good-sized heifers—running around, and he wanted witness to help him butcher one. On the third Sunday in the month they went out together; defendant packing a rifle, and witness an axe. After walking some time over the hills in company, defendant heard a bell, and said, "That's where the stock are running." He then went off, and the witness walked around to keep warm. After a while witness saw the cattle up the hill, crossing the ridge, with defendant after them. A little later, witness heard a shot, and then followed in the direction where he heard it, and found defendant with the steer shot and his throat cut. Witness helped defendant skin the steer and cut the meat out, and pack it home on a horse. They only packed a piece home that day. The next day it rained, and so they waited till Tuesday, when they got a horse and went again. Witness then cut the meat out, put it in a sack, and defendant packed it up the hill with the horse. They left the hide, as it was badly cut up. Defendant salted the meat down, and, when witness left his place, he had just begun smoking it. Witness guessed it was more than four miles, over a rough country, to the place where the steer was killed. In June, following, witness took two other parties to the place where the steer was killed, and showed them the bones. He further testified that he remained at defendant's place about four weeks after the steer was killed, and then left, and that he was friendly with him before, but not then. It was further proved that the animal killed belonged to the estate of W. C. Elledge, deceased. For the defense, the defendant's wife, her son by a former marriage, then a little more than 10 years old, and the defendant, were called and examined as witnesses. Each witness testified that on the Sunday when the steer was shot the defendant was at home all day, and did not go out with Spoerner at all. Mrs. Smith testified, in substance, that on Saturday night Spoerner asked her husband to go hunting with him, and her husband told him he would not go; that the next morning, at breakfast, Spoerner again asked her husband to go hunting with him and the latter told him "No"; that, shortly after, Spoerner went away with an axe and gun on his shoulder, and that when he came back it was nearly dark, after she and her husband had had supper; that he had a piece of meat, which he threw down, and said, "Fry it for supper;" that she asked what it was, and he said, "Well, a big buck I shot;" that after that he told her husband, "You get Hill's horse, and go with me, and help me get that meat home. I have lots in the woods;" that it rained Monday and Tuesday, and on Wednesday he said the meat must be got in; that her husband then went and got Hill's horse, and they then went away, the boy going with them; that in the evening, about 6 o'clock, they came back, bringing three or four sacks of meat on the horse; that they took the meat out, and let it lie over night; that when she saw the meat she said, "Did you kill a beef?" and Spoerner said, "Yes;" that she told Spoerner, "You bring us all into trouble. Whose beef is that?" He said, "What the hell do you want to know about it? Any trouble that I bring on, I defend it, and you mind your own business;" that when Spoerner left he took a sackful of the meat, and "the rest he said we could keep for his board." "He gave the meat to me. My husband said we didn't want it at all, and the next time he come he should take some along. He said when he got his clothes he would take some of it along." Defendant testified: "On the Sunday this beef is alleged to have been killed I was at home. Mr. Spoerner was stopping with me at the time. He came there right after Thanksgiving. There was a sort of agreement between us that he was to help me, and I would return it next fall. I told him, before we went into this agreement, that grub was scarce; times were hard; it would be hard to get provisions. On the Saturday night previous to the alleged killing of this beef, he proposed to me to go out and get some pork. I told him I didn't want any pork. On Sunday morning, after breakfast, he went out, taking my rifle with him. He was gone all day. I did not go with him. I was at home all day, with my wife and boy. He came home about six o'clock on that Sunday evening, bringing a piece of meat —about thirty-five pounds—with him. He remarked to the boy that he had killed a big buck out in the woods. That evening he said he had a big beef in the woods, and wanted me to get a horse, and help him pack it in. I got Hill's horse, and we took the boy with us, went out and got the meat, brought it in, and salted it down. I smoked it afterwards. Spoerner left it at my house. He was to take it home when he came after his clothes. He took some when he left my house."

The court gave to the jury certain instructions asked by defendant, and then, of its own motion, charged them as follows: "Now, gentlemen, I charge you that if this defendant and that man Spoerner went out to the range, or any other place in the woods, and that the defendant killed the steer and helped carry it to his home, and he did it feloniously, then he is guilty. I charge you furthermore,—and bear this in mind,—if he did not kill it, if Spoerner killed it, and he did not believe really that it was Spoerner's property, and he feloniously helped to remove it from the place where it was killed by Spoerner, and he took it to his place, or carried it to any other place, for the purpose of depriving the owner of the property, he is guilty, notwithstanding he did not kill it himself. The killing of the steer or a hog on a man's premises is not larceny. That is not what he is charged with. He is charged with the asportation of the property; that is, taking it and carrying it away. While it lay on the premises there, shot down, it was yet the property of the estate of Elledge; and the man who feloniously took it from that place and carried it away, knowing it was not his own, with the intention of depriving the owner of it, is guilty of larceny."

By our statute, "larceny" is defined to be "the felonious stealing, taking, carrying or driving away the personal property of another." Pen. Code, § 484. The offense is divided into two degrees,—grand larceny and petit larceny. It is grand larceny (1) when the property taken is of a value exceeding $50; (2) when the property is taken from the person of another; (3) when the property taken is a horse, mare, gelding, cow, steer, etc. In all other cases it is petit larceny. Pen. Code, §§ 486–488. To make the stealing of one of the animals named, however, grand larceny, the animal must be a live one, and not a dead carcass. It is true, if one should kill one of the animals for the purpose of stealing it, and then take and carry away the whole or a part of the body, it would be grand larceny. But if one should go into a field and find a dead animal lying there, and should take and carry away the body, or a part of it, it would not be grand larceny, unless the part carried away was of the value of $50 or more. In Hunt v. State, 55 Ala. 138, the law upon this subject is very clearly and correctly stated. In that case the defendant was indicted for stealing a hog, and by the law of the state the stealing of a hog was declared to be grand larceny. The trial court instructed the jury "that if they should believe from the evidence that the defendant killed the hog accidentally, and put it in the swamp for concealment, and not with the felonious intent to convert it to his own use, or with intent to deprive the owner of his property therein, still, if they should believe from the evidence, beyond a reasonable doubt, that he afterwards went to the place where he had carried the hog, and then feloniously took and carried away the same, or any part thereof, he would be guilty as charged in the indictment." On appeal this instruction was held to be erroneous, the court saying: "If the animal was not killed with the intent, then entertained, of stealing it or some part of its carcass, but the act was in truth done without any such purpose, though recklessly, the subsequent cutting and taking away by the defendant of a part of the body, in the course of the night following, or the next day, would not make him guilty of grand larceny, the whole hog being of the value of only six dollars. It is the live hog that he must intend to steal (which he may, of course, do by killing it and then taking it away), that constitutes grand larceny, in such a case. But if after it is killed, no matter by whom, if not done by the defendant, or some one with whom he is conspiring with intent to steal the body or some part of it, a purpose is afterwards formed, and carried into effect, of taking and carrying away a part of the meat, the person guilty of this is not guilty of grand larceny, or of stealing a 'hog,' within the meaning of the statute. The act of trespass and the felonious intent do not so coexist as to make the offender guilty of that crime;" citing Bish. Cr. Law (3d Ed.) § 366 (314), and cases cited in note. The instructions in this case were in clear conflict with the rule above declared. They, in effect, told the jury that if Spoerner killed the steer, and defendant did not believe it was his property, but feloniously assisted to asport the meat to his own house, he was guilty, and should be so found. This certainly cannot be sound law.

The point is made that, according to his own testimony, Spoerner was an accomplice, and that his testimony, being uncorroborated, was not sufficient to warrant a conviction; but that question need not be considered. The judgment and order appealed from should be reversed, and the cause remanded for a new trial.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

112 Cal. 354

LEE et al. v. SUPERIOR COURT OF SAN JOAQUIN COUNTY. (S. F. 429.)

(Supreme Court of California. April 11, 1896.)

ATTORNEYS—APPOINTMENT BY COURT—SUBSTITUTION.

1. Attorneys, appointed by the court in probate proceedings to defend the interests of absent heirs and legatees, are entitled, not only to reasonable compensation for their services, but to considerate treatment, and cannot be arbitrarily discharged.

2. The right of a party under Code Civ. Proc. § 284, to a substitution of attorneys on proper application therefor, is absolute, and the court has no power to refuse a motion by nonresident legatees, who are sui juris, for the substitution of an attorney of their own selection in place of one previously appointed by the court.

In bank. Petition by one Lee and others for a writ of mandamus to the superior court of San Joaquin county to compel a substitution of attorneys. Granted.

John A. Percy, for petitioner. F. D. Nicol, for respondent.

PER CURIAM. This is a petition for a writ of mandate to the superior court to compel a substitution of attorneys. The petitioners are legatees under the will of a deceased person, and reside out of the state of California. In the course of the probate proceedings the judge of the superior court appointed certain attorneys to represent the interests of petitioners. Subsequently petitioners appointed an attorney of their own selection, and moved that he be substituted in place of the attorney appointed by the court. This motion was denied by the court, principally upon the ground—as we infer from the answer—that the attorneys previously appointed had performed valuable services before the motion for substitution, and were still efficiently protecting the interests of the petitioners, while the personal relations of the attorney selected by them to the executor of the will were such as might prevent him from serving them equally well. We do not think that this or any of the grounds suggested in the answer or argument justify the refusal to make the substitution. It is eminently proper that the court should appoint attorneys to guard the interests of absent heirs and legatees, and such attorneys are entitled, not only to a reasonable compensation for their services, but to considerate treatment. The motion originally made to vacate their appointment and to discharge them was, therefore, properly denied; but, on the present motion for a substitution, the petitioners being sui juris, and insisting upon their right, the statute makes the granting of the order imperative. Code Civ. Proc. § 284. Peremptory writ granted.

112 Cal. 401

PAIGE v. AKINS. (Sac. 59.)

(Supreme Court of California. April 13, 1896.)

LANDLORD AND TENANT—PRINCIPAL AND AGENT—EVIDENCE—BURDEN OF PROOF—INJUNCTION.

1. It appeared that defendant had been for several years foreman in charge of all plaintiff's lands, with authority to rent the same, and negotiate the purchase and sale of land; that, in 1891, a tract of 500 acres was subdivided for purposes of sale; that, prior to the subdivision, 350 acres of this tract had been leased for the planting of a crop in the winter of 1891, which would not mature till 1892, and that the tenant had summer-fallowed the same in the spring of 1891; that, at defendant's suggestion, plaintiff purchased the summer-fallow from the tenant; that, as plaintiff's foreman, defendant had authority to cultivate lands for plaintiff's benefit; that, November 21, 1891, defendant wrote plaintiff, "There is 350 acres of summer-fallow; * * * I will need seed wheat to put it in," and again, December 1st, "What shall I do with the summer-fallow?" that not till two

months after he began seeding the land was there an intimation that defendant was putting it in on shares; that plaintiff paid for the labor employed in putting in the crop, and furnished the seed. *Held*, that the evidence was insufficient to establish the relation of landlord and tenant.

2. An agent can acquire rights in the property of his principal only through a personal contract with him.

3. The burden of showing such contract is on the agent, and it must appear to be fair, just, and reasonable.

4. A party to an instrument purporting to be a settlement in full cannot testify that it did not include a certain item, afterwards in controversy.

5. To entitle a landowner to an injunction restraining another from removing a crop from the land, absolute and complete insolvency of defendant need not be shown.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Injunction by Timothy Paige against S. L. Akins. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Pringle, Hayne & Boyd and C. A. Stonesifer, for appellant. Easton & Griffin, for respondent.

HAYNES, C. Suit to enjoin defendant from harvesting and removing a crop from plaintiff's land. The defendant had judgment, and the plaintiff appeals therefrom, and also from an order denying his motion for a new trial. Certain special issues were submitted to a jury, and these being found in favor of the defendant were adopted by the court, and incorporated in the general findings, all of which, appellant contends, were not justified by the evidence; and he also specifies several particulars in which he alleges the court erred in its rulings upon matters of evidence.

During all the time covered by the evidence, the plaintiff resided in the city of San Francisco, and owned large quantities of land in the counties of Stanislaus and Merced. About ten years before the commencement of this action the defendant became a tenant, or cropper, upon a portion of plaintiff's land in Merced county known as the "Gardner Ranch," and farmed it two years upon shares. At the expiration of that time the defendant was employed as agent and foreman in charge of all plaintiff's lands in said counties, with authority to rent the same, collect the rents, and negotiate the purchase and sale of land. Afterwards, at defendant's suggestion, an arrangement was made between the parties by which the plaintiff purchased cattle, and furnished pasture for them, the defendant to take charge of them and pay "the running expenses," and, after deducting 1 per cent. per month interest on the purchase price of the cattle, was to receive one-half of the profits as compensation for his services and expenses. This relation between the parties as to the cattle, and the relation of principal and agent in reference to renting the land and defendant's control as foreman, continued until March 25, 1892, when the plaintiff discharged him. Whether the other relation, that of landlord and tenant, existed at that time, is the principal question in the case, the subject of the action being the ownership of a crop upon 500 acres of plaintiff's land which the defendant claims he put in as tenant, he to pay a share of the crop for the use of the land. Acting upon this claim the defendant began to cut and remove said crop, and plaintiff, claiming that the crop was not planted by the defendant upon shares, but that he did it as plaintiff's foreman, for plaintiff's benefit, and at plaintiff's expense, brought this action to enjoin him from cutting and removing said crop.

I think the evidence insufficient to justify the finding that defendant planted the crop under an agreement with the plaintiff that he should cultivate said land as tenant for a share of the crop. The crop in question was grown upon 500 acres of land, which was part of a larger tract containing about 1,400 acres. The whole tract was subdivided, in the summer of 1891, into lots or parcels of about 20 acres each for purposes of sale. Prior to the subdivision, 350 acres of the 500 upon which the crop in question was grown was let to a third party for the purpose of raising a crop thereon, to be planted in the winter of 1891, and harvested in 1892, and the tenant had summer-fallowed the same in the spring of 1891. When it was concluded to subdivide the land into colony lots, it was thought that the cultivation of the summer-fallow by said tenant might interfere with the sale of the lots included in the 350 acres already plowed by the tenant, and at defendant's suggestion the plaintiff purchased the summer-fallow from the tenant, paying therefor $2.50 per acre. This statement as to the situation and condition of the land, and of the relations existing between the parties, is essential to a just and true comprehension of the evidence upon the vital point of the controversy.

There is no controversy or conflict as to the fact that the defendant was the agent of plaintiff in renting his lands and collecting the rents. For these services, and for his services as foreman, he received a compensation of $50 per month. The record does not specify with any particularity the duties attached to the position of foreman, but we may assume that the word is used in its ordinary sense, denoting the chief or superintendent of employés, as one who has the general oversight and care of the property. All of these duties involve the relation of principal and agent, and it was not in the power of the defendant to contract, as the agent of the plaintiff, with himself as the other party to the contract. A tenancy, such as is claimed by the defendant to have existed as to this land and crop, could only be created by contract; and, if the contract were valid, it gave the tenant the exclusive right to the control and possession of the crop until it was harvested and divided, and vested in him the absolute ownership of the share to which he was entitled. That an agent cannot confer upon himself such rights and privileges in the lands and property of his principal is too well settled to require extended discussion or citation of authorities. It is only necessary to say that the absence of an intention on the part of the agent to injure his principal, or that the self-imposed terms of the tenancy were those usually made in renting to third persons, do not affect the question, and will not defeat the plaintiff's right to the remedy he has invoked. Pom. Eq. Jur. § 959, quoted and approved in Sterling v. Smith, 97 Cal. 343, 32 Pac. 320.

The only question of fact, therefore, which need be considered is whether the plaintiff personally leased the land to the defendant. The defendant was not only an agent for the purpose of leasing plaintiff's lands and collecting the rents, but was also plaintiff's foreman; and it is not questioned that, in the latter capacity, he had authority to cultivate the tract in question, and raise the crop in controversy, for the plaintiff's benefit, and at his expense; and, in the absence of evidence of an agreement that he should cultivate the land as tenant of the plaintiff, the presumption is that he did it as plaintiff's foreman, since he had authority to cultivate it as foreman; and, in the absence of a special agreement, he had no authority to cultivate it as tenant. The burden is therefore upon the defendant to show such an agreement as authorized him to cultivate it as tenant, and the proof of it must be clear.

It is true the defendant denied that he put in the crop as foreman for the plaintiff, but that is no evidence of an agreement between him and the plaintiff that he would put it in for a share of the crop. He testified, however, that when it was decided to purchase the summer-fallow, the plaintiff asked, "What will we do with the summer-fallow in case the land is not all sold?" and defendant replied, "Any that is remaining there I will put it in"; that plaintiff replied, "Very well," and, "pursuant to that understanding or conversation, I put in the crop." But, as already shown, he was authorized to put in the crop for the plaintiff as his foreman, and the language used was entirely consistent with his intention to do so, and gave no intimation of a purpose to cultivate the land on shares. Besides, in accordance with his advice, the plaintiff had just purchased the summer-fallow, because, if a tenant cultivated the land, he would desire, and would be entitled, to hold it until his crop was removed, and if the defendant entered into the same relation, and put in the crop on the same terms, his rights and interests would be as secure and sacred; and the plaintiff, upon that theory, gained nothing by buying off the former tenant at an expense of $875.

According to defendant's testimony, the foregoing was all that was said in regard to putting in the crop until in February, 1892, notwithstanding he commenced to put it in as early as December 14, 1891. As to the conversation in February, the defendant testified that plaintiff asked him "how he was putting it in,—what the conditions were?" The inquiry itself would appear remarkable if there had been an "agreement" in regard to it made long before. Defendant, however, replied, "Just the customary way,—the same as the others"; and that plaintiff did not dissent. Upon being asked what part of the crop he claimed for himself and what part for Mr. Paige, he replied: "Three-fourths for myself and one-fourth for Mr. Paige. That was never expressly mentioned between myself and Mr. Paige. Those are the usual conditions for putting in crops on the shares; that is, where the landowner furnishes nothing but the land. The seed that seeded this land came from Newman's warehouse. It was Mr. Paige's wheat. I do not know whether that was ever charged to me or not. I never drew an order on Mr. Paige for the wheat. I sent him a statement of the amount used, I think." He further testified that he had some talk about the seed, and plaintiff told him, if he could get some better seed than was in the warehouse, to buy it; that he thought he traded with Newman for part of the seed (traded Paige's wheat), and paid four bits or a dollar a ton difference. "The difference was charged, I presume, and Mr. Paige paid it." Upon further cross-examination defendant identified certain letters written by him to the plaintiff, from which certain passages are quoted as follows: November 21, 1891: "There is 350 acres of summer-fallow on the Montgomery ranch. I will need seed wheat to put it in." December 1, 1891: "What shall I do with the summer-fallow on the Montgomery land? It ought to be put in soon." December 11, 1891: "Newman has not got any wheat that is better than yours that is stored there, so I will sow it. I don't need an order for the wheat." December 14, 1891: "I am getting in the summer-fallow now. Running four six-horse harrows. Looks like rain. We are on it alone." December 17, 1891: "Summer-fallow is going in in good shape. The rain stopped me a day and a half, but have been working this afternoon. We had forty-seven hundredths of an inch of rain last storm. The weather is warm and grain will come quickly if the weather continues favorable." December 28, 1891: "I am plowing for barley. We had quite a nice rain yesterday, and it is now raining again and is warm. Vegetation is starting in early."

The foregoing synopsis of the testimony shows the material facts directly touching the crop here in question, as brought out on the examination of the defendant. It will be observed that, until some two months after he commenced seeding the land, there was no intimation that he was putting it in on shares; that, though the ground had been summer-fallowed at an expense to the plaintiff of $875, no provision was made for the repayment of that sum, and, while he claimed the benefit of furnishing the seed, it was furnished by the plaintiff without any agreement that it should be charged to him or repaid out of the crop. These circumstances are wholly inconsistent with defendant's claim, but are entirely consistent with the contention of plaintiff that he did the work as plaintiff's foreman. The plaintiff not only testified that the defendant put in the crop for him as his agent or foreman, that he paid him $50 per month for his services as such, but that "he [the defendant] employed the labor and I paid them. The seed used was mine. I had it stored at Mr. Newman's warehouse, and the seed was taken from there to put in this crop. The crop was put in upon summer-fallow. The former tenant had done the work of summer-fallowing. I paid that tenant $2.50 per acre for doing it,"—and expressly denied any arrangement or agreement that defendant should put it in on shares. The defendant did not deny plaintiff's express statement that he paid for the labor employed in putting in the crop, and admitted that he also paid for the summer-fallowing, and that the land was sown with plaintiff's wheat, and did not know whether it was charged to him or not.

There was much testimony as to the continuance of the relation of landlord and tenant after defendant became plaintiff's agent and foreman. The defendant insisted that he farmed portions of plaintiff's land almost, if not quite, every year; that, if he failed to find a tenant, and the season was well advanced, he would put in the crop himself; that "there might have been some seasons I made special contracts, and other seasons I would put it in without consulting him; just go ahead,—go right along just the same as I had done, perhaps, the year before." The plaintiff testified that there had been occasions when a special arrangement had been made with the defendant, either verbally or by letter, but that he did not otherwise raise crops upon the shares so far as he knew; that he might have done so without his knowledge, as he seldom knew the names of the tenants cultivating the land, the reports being usually made as to particular lands, and not as to particular tenants; and denied that the defendant was authorized to cultivate his lands on shares without special authority. It is not necessary to discuss this part of the evidence, nor to consider how far the custom of the parties can affect or enlarge or create the power of an agent to deal with himself as to his principal's property; for, though the agent may contract with his principal, yet the fact that a contract was made must be clearly shown, and the burden of showing it must rest upon the agent, and it must also appear to be fair, just, and reasonable, or the principal will not be bound. In no aspect, therefore, is the finding of the alleged cropping agreement justified by the evidence. Other findings intimately connected with the principal one above discussed must fall with it.

After the defendant was discharged by the plaintiff, a settlement was had between the parties, and the following paper was executed by defendant to plaintiff: "Newman, April 21, 1892. Received of Timothy Paige one hundred dollars in full satisfaction for all demands of every kind and nature to date, and for any interest I have in any of the mowers and wagons and tools of every kind on the ranch of said Paige. S. L. Akins." And plaintiff executed and delivered to the defendant the following: "Newman, April 20. 1892. Received of S. L. Akins one hundred dollars in full of all notes and book accounts and all demands to date. Timothy Paige." Upon cross-examination plaintiff testified that he and the defendant met and agreed upon the terms of settlement; that he told defendant he preferred to settle all their matters rather than to have any litigation, and he said, he did, too; and, upon the examination in chief of defendant, he was asked by his counsel the following question: "I will ask you whether or not you have settled with Mr. Paige in a way to include that crop, and to transfer your rights to him in connection with other conditions you made in the settlement, whatever they were." Plaintiff's objection was overruled, and the witness answered: "No, sir; I would not." The court erred in overruling plaintiff's objection. It permitted the defendant to testify to the legal effect of a written instrument, and say to the court and jury that the receipt did not cover or include the crop in controversy. He could testify as to the situation of the parties, the surrounding circumstances, and to such matters of fact as would put the court as nearly as possible in the situation of the parties; but he could not be permitted to testify to his intentions, or to the meaning or legal effect of the writing.

Whether the instrument has or should be given the conclusive effect contended for by appellant need not be considered, in view of the conclusions reached upon other points. The evidence may be quite different upon another trial, and, as already stated, it must be read and construed in the light of surrounding circumstances disclosed by the evidence. This much may be said, however, that, if it be conceded that defendant put in the crop upon shares, and the effect of the settlement and receipts should be held to operate as a release of the defendant for the cost of the summer-fallow, or the value of the seed wheat which belonged to the plaintiff, or the expense of putting in the crop, the contention of the plaintiff that the defendant thereby released all claim to the crop should be sustained. Respondent, in his brief, says: "Anything charged to Akins for seed or feed was settled by the receipts, because this was a book account." But it must be evident that the defendant cannot shield himself behind the settlement from any liability connected with the crop, and at the same time insist that his right to the crop was not considered in or affected by the settlement. Putting such contention in plain English, the defendant would say: "The plaintiff furnished the land and the seed, advanced the cost of the summer-fallow, paid for the labor in putting in the crop, and paid me for superintending it, then released me from all these liabilities, and leaves me three-fourths of the crop for harvesting it."

The evidence of the inability of the defendant to respond in damages was sufficient. Absolute and complete insolvency need not be shown. The granting of injunctions are to some extent matters of discretion, and should be exercised in favor of the party most likely to be injured. Hicks v. Compton, 18 Cal. 206; Real Del Monte Consol. Gold & Silver Min. Co. v. Pond Gold & Silver Min. Co., 23 Cal. 83, 85.

The judgment and order appealed from should be reversed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

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112 Cal. 345

STEVENS v. HOLMAN et ux. (No. 19,475.)

(Supreme Court of California. April 11, 1896.)

MORTGAGE ON HOMESTEAD—ACKNOWLEDGMENT BY WIFE—MISTAKE—REFORMATION.

1. The statute, requiring a mortgage on the homestead to be signed and acknowledged by the wife in the statutory form, relates merely to the execution of the instrument, and will not prevent the reformation of a mortgage on the homestead, properly signed and acknowledged, which, by mistake of the mortgagee, did not include all the land which the parties had agreed that it should cover, on the theory that the mortgage, as reformed, would not be so acknowledged by the wife.

2. Civ. Code, § 3399, providing for the reformation of written instruments which, by "mutual mistake of the parties or a mistake of one party which the other at the time knew or suspected," applies to a mortgage on the homestead, which, by mistake of the mortgagee, but with the knowledge of the mortgagors, did not include all the land that the parties had agreed it should cover.

Temple, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by William Stevens against one Holman and his wife to reform a mortgage. Judgment for plaintiff, and defendants appeal. Affirmed.

Jos. McKinley, for appellants. J. D. Reymert, for respondent.

McFARLAND, J. This is an action for the reformation of a mortgage executed to plaintiff by the defendants, Holman and wife, and to foreclose the same. Judgment went for plaintiff, and defendants appeal from the judgment, bringing up the judgment roll alone.

Respondent had a former note and mortgage from appellants, and appellants, desiring further time, agreed to give a new note and a mortgage to secure it covering certain described land. Respondent consented, whereupon the old note and mortgage was canceled, and the note and mortgage now in suit was given. But the description in the new mortgage did not include all the land which appellants had agreed to mortgage. Respondent supposed that the description did include all such land, and accepted the mortgage under the mistaken notion that he was thereby getting a lien upon all the land which appellants had promised to mortgage. Appellants knew that the description did not embrace all said land, but they, and each of them, "knew that plaintiff believed that the mortgage, as executed by them to him, did include all the land they, and each of them, had agreed to mortgage as aforesaid, and that plaintiff was deceived in so believing, and took and accepted said mortgage with the mistaken belief that the same did embrace all the land said defendants had agreed to mortgage to him."

If the appellants were both men, and there were no question of homestead rights involved, there would be no plausible objection to the judgment. But the land constituted the homestead of the appellants, and their counsel contend that, as a homestead can be conveyed or incumbered only by an instrument signed and acknowledged by both husband and wife, the acknowledgment of the latter to be in the form provided for the acknowledgment of married women, therefore there could be no reformation of the mortgage by the court, because such reformation would not have the sanction of the wife's acknowledgment. But the provisions of the statute invoked merely prescribe the things which are requisite to the due execution of a written instrument by a married woman. It may be readily conceded that she is not bound by any instrument not executed by her in the manner prescribed by the statute. When, however, she has duly executed a contract, there is no reason why she does not bear the same relation to it, and to rights and remedies under it, as any other contractor. See Hamar v. Medsker, 60 Ind. 413, and Society v. Meeks, 66 Cal. 371, 5 Pac. 624. And in the case at bar the contract—the mortgage—was duly executed by the appellants, the wife having signed and acknowledged it with all the formalities prescribed by the Code. If, therefore, the mortgage could have been rightfully reformed as decreed by the court, in case neither of the mortgagors had been a married woman, the decree was right as against the appellants. The fact that the land was a homestead cuts no figure. Parties can contract as to their homestead as fully as to any other land, provided their contract be executed in the manner prescribed by statute. These views are sustained by the decision and opinion in Society v. Meeks, 66 Cal. 371, 5 Pac. 624. There the lower court had reformed a mortgage upon land which was the separate property of the wife, so as to make it describe the land intended to be mortgaged; and we see no difference in principle between that case and the one at bar. It was there contended that "the court erred in reforming the mortgage, because the mortgage, as reformed, was not the act and deed of the wife, as it was not acknowledged by her as required by law." But the court said: "It is merely carrying into effect the intention of the parties. No new right was conferred. The instrument was reformed, so as to express truly the intention of the parties. Hayford v. Kocher, 65 Cal. 389, 4 Pac. 350. If such mistakes could not be corrected, gross wrong and injustice would result. By the reformation of the instrument and the correction of the mistakes, the object and policy of the law as to the conveyance of the separate property of a married woman are not controverted or thwarted." In Hayford v. Kocher, 65 Cal. 389, 4 Pac. 350, Flavel Hayford had made a conveyance to Kocher in which certain premises were "intended to be, but by mutual mistake were not, included." Kocher afterwards, in an action against Flavel, had the conveyance reformed so as to include said premises. But before the reformation, Flavel's wife, Lydia Hayford, selected said premises as a statutory homestead. The two Hayfords then brought an action in ejectment to recover said premises, upon the theory that there could be no judicial reformation of a conveyance affecting a homestead. They were defeated in the lower court, and the judgment was affirmed here. But, if the homestead had existed at the time of the conveyance, and the wife had duly executed the conveyance in the manner as prescribed by the statute, must not the judgments in the suit for reformation and in the action of ejectment have been, upon principle, the same?

Counsel for appellants cite Barrett v. Tewksbury, 9 Cal. 14; Leonis v. Lazzarovich, 55 Cal. 52. The former case is not at all in point; for there it was merely held that the consent of a married woman to execute an instrument must be perfectly free, and that "it is not in the province of a court of equity to compel a married woman to correct an insufficient acknowledgment." Leonis v. Lazzarovich lends some support to appellants' contention; but that case, in the character of the action and the substance of the judgment, is different from the case at bar, and the form of the judgment was evidently the thing most prominent in the mind of the court when the opinion was delivered. That action was evidently not for the reformation of a conveyance which had been already properly executed by a married woman, but for a decree compelling her to execute another conveyance. The court, in its opinion, says: "Was it within the equitable powers and jurisdiction of the court below to decree, as it did, that the defendant should, within a certain time, fixed by the decree, execute to the plaintiff her deed conveying lands not described in any deed or other written instrument, and, in case she made default, that such deed should be executed by the clerk of the court? That is what the court did by its decree, and it is the correctness of such proceeding that we are now called upon to review." It is true that, in the opinion, there are some statements about the reformation of a married woman's deed which are inconsistent with Society v. Meeks; but they are mainly dicta, and, if any of them can be considered as forming a part of the decision, they must be held as overruled by the case last above mentioned. See, also, Banbury v. Arnold, 91 Cal. 610, 27 Pac. 934. When a conveyance, mortgage, or other contract of a married woman has been duly executed by her as provided by statute, it is subject to reformation in like manner as the contract of any other person. In such a case, she has no special license to insist upon a wrong caused by fraud or mistake.

Most of the adjudged cases upon the subject deal with mutual mistakes, but the Code provides expressly for the kind of mistake involved in this action. By section 3399 of the Civil Code it is enacted as follows: "When through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written instrument does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it may be done without prejudice to rights acquired by third parties in good faith." There is no difference between a description which does not include all the property intended to be included, and a description which is defective in any other respect. In either instance, an action for a reformation lies. Hayford v. Kocher, supra, is an instance of the one kind. Society v. Meeks, supra, is an instance of the other.

We see nothing in the point that there is no averment in the complaint that the mortgage as mistakenly made is not sufficient security. Respondent was entitled to all the security for which he contracted. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.; HENSHAW, J.

TEMPLE, J. I dissent. The mortgage in question here was executed February 9, 1889, long before the provisions of the Code requiring conveyances of married women to be executed in a special mode were repealed. The complaint charges that certain parts of the homestead which defendants had agreed to mortgage were omitted by mutual mistakes. Defendants denied that they ever made such promise and that there was any mistake. The court found that plaintiff supposed that the mortgage was to include the certain homestead, and that defendants knew that such was his understanding, but they knew that it did not include the homestead, and did not intend that it should. In other words, the wife signed and acknowledged the mortgage after having it explained to her that it did not cover the entire homestead, and would not have executed it if it had included it, and now, on a finding that her husband practiced a fraud upon plaintiff, the court is asked to hold that she did execute such a mortgage, and acknowledged that she did so freely and voluntarily, and that, after being made acquainted with its contents, she did not wish to retract the execution of the same. To my mind the mere statement has the force of a demonstration, but the identical question was settled by this court in Leonis v. Lazzarovich, 55 Cal. 52. This decision has been frequently affirmed by this court. The finding that the defendants promised and agreed to mortgage to plaintiff the entire homestead is not supported by the evidence. No such agreement could be made except by an instrument signed and acknowledged by both husband and wife. The action is really to enforce specific performance of a parol contract to give a mortgage upon the homestead. To so decree is, in my opinion, to violate the law.

112 Cal. 422

PEOPLE v. MARSHALL. (Cr. 77.)

(Supreme Court of California. April 15, 1896.)

MURDER—INSTRUCTION—BURDEN OF PROVING JUSTIFICATION OF KILLING—REVIEW.

1. An instruction, in the trial of a defendant for murder, that, when the act of killing has been proved, the burden of proving justification devolves on the defendant, and it must be established by a preponderance of the evidence, is erroneous.

2. Where an instruction was given erroneously imposing on the defendant the burden of proof on an issue, and there was evidence tending to support his defense on such issue, a reviewing court cannot weigh the evidence on the question, and determine therefrom that the error was not prejudicial.

3. An instruction erroneously imposing the burden of proof on a defendant to establish a defense is not cured by the giving of a general instruction correctly stating the law as to reasonable doubt.

In bank. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Charles Marshall was convicted of murder, and appeals. Reversed.

R. E. Bledsoe and C. C. Haskell, for appellant. Atty. Gen. Fitzgerald, for the People.

TEMPLE, J. The defendant was convicted of murder in the first degree, and takes this appeal from the judgment, and from an order refusing a new trial.

Appellant makes several points upon which a reversal is claimed; but, as I think a new trial must be had, and as most of the alleged errors are of a character not likely to be repeated, they need not be noticed. The homicide was practically admitted by the defendant, but he claimed that it was in necessary self-defense. At the request of the district attorney the court gave the instruction approved in People v. Hong Ah Duck, 61 Cal. 394, but which, upon mature consideration, was declared erroneous in People v. Bushton, 80 Cal. 160, 22 Pac. 127, 549, and in People v. Lanagan, 81 Cal. 142, 22 Pac. 482. The instruction was as follows: "Up to the moment when the killing is proved, the prosecution must make out its case beyond a reasonable doubt. When the killing is proved, it devolves upon the defendant to show any circumstance in mitigation, to excuse or justify, by a preponderance of evidence on his part; that is, the killing being proved, the defendant must make out his case in mitigation, to excuse or justify, by some proof stronger in some appreciable degree than the proof of the prosecution. The burden of proof changes. It must be in some appreciable degree, no matter how small, stronger than the proof of the prosecution on the other side." The attorney general admits that the instruction was erroneous, but claims that it was not injurious for two reasons:

1. There was no evidence in the case which tended to make a case of justifiable homicide, or which tended to reduce the grade of the offense. To show this he prints in his brief what purports to be an extract from the opinion of the trial judge in refusing a new trial. In this appears a statement of the facts in regard to the homicide, made for the purpose of showing that there was no possible claim that the killing was in necessary self-defense. That nearly every material fact in this statement was contradicted by the defendant as a witness is absolutely conclusive that the instruction was injurious. That the testimony of the defendant did tend to show justification is admitted by the judge in this statement, but he says his evidence was uncorroborated; and he says such was the case in People v. Smith, 59 Cal. 601, where it is held that a similar instruction was not injurious because there were no facts which tended to show justification. I do not so understand that case. On the contrary, the court said, as I read the case, that even the defendant testified to no fact which tended to justify the homicide. The defendant had a right to have his own testimony considered, and, if it was sufficient to raise a reasonable doubt in the minds of the jurors as to whether the killing was justifiable, he was entitled to an acquittal, though he was entirely uncorroborated.

The point made by the attorney general really is that the evidence against the defendant was so overwhelming that his uncorroborated testimony could not possibly be accepted by the jury, and, therefore, he is not injured. But this court cannot thus pass upon the evidence. This court has no jurisdiction in criminal cases, save on questions of law. The law has prescribed certain rules of pleading, practice, and evidence, in accordance with which persons accused of crimes must be tried. This court has appellate jurisdiction for the correction of errors in such cases. Evidently, the function of this court, on such an appeal, is to determine whether a defendant has been tried as the law prescribes. If he has not been, there is but one way to correct the error, and that is to grant a new trial. But a defendant would not be entitled to a new trial for any error which has not prejudiced his case. This rule prevails in civil, as well as criminal, cases. But this court cannot say that a defendant has not been injured because, notwithstanding the error, he must have been convicted anyway, as the evidence is very convincing. We cannot look at the evidence, except for the purpose of considering some questions of law which may be raised in regard to it. We can only regard persons guilty or innocent upon a verdict of a jury upon a trial according to law. If an appellant has been wrongly deprived of evidence, or has been required to make a stronger case than the law demanded, he has been injured.

2. The other ground upon which the attorney general claims that the instruction is not injurious is because the court gave other instructions of a contrary effect. For instance, the jury was told that the burden of proof always was upon the people, and that it was only necessary for the defense to create a reasonable doubt as to his guilt to entitle him to an acquittal. To give contradictory instructions must be to commit error, and it is almost always impossible in such cases to say that the jury has not followed the erroneous instruction rather than the correct one. If the court properly instructed the jury, for defendant, that it was only necessary to create a reasonable doubt to entitle him to an acquittal, and then instructed them that this rule only applied up to the time when it was proved that defendant killed the deceased, but from that time defendant must make his defense by a preponderance of proof, no one would doubt that the last instruction was injurious, notwithstanding the correct general proposition. In effect, that is exactly what was done here.

The judgment and order are reversed, and a new trial ordered.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; VAN FLEET, J.; HENSHAW, J.

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112 Cal. 375

SWINNERTON et al. v. ARGONAUT LAND & DEVELOPMENT CO. (Sac. 71.)

(Supreme Court of California. April 13, 1896.)

PRINCIPAL AND AGENT — CONTRACT OF AGENT — IMPLIED PROMISE—INTEREST—EVIDENCE.

1. One who had been and was ostensibly the general agent of a corporation, employed plaintiffs to render certain professional services for the corporation. Plaintiffs had knowledge of such agency, and to the time of their employment and rendition of the services had no notice of a termination thereof. *Held*, that the corporation was liable for the services.

2. A finding of an express promise to pay for services rendered, unsupported by the evidence, is without prejudice where there is an implied promise to pay, and the value of the services is shown.

3. Where the amount due is not susceptible of ascertainment by computation or by reference to market rates, plaintiff is not entitled to interest prior to verdict or judgment.

4. One professing to be an agent authorized to employ counsel for his principal may be asked whether he employed the counsel for himself individually or for his principal.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by J. G. Swinnerton and W. N. Rutherford, co-partners as Swinnerton & Rutherford, against the Argonaut Land & Development Company and others. From a judgment in favor of plaintiffs against the defendant company, and an order denying a new trial, said defendant appeals. Modified.

Dudley & Buck, for appellant. Swinnerton & Rutherford in pro. per.

SEARLS, C. Action to recover by the plaintiffs, as co-partners, from the corporation defendant and certain others the sum of $575 for services rendered by plaintiffs in the year 1892, with interest thereon from January, 1893. The cause was tried by the court without a jury. A nonsuit was granted as to all the defendants except the corporation, against which judgment was entered for $500 and legal interest from January 1, 1893, amounting to $577.83. Defendant appeals from the judgment and from an order denying its motion for a new trial.

The corporation defendant was the owner of a tract of land situate near Stockton in the county of San Joaquin. On the 12th day of September, 1888, the defendant entered into a written contract with George H. Fairbrother, by the terms of which the latter was employed by the former for a term of one year, to locate himself at Stockton, and act as the agent of the former in and about the land and business of the corporation; to negotiate leases of the land, collect rents, and generally to transact all its business in relation to said land and such other land as might be purchased in the vicinity. The agreement of agency provided that the agent should not bind the corporation (which was located at San Josê) to pay any money or assume any responsibility, unless such acts were ratified by the company. Fairbrother located in Stockton, took charge of the land, leased it to sundry parties, built levees, did dredging, constructed a wharf, and managed the property generally during the term of one year. He incurred obligations and contracted debts, all of which were met and paid by the company, so far as appears, without objection. In October, 1889, the corporation, by a resolution duly passed, declared the agency of Fairbrother vacant upon the expiration of the year. He continued, however, as before, to manage and attend to the property, and up to 1892 seems to have made leases, collected rents, etc. His general management and agency was known to plaintiffs, who knew nothing of the terms and conditions of the agency, or of its termination by act of the company. Fairbrother became president of the corporation, and served as such for one year. The precise time of such service does not clearly appear, but it is to be inferred that it was from April, 1890, to April, 1891. In August or September, 1892, he employed the plaintiffs to bring several suits to collect rents due from tenants upon the land. They collected some $2,500, and their services were at the trial admitted to be reasonably worth $500.

The question of fact involved on this appeal is this: Did Fairbrother, in August or September, 1892, have authority, either actual or ostensible, to bind the corporation defendant in the employment of the plaintiffs and respondents herein? The defendant introduced no evidence except such as was drawn from the witnesses of plaintiffs. The testimony is not as full and explicit on some points as could be wished, but is deemed sufficient to maintain the following propositions: (1) Fairbrother was the general agent of the corporation defendant. (2) Plaintiffs had knowledge of such agency. (3) Said plaintiffs never had any notice of the termination of the agency. (4) Said Fairbrother was the ostensible agent of defendant up to the date of the employment of plaintiffs and the rendition by them of the services for which a recovery was had. These propositions having evidence in their support, the court was warranted in concluding, as found by the first finding, that defendant was on the 1st day of January, 1892 (1893), indebted to plaintiffs, etc. The date 1892 is evidently a clerical error, and that 1893 was intended is apparent from the record. The last portion of the finding is as follows: "And it was agreed by said company that said services should be paid for on January 1, 1893." No evidence is found in the record supporting this finding of an express agreement to pay by defendant on the 1st of January, 1893, or at any other time. But, as the law implies a promise to pay by defendant upon the performance of the services for it, etc., and the showing of their value, it is not perceived that defendant was injured by the finding, except as it may serve as a predicate for allowing interest on the claim. The allowance of interest was error. In an action to recover the reasonable value of services performed by a plaintiff, the amount, character, and value of which can only be established by evidence in court, or by an accord between the parties, and which are not susceptible of ascertainment by computation or by reference to market rates, the plaintiff is not entitled to interest prior to verdict or judgment. Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100; Brady v. Wilcoxson, 44 Cal. 239.

There was no error in the ruling of the court permitting plaintiffs' counsel to ask the witness Rutherford on whose behalf the plaintiffs were employed. The declarations of an alleged agent are not admissible to prove the fact of his agency, or the extent of his power as such agent. But the question whether one professing to be an agent employs another in his individual capacity or for another is quite a different question, —a question which goes to the character of the act, and not to his authority to perform it. An agent duly authorized to employ counsel for his principal would not bind such principal by employing such counsel for himself individually.

There are no other errors assigned calling for a consideration. We recommend that the cause be remanded, and the court below be directed to strike out from the judgment the sum of $77.83, and that, as thus amended, the judgment and order appealed from be affirmed, and that the appellant recover its costs on this appeal.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the cause is remanded, and the court below directed to strike out from the judgment the sum of $77.83, and that, as thus amended, the judgment and order appealed from are affirmed, and that the appellant recover its costs on this appeal.

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112 Cal. 426

MERRILL v. SOUTHSIDE IRRIGATION CO. (L. A. 112.)

(Supreme Court of California. April 15, 1896.)

IRRIGATION—ACTION TO COMPEL FURNISHING OF WATER—IRRIGATION CORPORATION.

1. In an action against a corporation for a mandamus to compel the furnishing of water for irrigating purposes, an allegation that defendant was organized for such purpose, and a finding of such fact, are justified, although there are other purposes of its organization, not involved in the action, as to which neither allegations nor findings are made.

2. An allegation, in the answer of such company, that it has not sufficient water to supply the plaintiff, and all lands lying under its ditch that need water, states no defense, in the absence of an averment that others have demanded or have purchased it.

3. Neither does an allegation that defendant is likely to lose its supply of water at a future time state a defense.

4. Const. art. 14, § 1, providing for the regulation and control by the state of all water "appropriated for sale, rental, or distribution," applies to all water set apart for, or devoted to, such purposes, whether taken from public streams, or acquired from other sources.

5. The second clause of Civ. Code, § 552, providing that the owner of cultivated land within the flow of the ditch of a corporation, who has been furnished water for irrigation, shall be entitled to the continued use of water for that purpose, applies to all water and canal companies, and is not confined to those that have sold land to be irrigated, referred to in the first clause of the section.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Mattie H. Merrill against the Southside Irrigation Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Anderson & Anderson, for appellant. John D. Pope, for respondent.

SEARLS, C. Mandamus proceeding to compel the defendant, a corporation, to furnish to plaintiff water to irrigate plaintiff's land, to wit, the W. ½ of the S. E. ¼ of section 21, etc., to the extent of one-half the flow of a 22-inch round pipe, twice per month, for 36 hours each time, once on or about the 1st day of each month, and once on or about the 15th day of each month, upon tender by plaintiff to the defendant of the reasonable and customary charges for said water. Plaintiff had judgment in consonance with the prayer of her petition. The appeal is from the judgment, and from an order denying a motion of defendant for a new trial.

Defendant is a corporation, organized under the laws of the state of California. The objects of the corporation, as expressed in its articles of incorporation, are: "To care for and manage the water and sewage flowing through any or all of the sewers of Los Angeles city, and to enter into and make an agreement or contract with the city of Los Angeles relating to the care and management of the water and sewage flowing through any or all of the sewers of said city, and flowing in or through any ditch or zanja of said city, and to construct sewers, aqueducts, and other means of carrying the sewage of said city, or any water acquired by said city, or from any place, upon any lands, for the purposes of irrigation, and to distribute and sell the same for the purposes of irrigation, or any other purposes, and to acquire lands and rights of way, and do all other things necessary to be done to carry out the business aforesaid." Defendant admits that it procured a right of way by conveyance from plaintiff and one Fleming, across the land of plaintiff described herein, and constructed and placed thereon a pipe 22 inches in diameter and of a capacity of 450 inches, which pipe has sufficient capacity to supply water for the irrigation of plaintiff's land, but denies that it has the capacity, or that defendant has the water, to supply plaintiff and all the lands that lie under the flow of its ditch that need water for irrigation; that it has a steady supply of only 180 inches, to which it has occasionally added by purchase from the city zanjas, and that all its water has been sold to persons along the line needing water for irrigation during the irrigating season, and that it could not supply the demand of plaintiff without depriving others of needed water, etc., and that, if it had 450 inches of water it would all be needed by such other persons, etc.

The court found that the plaintiff and S. A. Fleming conveyed to defendant, on the 21st day of February, 1889, a right of way across the land in question for its water pipe, for a nominal consideration, but that the real inducement for such conveyance was an understanding (not in writing) that plaintiff could have water from defendant's pipe to irrigate her land; that defendant furnished her water for a time, and then extended its pipe, and sold its water to others, and refused to furnish plaintiff with needed water, though requested so to do. The court also found paragraphs 1, 2, 4, and 7 of plaintiff's amended complaint true.

The only specification of particulars in which the evidence is insufficient to sustain the findings is: "That the third finding of the court is not sustained by the evidence, in so far as it finds that paragraph 1 of plaintiff's complaint is true, for the reason that the evidence shows that the defendant corporation was organized for the following purposes, viz.: [Then follow the purposes specified in the articles of incorporation, as hereinbefore quoted.]" Paragraph 1 of the complaint, thus found true, after averring that defendant is a corporation organized under the laws of California, with its principal place of business at Los Angeles, avers that it was so organized "for the purpose of selling, distributing, and delivering water for irrigating upon the lands along the line of pipes owned by said company and situated to the south of the city of Los Angeles." The purpose specified was certainly one of the purposes of the organization. As it was in the execution of this purpose that its duty to supply water to plaintiff, if such duty devolved upon it, arose, and as other purposes contemplated by the incorporation were either not involved, or only remotely so, it was not necessary to enumerate them in the complaint, or to find as to them. Had there been no allegation as to the objects of the corporation as expressed in its articles of incorporation, the fact that it was engaged in the business of conducting and selling water for irrigation from its pipe constructed for that purpose, would have been sufficient, under that branch of the case, to raise a presumption of authority so to do, and to impose upon it the legal liabilities arising therefrom. This question was raised in Price v. Irrigating Co., 56 Cal. 431, and decided against the contention of appellant.

Another error assigned is that the court failed to find upon the issue raised by the allegations contained in paragraph 5 of defendant's answer, and a like error is assigned upon the failure to find upon paragraph 6 of the answer. The fifth paragraph of the answer referred to is as follows: "Defendant admits that the pipe laid by defendant upon the right of way granted [by] plaintiff and Fleming is of the diameter of 22 inches, and admits that said pipe has sufficient capacity to supply water for the irrigation of the lands of the plaintiff, but denies that defendant has the capacity or the water to supply plaintiff and all the lands that lie under the flow of its ditch, that need water for irrigation, with water for irrigation." The paragraph is taken up with an admission of the allegations of the complaint,—which, of course, create no issue,—except the last clause, which denies that it has either the capacity or water to supply plaintiff and all others who need water for their land. There is no averment that persons other than the plaintiff have demanded water from defendant, or have purchased it, but only that it is needed. This raises no issue material to the case. The second finding of the court, however, throws light upon the question sought to be raised by the answer. It is as follows: "After defendant had supplied water for use on plaintiff's said land for a considerable time, defendant extended its pipe line beyond and below the lands of the plaintiff, and began, and has since continued, to sell and deliver water for lands along the extension of the said pipe line, notwithstanding the fact that plaintiff desired and requested the defendant to continue to supply water for the irrigation of her said lands." The sixth paragraph of the answer, upon which it is claimed there should have been findings, is too long to be copied. It may be epitomized as follows: (1) Defendant was organized for handling the sewage water of Los Angeles, and so much other water as it was able to obtain, and, to carry out the project, constructed a pipe capable of carrying 450 inches along the line selected. (2) It only secured 180 inches, and was able to procure no more, except occasionally. (3) That it has been selling and distributing this 180 inches to people along the line of pipe, to persons who needed it for irrigation, and could not have supplied plaintiff without refusing others. (4) It will be the same in the future. (5) The land along defendant's pipe line needs 450 inches of water in the irrigating season. (6) Los Angeles is engaged in the construction of a system of sewage which defendant believes will be completed within six months, when defendant is informed and believes the city intends to resume control of the 180 inches of sewage water which it now supplies to it, and defendant is advised the city has a right so to do, notwithstanding its contract with defendant, and should it do so defendant would have no water for distribution. As to future deprivation of water, it is sufficient to say that, if the time arrives when it has no water, that fact will be an answer to any demand therefor under the judgment in this case. The residue of the paragraph is covered by the findings of the court upon the subject, to the effect that defendant has water which it was accustomed to furnish to the plaintiff, but which it took from her and sold to others.

If these facts do not render defendant liable, then this judgment is erroneous, and should be reversed. Do the facts, as found, warrant the relief asked and granted in the judgment? "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law." Const. Cal. art. 15, § 1. Appellant contends that the word "appropriated," as used in the section of the constitution quoted above, only applies to water appropriated from streams upon the public lands, and has no application to water acquired by other means than an appropriation under the Civil Code. This construction is too narrow, and, we think, does violence to the evident intent of the framers of the constitution. There is no doubt but that, in a broad sense, to appropriate is to make one's own, to make it a subject of property, and it is often used in the sense of denoting the acquisition of property and a right of exclusive enjoyment in those things which before were without an owner or were publici juris. But it is also used in the sense of prescribing property or money to a particular use, as to appropriate money to a designated purpose, to appropriate land to grazing, or fruit, or other purpose. It is also used in the sense of "to distribute." And. Law Dict. When water is designed, set apart, and devoted to purposes of sale, rental, or distribution, it is appropriated to those uses, or some of them, and becomes subject to the public use declared by the constitution, without reference to the mode of its acquisition. A perusal of the latter part of section 1, from which we have quoted, will show that in all cities and counties, or cities, or towns of this state, it is made the duty of the governing bodies thereof to prescribe, by ordinance or otherwise, the rates to be charged for water supplied to such cities, etc. This is general, and applies to all parties supplying water, and not merely to those who have acquired the ownership thereof by appropriation of water upon the public lands. The evident intent of the framers of our constitution was to strike a blow at the monopolies which had grown up out of the sale, rental, and distribution of water, and, by declaring such use a public use to bring it within the control of the local authorities in municipalities where the burdens of the system were most onerous. To have made these provisions applicable only to the distributers of water acquired in a given manner, and not otherwise, would have defeated in most instances the paramount object in view. It is apparent that, in most of the cases in which this court has applied the doctrine enunciated in the constitution, the water which constituted the subject-matter in question was not the fruit of an appropriation in the sense contended for by appellant. See McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264; Price v. Irrigating Co., 56 Cal. 431; Fresno v. Fresno Canal & Irrigation Co., 98 Cal. 179, 32 Pac. 943; People v. Stephens, 62 Cal. 209.

Counsel for appellant further contend that section 552 of the Civil Code, which, under the facts of this case, was evidently relied upon by the court below as establishing the duty of defendant to furnish water to plaintiff, is not applicable. That section reads as follows: "Whenever any corporation, organized under the laws of this state, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation has been furnished water by it, with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation." The contention is that the section only applies to cases in which the corporation has sold and furnished water to irrigate, and that, as it does not appear that the corporation defendant has sold any land to any one, it is not one of the corporations specified in section 552, supra. Title 8, of which this section is a part, relates to water and canal corporations, and must be read with reference to the subject-matter under treatment. The section in question contains two distinct clauses applicable to this class of corporations, viz. to those organized under the laws of this state. The first clause relates to those cases in which the corporation furnishes water to irrigate land which it has sold, and it must continue to furnish such water to the land thus sold at the established rate. The second clause involves an independent proposition, and makes it the duty of such corporations,—water and canal corporations,—organized under the laws of the state, to continue to furnish water to those within the flow and on the line of their ditches, who are cultivating land which has been furnished with water for irrigation, and the latter are entitled to the continued use of water so supplied upon the same terms as those mentioned in the first clause of the section, "at such rates and terms as may be established by said corporation in pursuance of law." The object of the statute is quite evident. Water for irrigation is, in many pursuits, essential to the productiveness of land, and if, when it has been once furnished, the company so supplying it for such purpose may at will refuse such supply, the owner of irrigated land is at the mercy of the corporation, who may ruthlessly destroy the crops of the season, or, in case of orchards and vineyards, the result of many seasons' industry, by refusing to continue the supply of water. The use being a public use, the legislature may regulate it so as to promote the interests of the public, and at the same time do no injustice to the water company. The defendant, having supplied plaintiff with water for irrigation, and having sufficient on hand to continue such supply, was not at liberty, without good cause, to refuse to supply her, while she, on her part, was ready and willing to pay the established price therefor.

We recommend that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

112 Cal. 369

EPPINGER et al. v. SCOTT, Sheriff. (No. 18,429.)

(Supreme Court of California. April 13, 1896.)

FRAUDULENT CONVEYANCES—WHAT CONSTITUTES—EVIDENCE—RECEIPT OF TELEGRAM—RES GESTÆ.

1. In replevin for goods taken under execution, where plaintiff claimed under a bill of sale made by the execution debtor, which defendant alleged was made to defeat defendant's claim, and it appeared that the alleged sale was clandestinely made, and the goods hastily removed, it was admissible, as tending to show that the sale was made in consequence of an effort by defendant to collect his claim, to put in evidence a telegram sent by defendant to the debtor, the day before the sale, stating that unless the debt was paid suit would be commenced.

2. In the absence of any suggestion of non-receipt made on the trial, it will be presumed on appeal that a telegram introduced in evidence was prepaid, delivered to the telegraph company for transmission, and received by the person to whom it was addressed.

3. Statements made by the execution debtor as to his object in moving the property at the time of the alleged sale were admissible in evidence as part of the transaction.

McFarland, J., dissenting.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action of claim and delivery by J. Eppinger and others against Jay Scott, as sheriff, to recover property taken by defendant under a writ of execution upon a judgment issued against Napoleon Vieu on behalf of Fon Kee. There was a judgment for defendant, and an order denying a new trial, which were reversed in department (42 Pac. 301), and plaintiffs appeal. Affirmed.

Terry & Williams and H. G. W. Dinkelspiel, for appellants. Geo. E. Church, for respondent.

HARRISON, J. Action of claim and delivery for recovering the possession of certain trays and sweat boxes. The plaintiffs claim the property by virtue of a bill of sale made to them by Napoleon Vieu; and the defendant, who is the sheriff of Fresno county, claims the same by virtue of a levy under a writ of execution upon a judgment issued against said Vieu in behalf of one Fon Kee. The controverted issues at the trial were whether there had been a sufficient change of possession to satisfy the statute of frauds, and whether the sale to the plaintiffs had been made with the express purpose on the part of Vieu to hinder and defraud his creditors, and particularly the plaintiff in the execution. The case was tried by a jury, who rendered a verdict in favor of the defendant. From the judgment thereon, and an order denying a new trial, the plaintiffs have appealed.

Upon the foregoing issues the evidence in behalf of the respective parties was decidedly conflicting, and the verdict of the jury thereon cannot be disturbed. For the purpose of sustaining the defendant's claim that the sale by Vieu to the plaintiffs was with the intent to defraud his creditors, evidence was introduced tending to show that the sale was made in consequence of an effort by Fon Kee to collect the amount of his claim; and a telegram, dated April 5, 1893, and directed to Vieu at Dixon, which Mr. Spencer, a witness on behalf of the defendant, testified that he wrote and sent for Fon Kee, was offered in evidence. This telegram is as follows: "April 5, 1893. N. Vieu, Dixon, Cal.: Your note is past due. You no pay me I commence suit. Fon Kee." The plaintiffs objected to the introduction of this telegram on the ground that it was irrelevant, immaterial, incompetent, and could in no way bind them. Their objection was overruled, and the telegram admitted in evidence, and this ruling is now assigned as error. It had already been shown that Vieu made the bill of sale to the plaintiffs on the 6th day of April; that Eppinger, one of the plaintiffs, who resided at San Francisco, met Vieu at the ranch in Fresno on that day by previous appointment, and received the bill of sale, and commenced moving the property in the afternoon; that it was moved by persons who up to that time had been in the employ of Vieu; that they worked in moving the property during the whole of that night; that when they commenced to move it Vieu was asked to send the Chinamen to help them, and he replied that he did not want to let the Chinamen know anything about it. During the previous month Vieu had given his note to Fon Kee, and the judgment in favor of Fon Kee had been offered in evidence. Under this state of the testimony it was competent for the defendant to show that the sale by Vieu was with the intent to defraud Fon Kee, and the telegram was both relevant and material for that purpose. If, upon the receipt of the telegram, Vieu immediately went to Fresno, and clandestinely executed the bill of sale, and aided in removing the property, the jury would be justified in inferring that these acts were done in consequence of the telegram, and for the purpose of defeating the suit threatened therein by Fon Kee.

In the specifications of errors of law the plaintiffs assign the admission of this telegram in evidence "for the reasons assigned at the time, and for the reason it is not shown that plaintiffs had any knowledge whatever of any such action, or that said telegram was ever received by Napoleon Vieu." These latter objections were not made at the time it was offered, and, although the defendant stated to the court that he intended to show that the telegram had been received by Vieu, it was not necessary that any direct evidence of its receipt should be given. The rule has long been settled and is made statutory in this state (Code Civ. Proc. § 1963, subd. 24) "that a letter duly directed and mailed was received in the regular course of the mail." The same rule has been extended to telegrams. Whart. Ev. § 1329; Greenl. Ev. § 40; Gray, Tel. § 136; Com. v. Jeffries, 7 Allen, 548; Steamship Co. v. Otis, 100 N. Y. 447, 3 N. E. 485. The presumption is one of fact, and is entitled to more or less weight according to the circumstances under which the telegram or letter was sent, and its receipt may be disproved; but the fact that it was sent is admissible evidence, and tends to show that it was received. The suggestion that it was not shown that the telegram was delivered to the telegraph company for transmission, or the rates therefor prepaid, in the absence of any objection of this nature at the time of its offer, or of any attempt to show these facts upon cross-examination of the witness, is not entitled to consideration. As was said upon a similar suggestion in Steamship Co. v. Otis, supra: "Norris swears that he sent the three letters written by him to Otis. In the absence of any proof to the contrary, or any inquiry as to the mode, we must understand this to mean that they were mailed in the usual manner. If there was doubt about that, the attention of Norris should have been drawn to it, and the manner of transmission challenged. It would be extremely critical to deny to the form of expression used by the witness its ordinary and usual interpretation, because it might have been more precise and explicit." The testimony given by Ah Loo, of statements made by Vieu of his object in moving the trays, was properly received. Burton had testified that Vieu was present during the moving of the trays; and Pourtett had testified that Vieu had directed him to move them, or help to move them, and these statements of Vieu were made before the sale had become complete by delivery, and while the trays were being moved. They were, therefore, a part of the transaction, and were admissible for the purpose of throwing light upon its character, and enabling the jury to determine whether the sale was bona fide, or with the express intent to defraud his creditors. The testimony of the witness Schleyer that she had made a statement at Vieu's request for Fon Kee, even if immaterial, could not have prejudiced the plaintiffs. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.; TEMPLE, J.

McFARLAND, J. I dissent, and adhere to the conclusion reached in department. 42 Pac. 301.

112 Cal. 412

Ex parte HASKELL. (Cr. 112.)

(Supreme Court of California. April 14, 1896.)

MUNICIPAL CORPORATIONS — POWERS — LICENSING NONRESIDENT MERCHANTS—VALIDITY OF ORDINANCES.

1. A city ordinance providing that persons, excepting those conducting regular places of business, selling certain articles of merchandise to persons not regularly engaged in or carrying on such lines of business, whether by sample or otherwise, shall pay a license of $50 per quarter, is not void as being oppressive or unlawfully discriminating, in that regular merchants in those lines pay a less sum per quarter.

2. The provision of the constitution requiring that legislative acts shall embrace but one subject, which shall be expressed in the title, does not apply to city ordinances, there being no express provision making it thus applicable.

Temple, J., dissenting.

In bank. Petition for habeas corpus by one Haskell, who was arrested and held by the marshal of the city of Chico for selling wearing apparel without a license, in violation of the provisions of the city ordinance. Writ denied.

D. E. Alexander and Isaac Joseph, for petitioner. F. C. Lusk, for respondent.

VAN FLEET, J. The city of Chico is a municipal corporation of the fifth class, having power, as such, to license, for purposes of regulation and revenue, all and every kind of business transacted or carried on in such city, and to fix rates of license tax upon the same, and provide for its collection. It has an ordinance which, among other provisions thereof relating to the revenue, has the following: "Persons, outside of those conducting regular places of business, selling different articles of apparel, dry goods, fancy goods, notions, jewelry, cutlery, groceries, harness, pianos, organs, machinery of all kinds, vehicles, hardware, tinware, mill products, or merchandise of any class or character, to persons not regularly engaged in or carrying on such lines of business, whether by sample or otherwise, shall pay a license of fifty dollars per quarter." Haskell, a traveling salesman for a shirt house in Oakland, was arrested and is held by the marshal of Chico upon a warrant issued from the recorder's court of said city, upon a complaint which charges Haskell with a misdemeanor, in vending within said city wearing apparel, to wit, shirts, by sample, without a license therefor, in violation of the provision of said ordinance above quoted. The petitioner asks that Haskell be discharged on habeas corpus, upon the ground that the ordinance is void and of no effect, for various alleged reasons, and so furnishes no competent authority for his detention.

It is urged, in effect, that the particular provision in question is unreasonable and oppressive, and that it is unequal and unlawfully discriminating. But we are unable to regard it as open to either or any of these objections. A municipal ordinance must be very clearly obnoxious to such objections as those made, or some one of them, before it will be declared invalid by the courts. Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the lawmaking power, and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs,—within the law, of course,—and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the constitution, or laws made in pursuance thereof. That the ordinance in question violates any such right, we are unable to perceive.

It is said that the provision is unreasonable and oppressive, because the license charged against the business pursued by Haskell is so disproportionately great, in comparison with the rates charged against other classes of merchants, as to make it apparent that the amount was fixed with a view and purpose of prohibiting Haskell, and others pursuing the same calling, from doing business in the said city,—a result which is in restraint of trade, and against public policy. This contention is based upon the fact that elsewhere in the same article the ordinance provides for licensing those engaged in trade within said city, "who at a fixed place of business sell any goods, wares or merchandise," etc., of the same general character, and divides such into classes according to the amount of their monthly sales, and fixes rates of license based upon such classification, somewhat less, perhaps, in proportion than the license tax charged against the business as carried on by Haskell. But we cannot say that the ordinance is either oppressive or unreasonable by reason of this difference. The very power to license for purposes of regulation and revenue involves the right to make distinctions between different trades, and between essentially different methods of conducting the same general character of business or trade. And that is all that is done here. While it may be true, as suggested by petitioner, that Haskell is, in a sense, a merchant, equally with those having a fixed place of business, it is nevertheless true that the manner in which he conducts and carries on his business is so distinct from that of the merchant of the latter class as to make it essentially a different business. And we are not at liberty to say that this difference does not constitute a just ground for the discrimination which the ordinance makes between the two. The tax imposed is not, upon its face, necessarily unreasonable; and to say that it is so simply because the legislative body of the city has seen fit to impose a heavier license upon the business when so conducted, than where carried on in a different way, is, as suggested in Ex parte Hurl, 49 Cal. 558, "to argue that because the common council, in fixing the rates for licenses, have discriminated between the several business pursuits which they were regulating, and have imposed a larger license tax upon one pursuit than upon any other, the ordinance is oppressive and unreasonable. But to argue thus is to forget that the authority of the common council to fix the rates of license is a branch of the taxing power,—which is in itself the power to discriminate as to the objects upon which burdens are to be imposed,—but which, not being taxation pure and simple, is as yet untouched by the constitutional requirement of uniformity." It may well be that, to the knowledge of the city council, the profits of such itinerant business, by reason of the fact that there are no rents, taxes, insurance, or other municipal charges to pay in its pursuit, are so much greater, proportionately, over the same amount of business done at a fixed place, as to fully justify the difference in the tax imposed. Indeed, the right to make such discriminating distinctions, based upon like grounds, is amply sustained by authority, and in many cases involving a much greater disparity between the rates charged than is exhibited here. In Borough of Warren v. Geer, 117 Pa. St. 211, 11 Atl. 415, where the town passed an ordinance requiring every person canvassing from house to house, soliciting orders for books, pictures, gentlemen's shirts, etc., to take out a license, and the license for selling shirts was $3 a day, it was held that this ordinance was not unreasonable, nor in conflict with the constitution of the United States or that of Pennsylvania, the court saying: "The effect of the ordinance would seem to be to subject persons who would otherwise pay no license for the privilege of doing business within the borough, to the duty of paying something for the privilege, when they undertook to exercise it without incurring the expense of a mercantile license. There is surely nothing unreasonable in such a requirement." In City of Cherokee v. Fox, 34 Kan. 16, 7 Pac. 625, it was held that an ordinance requiring itinerant hawkers, peddlers, etc., to pay a license fee of $2.50 per day is neither class legislation or unjust discrimination, nor partial or oppressive, nor inconsistent with public policy, as being in restraint of trade. The same principle is involved in Ex parte Heylman, 92 Cal. 492, 28 Pac. 675 (decided by this court), upholding a license passed by the board of supervisors of the city and county of San Francisco for peddling meats or fish from wagons or baskets, where the license charged was $75 a quarter for a meat peddler, and only $10 a quarter for peddlers of fish, vegetables, fruit, game, or poultry, and where the amount charged for vending meat by this method was a different and higher license from that charged for selling meat at a fixed place of business. In that case it is said, "The validity of such an ordinance is not now an open question here." See, also, Amador County v. Kennedy, 70 Cal. 460, 11 Pac. 757; Ex parte Felchlin, 96 Cal. 360, 31 Pac. 224.

Nor is the provision in question unlawfully discriminating. It may be conceded that if it could be said to discriminate in favor of residents of the city of Chico, by requiring such license only from nonresidents engaged in the line of business pursued by Haskell, it would be bad; or if it discriminated against residents of the state, or against merchandise from without, or not the product of the state, that it would be void, as being, in effect, a regulation of interstate commerce,—something entirely within the power of congress. Ex parte Maier, 103 Cal. 484, 37 Pac. 402. But it does neither of these. In the contention that it does so discriminate against nonresidents of the municipality, counsel has evidently confused this provision with another in the same ordinance, relating to hawkers and peddlers who carry their goods with them, which last may be, in its terms, open to such objection. But the latter provision is a wholly independent one, relating to a different class, and in no way affects the construction of the feature under consideration. The fact that one portion of an ordinance, or a portion of the same section, may be void for any reason which does not necessarily affect the whole, does not invalidate another part, unless the two are so interblended or dependent that the vice of the one must be held to vitiate the other. Ex parte Christensen, 85 Cal. 211, 24 Pac. 747. The provision here involved is general in terms, and applies alike to all—residents and nonresidents equally—who do not maintain "regular places of business" in the city, and who sell to "persons not regularly engaged in carrying on such lines of business." It in no way discriminates, as to the class against which it is directed, between those living within the city and those without, but is broad enough to include all of such class, wherever residing. It does put into a class by themselves those who prosecute their business by the method therein specified, and discriminates in the amount of license as between such class and merchants having their business located in the municipality, and also as between such class and persons "selling to the trade," as it is expressed, such as regular drummers and traveling salesmen for commercial houses, who go from place to place soliciting orders from merchants and traders. But such discrimination is lawful, and has been uniformly upheld, upon the principle that, although the different classes are engaged in the same general business of selling merchandise, it is in the several instances carried on under such different circumstances, and by methods so essentially dissimilar, and with such widely different facilities for profit, as to furnish just and reasonable ground for such discrimination. See cases cited above, and also City of East St. Louis v. Wehrung, 46 Ill. 394; City of St. Louis v. Sterrberg, 69 Mo. 301; Machine Co. v. Gage, 100 U. S. 679. There is nothing in Ex parte Frank, 52 Cal.

606, necessarily opposed to this view. In that case the attempted discrimination was made to depend, not upon the fact of any essential difference in the methods of carrying on the business, or the profits to be derived therefrom, but solely upon the question whether the merchandise, at the time of sale, was or was not within the corporate limits of the city, or in transit thereto. This was held to constitute no just or proper ground for the discriminating difference in amount of license imposed in the two instances, and as being, therefore, partial, unjust, and in restraint of trade.

Within the principles of Ex parte Miller, 89 Cal. 41, 26 Pac. 620, we discover no merit in the objection that the ordinance is void by reason of the penalty imposed, even if such objection can properly arise before conviction. See Ex parte Mansfield, 106 Cal. 400, 39 Pac. 775. Nor is there anything in the further point that the ordinance is void because embracing more than one subject, and that not expressed in its title. The provision of the constitution as to the requirement, in that respect, of acts of the legislature, is not made applicable in terms to municipal ordinances, and was evidently not intended so to apply. Its application would practically put an end to the practice of many cities and towns in the state, prevailing before, at the time, and since the adoption of that instrument, of codifying the ordinances of the municipality, as in this instance, into compact and convenient form, in a single ordinance. A similar requirement of the constitution of Missouri was held not to apply to city ordinances, in the absence of an express provision of the statute making it so. City of Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202.

We discover nothing in the provision of the ordinance under consideration which renders it invalid under the objections made. The writ is denied, and the prisoner remanded.

We concur: HARRISON, J.; GAROUTTE, J.; McFARLAND, J.; HENSHAW, J.

I dissent: TEMPLE, J.

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112 Cal. 380

DELLAPIAZZA v. FOLEY et al. (Sac. 80.)

(Supreme Court of California. April 13, 1896.)

PARTNERSHIP—DISSOLUTION—NOTICE TO EMPLOYE—LIABILITY OF PARTNER FOR WAGES—PAYMENT.

1. Civ. Code, § 2453, providing that the liability of a general partner for the acts of his copartners continues, even after a dissolution of the co-partnership, in favor of persons who have had dealings with, and given credit to, the partnership, during its existence, until they have had personal notice of the dissolution, etc., applies to mining partnerships.

2. One who was employed by a mining firm, and who had no notice of a deed of the mining property to a corporation, can recover of the partners for services rendered after the execution of the deed, though he admitted that he heard that a corporation had taken charge of the mine; it appearing that one of said partners continued to act as superintendent of the mine, and that he stated that he did not remember that he had ever notified such employé of the change in the ownership of the mine.

3. When a mining partnership conveys all its property to a corporation, such partnership is thereby necessarily and wholly dissolved.

4. The individual note of one of a firm, given to an employé for wages due, did not operate as a payment of the demand for said wages, it appearing that there was no intention to give or accept the note as such.

Commissioners' decision. Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by Francisco Dellapiazza against Patrick Foley and Michael Bohannan for wages alleged to be due. There was a judgment for plaintiff, and defendant Michael Bohannan appeals. Affirmed.

F. T. Nilon (Sullivan & Sullivan, of counsel), for appellant. C. W. Kitts, for respondent.

VANCLIEF, C. Action to recover from defendants, as co-partners in the business of mining, a balance of $815.70 alleged to be due plaintiff for labor performed for defendants, at their request, between the 25th day of December, 1890, and November 15, 1891. The plaintiff had judgment for the full amount of his demand. As to defendant Foley, the judgment was by default, in that he failed to answer. Bohannan alone appeals from the judgment, and also from an order denying his motion for a new trial. It is not questioned that plaintiff was employed by defendants and performed the labor as alleged, nor that there was a balance of $815.70 due him for such labor on November 15, 1891; and it was admitted by appellant on the trial that defendants were mining co-partners when plaintiff was employed, and so continued until July 2, 1891. It was found by the court that, on July 2, 1891, defendants sold and conveyed, by deed, the mine on which they had theretofore worked as co-partners, to a corporation, which thereafter had control of the mine and the work therein, and that the deed to the corporation was duly recorded July 10, 1891.

1. It is contended for appellant that, upon the sale of his entire interest in the mine, he ceased to be a partner, and consequently ceased to be responsible to plaintiff for the labor thereafter performed, which appears to have been more than one-half of all the labor performed by plaintiff. In answer to this the respondent relies upon section 2453 of the Civil Code, as applied to the further findings of the court to the effect that plaintiff had no notice of the sale of the mine to the corporation, nor that either of the defendants had withdrawn from the co-partnership, nor that the corporation had assumed control or management of the mine; that Foley continued to act as superintendent of the mine and

work after the sale, precisely as he had done at all times before the sale; that appellant resided in San Francisco, and never personally participated in the working or management of the mine, but had intrusted the superintendency and management of the mine and the work to Foley, who employed the plaintiff; and that no payment had been made to plaintiff for any part of said work before November 12, 1891, when Foley, for the first time, audited and allowed plaintiff's account, without notifying him that any part of the labor had been performed for the corporation, or that the corporation was responsible to him for any part thereof. The finding of these facts is justified by the evidence, and, if section 2453 is applicable to mining co-partnerships, the facts found warrant the conclusion of law that the defendants were jointly bound to pay plaintiff's whole demand. The following is a copy of section 2453 of the Civil Code: "The liability of a general partner for the acts of his co-partners continues, even after a dissolution of the co-partnership, in favor of persons who have had dealings with and given credit to the partnership during its existence, until they have had personal notice of the dissolution; and in favor of other persons until such dissolution has been advertised in a newspaper published in every county where the partnership at the time of its dissolution had a place of business, if a newspaper is there published, to the extent in either case to which persons part with value in good faith, and in the belief that such partner is still a member of the firm." Counsel for appellant contends, however, that this section is not applicable to mining co-partnerships; but in this, I think, he is mistaken. The law governing general co-partnerships, with a few well-defined exceptions, applies to mining co-partnerships. Therefore a mining co-partner, who claims exemption from the general law of partnerships, must show his case to be within some one of those exceptions. This counsel has failed to do, and I see no just reason for excepting the case of appellant from the full operation and effect of the above-cited section of the Civil Code; it being a part of the general law of partnerships, and its application to this case not being inconsistent with any exception heretofore recognized in favor of mining partnerships. Jones v. Clark, 42 Cal. 180; Stuart v. Adams, 89 Cal. 367, 26 Pac. 970. As to the "personal notice of the dissolution" required by the Code section cited, see Johnson v. Totten, 3 Cal. 343, and Williams v. Bowers, 15 Cal. 321. The notice must have been actual. The deed to the corporation was not even constructive notice to plaintiff of the sale. The plaintiff testified that he had no notice of the sale before November 15, 1891, though he admitted that he had heard around the mine, in the summer of 1891, that the corporation had taken charge of the mine. If this admission tended to prove actual notice that appellant had parted with his entire interest in the mine, it only created a slight conflict with the evidence of a contrary tendency, namely, the positive testimony of plaintiff that he had no notice, corroborated by the circumstances that Foley had continued to act as superintendent and manager, and had audited and allowed plaintiff's account up to November 12, 1891, without notifying him of the sale, or intimating that Foley had withdrawn from the partnership, and that the labor performed by plaintiff was principally, if not entirely, that of cutting wood and timbers, necessarily at considerable distance from the mine. Besides, Foley testified that he did not remember that he had ever notified plaintiff of the sale, or of any change in the partnership. In this state of the evidence, the finding of the court that plaintiff had no notice must be taken as conclusive. It is further contended that the Code section quoted applies only in case of a dissolution of a partnership, and not to the case of a mining partnership which is not wholly dissolved by a sale of the interest of one member of the firm. But I think the sale of his entire interest by a mining co-partner does effect a dissolution as to him. It dissolves his connection with the concern, and the necessity of notice of such dissolution to third persons dealing with the firm is the same, if not greater, than in case of the dissolution of an ordinary partnership. Besides, when, as in this case, a mining co-partnership conveys all its property to a corporation, such partnership is thereby necessarily and wholly dissolved, in the sense of ceasing to exist.

2. No payment having been made to plaintiff, he on November 12, 1891, demanded of Foley a settlement and payment. A settlement was then made for the whole work performed by plaintiff, without distinguishing between that done before and that done after the sale to the corporation, whereupon there was found to be due plaintiff for such work the sum of $1,415.70. Foley then told plaintiff that he could not then pay the whole debt; that the best he could do was to pay $600, and give his promissory note for the balance of $815.70. Plaintiff asked for an indorser of the note, but, failing to get one, consented to take, and did take, the proffered $600, and Foley's note for the balance, and then gave Foley the following receipt: "Received from P. Foley fourteen hundred 70-100 dollars for timbers supplied for Gaston Ridge Mine." The taking of Foley's note and the giving of this receipt were pleaded by the appellant as payment in full of plaintiff's demand, and also, as a release of the appellant, although no part of the debt for which the note was given had been paid, and plaintiff had duly offered to surrender the note. The court found that the note was not given, accepted, or intended as payment of any part of the $815.70 therein mentioned; that no part of said sum had been paid, although duly demanded after maturity of said note; that Foley was unable to pay his debts in full at the time he

made said note, and was wholly insolvent at the time this action was commenced; and that plaintiff never released appellant from his obligation to pay the debt for which said note was given. These findings are justified by the evidence, and support the conclusions of law deduced therefrom by the lower court. Without the intention, and an express agreement of the parties, that the making and acceptance of the note should operate as payment or satisfaction of the original debt to secure which it was given, it did not so operate, though it may have suspended the right of recovery until the maturity of the note. Smith v. Owens, 21 Cal. 23; Brown v. Olmsted, 50 Cal. 165; Tolman v. Smith, 85 Cal. 287, 24 Pac. 743; Savings & Loan Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922, and cases there cited. Nor does the transaction, as found in this case, constitute a novation. Haubert v. Mausshardt, 89 Cal. 433, 26 Pac. 899. Neither can it be deemed an accord and satisfaction, since neither an accord nor a satisfaction was proved. Simmons v. Oullahan, 75 Cal. 508, 17 Pac. 543; Holton v. Noble, 83 Cal. 7, 23 Pac. 58. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(112 Cal. 355)

PORTER v. MULLER et al. (Sac. 47.)[1]

(Supreme Court of California. April 13, 1896.)

INDIVIDUAL MORTGAGE BY TENANT IN COMMON—JOINT MORTGAGE—CONVEYANCE TO MORTGAGEE—RELEASE OF ONE TENANT—EFFECT—SALE BY MORTGAGEE—APPLICATION OF PROCEEDS—ORAL PROMISE TO PAY MORTGAGE.

1. K., one of two tenants in common, executed a mortgage on his undivided half interest to secure his individual debt. Afterwards, K. and M., his co-tenant, executed a mortgage to the same mortgagee, to raise money to discharge a prior lien on the land. Thereafter K. conveyed his entire interest in the land to the mortgagee, pursuant to an agreement that, in consideration of such conveyance, said mortgagee should release said prior mortgage. At the time of said conveyance, K. was insolvent. Said undivided interest was afterwards sold by said mortgagee to another; the deed containing a covenant that the land conveyed should be free from the lien of the joint mortgage executed by said tenants; the mortgagee receiving for said conveyance a sum in excess of what was due on K.'s prior mortgage. *Held*, in an action to foreclose the mortgage executed by the tenants jointly, that a judgment foreclosing the same against the land of M. only was erroneous, as the surplus, if any, remaining after the discharge of K.'s individual prior mortgage should be applied to the subsequent joint mortgage.

2. The excess received by said mortgagee over the amount of the first mortgage executed by K. should have been credited on the subsequent joint mortgage, and, if the value of the land purchased by the mortgagee from K. was greater or less than the amount of K.'s prior mortgage, the credit should be correspondingly increased or diminished.

3. It having been determined on a former appeal in this case, for the guidance of the lower court on a new trial, that M.'s oral agreement to pay said joint note, and that his interest in the land should bear the mortgage in suit, would have been of no effect, such decision became the law of the case, though its determination was not absolutely necessary on the former appeal; and the application of said ruling was not affected by an additional finding on said new trial that M. consented to the compromise agreement, and verbally undertook, in consideration of the benefit he was to receive under said arrangement, and in recognition of his duty and legal obligation in the premises, that he would himself pay the whole of the joint note, and that his undivided half of the land should stand security for the payment of the whole of said note,—particularly as it did not appear that M. received any benefit from said arrangement, or that any claim on his alleged oral agreement was made to his administratrix after his decease.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by Mary Porter, executrix of David Porter, deceased, against Charlotte Muller, administratrix of Christian Muller, deceased, and others, to foreclose a mortgage. From the decree rendered, defendants appeal. Reversed.

J. H. & J. E. Budd, for appellants. E. S. Pillsbury, for respondent.

VANCLIEF, C. This action was commenced September 15, 1877, by David Porter against Christian Muller, to foreclose a mortgage executed by Christian Muller and George Kroeckel on two adjoining quarter sections of land, of which they were equal owners, as tenants in common, to wit, N. W. ¼ of section 28, and N. E. ¼ of section 29, township 2 N., range 8 E., M. D. M., to secure their joint debt of $3,000 and interest. Upon the death of each original party pending the action, his legal representative was substituted. The case has been before this court on two former appeals, in each of which a judgment in favor of plaintiff was reversed. 53 Cal. 677, and 65 Cal. 512, 4 Pac. 531. The record on the present appeal presents the following undisputed facts: Muller and Kroeckel had purchased the land above described from G. H. Tarr for the price of $8,000; paying one-half in cash, and executing their mortgage to Tarr to secure the balance, of $4,000. Thereafter, February 28, 1874, Kroeckel mortgaged his undivided half of the land to David Porter (plaintiff) to secure his individual indebtedness to Porter in the sum of $4,000, and interest to accrue thereon at the rate of 10 per cent. per annum, payable quarter-yearly. On September 2, 1875, Muller and Kroeckel, having paid $1,000 and all interest on their mortgage debt to Tarr, borrowed $3,000 from Porter, and paid the same to Tarr in full satisfaction of their mortgage to him, and at the same time, to secure Porter for said loan, made their joint note to him for $3,000, payable two years after date, with interest at the rate of 1 per cent. per month, and, to secure this note, executed the mortgage in suit. Thereafter, on July 13, 1876, Kroeckel again mortgaged his undivided interest in the land to Porter, to secure his individual debt to the latter in the sum of $1,404.25; this debt being additional to his debt of $4,000 secured by said mortgage of February 28, 1874. On September 30, 1876, Porter commenced an action against Kroeckel to foreclose the $4,000 mortgage of February 28, 1874, on Kroeckel's undivided half of the land. While the last-mentioned action was pending, to wit, on November 9, 1876, a compromise agreement was made between Porter and Kroeckel to the effect that Kroeckel should convey to Porter all right, title, and interest of the former in and to the two quarter sections above described; that, in consideration of such conveyance, Porter should release and discharge the $4,000 mortgage and debt (which debt, with interest, then amounted to $4,080), and dismiss the action to foreclose that mortgage at his own costs, and should also release and discharge the subsequent mortgage of July 13, 1876, and the debt of $1,404.25 thereby secured. This agreement was then (November 9, 1876) completely executed by both parties thereto. At that time, Kroeckel was considered insolvent, and the court found that he died in August, 1877, leaving no estate, real or personal. Thereafter, on December 15, 1876, Porter, by deed, granted to Hiram H. Jones the undivided half of said land which had been conveyed to the former by Kroeckel as aforesaid; the deed to Jones reciting a consideration of $5,600, and containing a covenant on the part of Porter that the land conveyed should be forever free from the lien of the $3,000 mortgage of September 2, 1875, executed to Porter by Muller and Kroeckel as aforesaid. It is admitted by respondent that the consideration paid by Jones to Porter was $5,600, as recited in the deed, whereas appellant contends that it was $5,700. On April 7, 1887, Muller and Jones partitioned said land, by making conveyances to each other, the effect of which was to give the quarter of section 28 to Jones, and quarter of section 29 to Muller. Since the commencement of this action, Jones conveyed the quarter of section 28 to the defendant, Charles Grupe. The object of this action is to enforce the $3,000 mortgage of September 2, 1875, executed by Muller and Kroeckel on both quarter sections, against the interest of Muller alone, as changed by said partition, to wit, against the northeast quarter of section 29, and also to obtain a judgment against Muller's administratrix, alone, for any deficiency after application of the proceeds of the sale of said northeast quarter of section 29. Fifteen days before the action was commenced, to wit, on August 31, 1877, Muller tendered to plaintiff, Porter, $1,680,—that being one-half of the amount then due for principal and interest on the mortgage note,—as full payment of the proportion which he (Muller) was liable to pay, and kept the tender good. Plaintiff then refused to accept the tender as full payment, but afterwards, on October 5, 1878, accepted it as a credit on the mortgage debt. Jones, who purchased from Porter the Kroeckel interest in the land, and Grupe, who purchased the quarter of section 28 from Jones, were made parties defendant, but both failed to answer, and their defaults were entered. On July 14, 1884, Muller conveyed the northeast quarter of section 29 to his wife, Charlotte Muller. She was therefore made a party defendant individually, as well as in her character of administratrix; and in both capacities she answered plaintiff's complaint, and also filed a cross complaint, with the object of clearing her title to the northeast quarter of section 29 from the cloud cast upon it by the mortgage in suit. The cross complaint was answered by plaintiff, though the facts therein alleged, so far as material, were legitimate matters of defense.

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[1] Rehearing denied.

The court found the facts hereinabove stated, with others claimed by respondent to be material (which will be considered hereafter), and therefrom deduced the following conclusions of law: "As conclusions of law from the foregoing facts, the court finds that the plaintiff is entitled to have and recover from the defendant Charlotte Muller, as administratrix of the estate of Christian Muller, deceased, the amount due and unpaid upon the note mentioned in finding 5, to wit, for the principal sum of three thousand dollars ($3,000), with interest thereon from the 2d day of September, A. D. 1876, at the rate of one per cent. per month, less a credit of the sum of sixteen hundred and eighty dollars ($1,680) as paid October 5, 1878, said principal and interest to be paid in gold coin of the United States, together with the plaintiff's costs of this action, and the sum of three hundred dollars ($300), in like gold coin, as her attorney's fee; and that the mortgage mentioned in finding 5 is a lien upon the northeast quarter of section twenty-nine (29), township two (2) north, range eight (8) east, Mount Diablo meridian, to secure the payment of the said amounts found to be due to the plaintiff; and that the plaintiff is entitled to have the said mortgage foreclosed, and the said northeast quarter of the said section twenty-nine (29) sold by an officer of this court, and the proceeds applied in paying the said amounts found due to the plaintiff." The judgment is in strict accordance with the conclusions of law, being a judgment against Charlotte Muller, as administratrix of the estate of Christian Muller, deceased, for the sum of $6,599.58 in gold coin, to be paid in due course of administration, to which is added an order and decree that the N. E. ¼ of section 29, township 2 N., range 8 E., M. D. M., be sold, and that from the proceeds of the sale, less the costs and expenses thereof, the sheriff "pay to plaintiff or her attorney the sum of

$6,599.58 in gold coin of the United States [that being the amount of said judgment], with interest thereon at the rate of seven per cent. per annum from the date of this decree, or so much thereof as the said proceeds of sale will pay." The defendant Charlotte Muller, as administratrix, and individually, appeals from the judgment, and from an order denying her motion for a new trial.

On the facts thus far stated, it seems clear that the judgment is erroneous. Plaintiff's $4,000 mortgage of February 28, 1874, was the prior lien on Kroeckel's interest, and, if necessary, might have exhausted that interest, and thereby have thrown the whole burden of the $3,000 mortgage of September 2, 1875, upon Muller's half of the land; but, if the value of Kroeckel's half of the land was more than sufficient to satisfy his prior individual mortgage thereon, then the surplus should have been applied to the subsequent joint mortgage of Kroeckel and Muller, to the extent of one-half of the joint mortgage debt for the payment of which Kroeckel was legally and equitably bound, unless such application of the surplus could not have been made consistently with the rights of plaintiff. "Equity requires equality in support of a common burden;" and, as between Kroeckel and Muller, their joint mortgage to plaintiff was a common and equal burden, the equality of which the plaintiff, having notice thereof, was not at liberty to disregard or disturb as he did by discharging that mortgage as to Kroeckel's half of the mortgaged land, and attempting to enforce it against Muller's half alone, when he necessarily had notice of the mutual rights and equities of Kroeckel and Muller. Stevens v. Cooper, 1 Johns. Ch. 425; Cheeseborough v. Millard, Id. 415; Parkman v. Welch, 19 Pick. 238; Ingalls v. Morgan, 10 N. Y. 188; Denman v. Prince, 40 Barb. 217; Stuyvesant v. Hone, 1 Sandf. Ch. 429; Birnie v. Main, 29 Ark. 591; Webb v. Meloy, 32 Wis. 319. In Stevens v. Cooper, supra, Chancellor Kent said: "(2) The next and only remaining point in this case is whether the release by the mortgage, on the 24th of October, 1797, of four of the lots included in the mortgage, does not, in equity, ratably reduce the power of the mortgage upon the remaining lots, inasmuch as it deprives the owners of those lots of their right of contribution as against the lots so released. It is a doctrine well established that, when land is charged with a burden, the charge ought to be equal, and one part ought not to bear more than its due proportion, and equity will preserve this equality by compelling the owner of each part to a just contribution. Harbert's Case, 3 Coke, 14; Harris v. Ingledew, 3 P. Wms. 98, 99. I need not go at large into this doctrine. It is perfectly well understood, and I had occasion recently to examine it in the case of Cheesebrough and Others v. Van Schaick and Others. The court will likewise compel the creditor to aid this right of contribution by assigning his bonds and securities to the debtor, or surety, or owner of the land, whom he charges with his whole demand, and they will not permit him, voluntarily, to defeat this right. He owes a duty to his debtors not to impair their rights as against each other. But here the mortgagee has deprived the owners of lot No. 72 and 82 of this recourse, by previously discharging the other lots; and he ought not then, in equity, to charge them with a greater burden than they would have been subject to, upon the principle of contribution, if no such discharge had taken place. This is a clear and fundamental rule of justice, which must strike at once every discerning mind, and which Pothier has illustrated in his treatise on Obligations,—a work which is founded on sound ethics, as well as upon the basis of the civil law. Traite des Oblig. No. 275, 520." In Webb v. Meloy, supra, the defendant, being prior mortgagee, purchased the mortgagor's title or equity of redemption, for which he paid $125, and also paid two years back taxes. Four months thereafter he conveyed the mortgaged premises to Blain for a sum sufficient to satisfy his prior mortgages, repay the sums he had paid for the equity of redemption and for taxes, and also to satisfy plaintiff's subsequent mortgage, to foreclose which the suit was brought. The lower court decreed a foreclosure of plaintiff's subsequent mortgage, and ordered that it be first satisfied from the proceeds of the foreclosure sale; and the supreme court affirmed the judgment, saying among other things: "What difference can it make that, instead of foreclosing, Meloy purchased the equity of redemption, and then sold the premises at private sale for a sum sufficient to pay off and discharge all of the incumbrances? We can perceive no difference in principle in the two methods, and we think that the circuit judge held correctly that equity will, under the circumstances of this case, regard the sale to Blain for $2,025 as equivalent to the sale of the premises for the same sum on a foreclosure of the prior mortgages. This principle seems so manifestly just and equitable that argument is scarcely needed in support of it. * * * The substance of the whole matter is that Meloy has received money, or its equivalent, which equitably he ought to apply in payment of plaintiff's mortgage. * * *" The substance of the whole matter in the case at bar is that Porter has received money (about $1,500) in excess of what was due him on his prior $4,000 mortgage, which excess he ought to have applied as a payment by Kroeckel on the mortgage in suit. That excess is admitted to have been received by him on the 15th day of December, 1876 (nine months before this action was commenced), and should be credited on the subsequent joint mortgage of Kroeckel and Muller (the mortgage in suit), not later than that date. If, however, the land purchased by Porter from Kroeckel was of greater or less value than $5,600, the credit should be correspondingly increased or diminished. Cheeseborough v. Millard, 1 Johns. Ch. 415. But according to the case of Webb v. Meloy, supra, the credit, in the absence of proof of greater or less value, should equal the price actually paid to plaintiff by Jones. The pleadings raise an issue as to the value of Kroeckel's half of the mortgaged premises, and there was considerable evidence applicable to that issue, but no finding upon it by the court.

I do not understand that counsel for respondent controverts either the facts or the law as above stated, but he claims that the court below found material additional facts, which, together with those above stated, support and justify the judgment. The only additional findings upon which it is claimed that the judgment may stand are, in substance, that, at the time of the compromise agreement between Porter and Kroeckel (November 9, 1876), Muller consented thereto, and then verbally "undertook and promised, in consideration of the benefit he was to receive by and under the said mutual arrangement, and in recognition of his duty and legal obligation in the premises, that he would himself pay the whole of the note mentioned in finding five (joint mortgage note of Kroeckel and Muller), and that his undivided one-half of the said land should stand security for the payment of the whole of the said note; * * *" that Porter, though at first unwilling to make the compromise with Kroeckel, "finally consented to accept such a deed [from Kroeckel] and dismiss the said foreclosure proceedings [on Kroeckel's $4,000 mortgage] only because he relied upon the said representations of Muller; that his [Porter's] rights under the note and mortgage mentioned in finding five would not and should not be affected or prejudiced by his accepting such a deed from Kroeckel, and that the said Muller would himself be bound to pay the same in full"; and that, but for such representations and promises of Muller, "Porter would not have dismissed the said foreclosure proceedings, but would have prosecuted the same to a final judgment and decree, and would have caused the interest of said Kroeckel in said tract of land to be sold thereunder, and the proceeds applied in satisfaction of said individual indebtedness of said Kroeckel." Though the findings cover 20 pages of the printed transcript, a comparison of the foregoing with the findings contained in the transcript on the last former appeal will show all that is materially peculiar to the findings on this appeal, or, in other words, all that is materially different from those on the last former appeal; and the only substantial difference is that on the present appeal it is found that "in consideration of the benefit he was to receive by and under the said mutual arrangement, and in recognition of his duty and legal obligation in the premises," Muller verbally undertook and promised that he would pay the whole of said note, whereas the ultimate fact of such undertaking or promise was not expressed, and was held not to be implied, in the findings on the former appeal. See 65 Cal. 516, 4 Pac. 531. In all other respects the findings on this appeal relating to the oral agreement are substantially the same as they were on the former appeal. On the former appeal it was, in effect, decided that the legal effect of the mortgage of Muller and Kroeckel to Porter was not, and could not have been, changed to the prejudice of Muller by any merely oral agreement between Muller and Porter. On the second former appeal it was contended by respondent that the findings on that appeal were to the effect that Muller had assumed and agreed to pay the whole mortgage debt; but the court, after concluding that the findings could not be so construed, added, "If he had expressly agreed, orally, that his co-tenant's share of the land should be relieved of the mortgage, and that his own should bear the whole burden, such oral agreement would have been of no effect" (citing Civ. Code, § 2922); that is to say, at least, that such agreement could not have had the effect to place upon Muller's share of the mortgaged land any burden additional to that imposed upon it by the written terms of the mortgage. As the oral agreement was pleaded, and claimed to have been proved and found as a fact, the question of law as to its legal effect, as well as the question as to whether it had been found as a fact by the court, was properly presented for decision; and the court having concluded that the agreement had not been found as an ultimate fact, and that a new trial should be granted, it decided the question of law as to the legal effect of the agreement, for the guidance of the lower court on the new trial, thereby preventing the necessity of another appeal to settle that question. Therefore the decision that the alleged oral agreement, even if proved and found as a fact, "would have been of no effect," is to be deemed the law of the case on this appeal, even though the decision of that question was not absolutely necessary on the former appeal. Tunnel Co. v. Stranahan, 21 Cal. 549; Leese v. Clark, 20 Cal. 388; Gwinn v. Hamilton, 75 Cal. 265, 17 Pac. 212. Furthermore, it is not at all clear that the oral promise or agreement, as found on the last trial, purports to add anything to the pre-existing "legal obligation" "in recognition" of which it is found to have been made. His recognition of a greater obligation than that imposed by the note and mortgage could not have enlarged or changed the obligations created by those instruments. As said by this court on the former appeal, "If he was informed and understood that he would become liable for the whole three thousand dollar note, as the consequence of facts from which no such liability arose, such information and understanding did not make him liable." Besides, if

Muller received any benefit "by and under said arrangement" (between Porter and Kroeckel) not necessarily and merely incidental thereto, or from his lease from Porter, and, in consideration of such benefit, he orally promised to do or pay anything which the note and mortgage did not oblige him to do or pay, any obligation thereby created was entirely distinct from those arising from the note and mortgage, and, being merely oral, could not have been secured by the mortgage; and, so far as the ground of such additional obligation is alleged in the complaint, it is therein stated as a distinct promise of Muller, made in consideration that Porter should pay the taxes on his own half of the land purchased by him from Kroeckel, for the then current year, and should lease his said half of the land to Muller during the ensuing cropping season at the rental of one-fourth of the crop. But it is not clearly apparent that Muller received any benefit, or that Porter suffered any detriment, from "said arrangement," lease, or payment of taxes which can be deemed a valuable consideration for Muller's distinct oral promise to pay the whole debt, since Porter was bound to pay the taxes on his undivided half of the land, and the stated terms of the lease imposed upon Muller no other obligation than to pay the stipulated rent. Again, it is not alleged, and does not appear, that any claim on this distinct oral agreement was ever presented for allowance to the administratrix of Muller's estate, although it is alleged in the amended supplemental complaint that the plaintiff's claim founded on the note and mortgage was, in due form, so presented on July 6, 1886, and is further alleged "that the said claim so presented arose and was founded upon the contract, to wit, the note and mortgage set forth in plaintiff's original complaint herein." On this branch of the case my conclusion is that the alleged oral agreement does not change nor affect the rights of the parties in this action, and should be excluded from consideration as a factor in the case.

I think the judgment and order should be reversed, and the cause remanded for a new trial on the following issues only: (1) As to the value of Kroeckel's undivided half of the mortgaged premises on the 9th day of November, 1876, when plaintiff purchased that half; (2) as to the amount of costs paid by plaintiff on his dismissal of his action against Kroeckel to foreclose the prior $4,000 mortgage; (3) as to the amount of taxes paid by plaintiff on Kroeckel's half of the land after his purchase thereof, which were a lien upon the land at the time of the purchase; (4) as to the amount of principal and interest due and unpaid on the prior $4,000 mortgage on November 9, 1876. These being found, the sum of the last three, namely, said costs, taxes, and amount of principal and interest due on the $4,000 mortgage, should be subtracted from the value (as found) of Kroeckel's half of the land on November 9, 1876, and the remainder of such value, if any, to the amount of one-half of the mortgage debt, should be credited on the mortgage note in suit, as of November 9, 1876. The $1,680 tendered by Muller on August 31, 1877, and afterwards accepted by plaintiff, should be credited on the note in suit as of the date of such tender. If, after allowing these two credits, there shall be found any unpaid balance due plaintiff on the note and mortgage in suit, he will be entitled to a judgment of foreclosure for such unpaid balance, and no more.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order and judgment appealed from are reversed, and the cause is remanded for a new trial in accordance with, and as limited in, said opinion.

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112 Cal. 436

SANTA ROSA CITY R. CO. v. CENTRAL ST. RY. CO. (No. 15,202.)

(Supreme Court of California. April 15, 1896.)

APPEAL—DIVIDED COURT—AFFIRMANCE.

Where one of the justices of the supreme court is disqualified, and the six others are equally divided in opinion as to the merits of a case twice argued, the judgment will be affirmed, in the absence of probability of any immediate change in the personnel of the court.

In bank. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by the Santa Rosa City Railroad (a corporation) against the Central Street Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Barham & Bolton and Van R. Paterson, for appellant. W. F. Russell and Rutledge & Pressley, for appellee.

PER CURIAM. In this cause it is impossible for a majority of the court to arrive at a conclusion upon the merits of the case, for the reason that the CHIEF JUSTICE is disqualified, and, of the six associates, Justices VAN FLEET, GAROUTTE, and McFARLAND think that the judgment of the lower court should be reversed for the reasons given in the former opinion of Justice VAN FLEET (38 Pac. 986), and Justices HENSHAW, HARRISON, and TEMPLE think that said judgment should be affirmed. The case has been twice argued in bank, orally and by briefs, and frequent consultations have demonstrated that the differences of opinion among the said justices are permanent. Moreover, there is no probability of immediate change in the personnel of the court. Under these circumstances we think that, upon the authority of Frankel v. Deidesheimer, 93 Cal. 73, 28 Pac. 794, and Luco v. De Toro, 88 Cal. 26, 25 Pac. 983, the judgment should be affirmed. The judgment and order appealed from are affirmed.

BEATTY, C. J., being disqualified, did not participate in the foregoing.

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112 Cal. 387

In re BURDICK'S ESTATE. (No. 15,869.)

(Supreme Court of California April 13, 1896.)

DESCENT AND DISTRIBUTION — COMMUNITY PROPERTY—SUCCESSION—DECREE SETTLING FINAL ACCOUNT—APPEAL.

1. A decree settling the final accounts of an executor, and determining the amount in his hands for distribution, fixes the character of the fund; and an objection that part of it does not belong to the estate cannot be urged on an appeal from the decree of distribution.

2. Civ. Code, § 1274, provides that all property "to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will, except as otherwise provided" in sections 1401 and 1402. Section 1401 gives the entire community property to the husband on the death of the wife, "without administration." Section 1402 provides that, on the death of the husband, "one-half of the community property goes to the surviving wife," and the other half, in absence of testamentary disposition, "goes to his descendants," and that "the entire community property is equally subject to [decedent's] debts, the family allowance, and the charges and expenses of administration." *Held* that, as to the community property, the widow is within section 1383, defining "succession" as "the coming in of another to take the property of one who dies without disposing of it by will," and that therefore the entire community property should be administered as the estate of the husband.

3. Trustees claiming part of an estate as a trust fund, but who are not named in the will, and claim no rights under it, and have presented no claim against the estate, cannot appeal from a decree of the probate court settling the final accounts of the executor and ordering distribution.

4. An order refusing to postpone the decree of final distribution is not appealable.

In bank. Appeal from superior court, Alameda county; John Ellsworth, Judge.

In the matter of the estate of Stephen Powell Burdick, deceased. The executor filed his final account, and a decree was entered settling his accounts and ordering a distribution. From this decree, or a part thereof, the executor, A. W. Burdick and A. M. Sutton as trustees, and A. W. Burdick in his own right, appeal. Dismissed as to trustees, and as to other appellants affirmed.

J. H. Craddock and R. S. Gray, for appellants. Clarken & Ross, for respondent. Rodgers & Paterson, amici curiæ.

TEMPLE, J. December 12, 1892, the executor of the above estate filed his final account, and prayed for a settlement thereof and for a distribution. The bill of exceptions stated "that by said final account it appeared that, after payment in full of all claims against the said deceased and said estate, the expenses of the last sickness, and all funeral charges, and all accrued expenses and charges of the administration of said estate, there remained in the hands of said executor a balance in money of $1,855.41, from which said executor asked to be allowed a reasonable attorney's fee, to be fixed by the court, together with such further expenses of administration as might thereafter accrue, and that the balance be distributed to the parties entitled thereto." The bill of exceptions then proceeds to give an extract from the petition accompany the final account, in which, among other things, it is stated, in substance, that the executor found a deposit in a certain bank to the credit of Stephen Powell Burdick, as attorney, $5,000 of which was claimed by Arthur W. Burdick and A. M. Sutton, as trustees; that the bank, upon demand, refused to pay the same to the executor; that thereafter the claimants executed a certain paper, the contents of which are given, and then the executor was permitted to take the money. A decree was entered settling the final accounts of the executor, and finding that he had in his hands, subject to distribution, the sum of $1,657.94. A decree was thereupon entered distributing said money as community property, one-half to Alice H. Burdick, widow of the deceased, and one-half to Arthur W. Burdick, who was sole legatee of deceased, or, rather, at the request of said Arthur W. Burdick, to certain trustees for his benefit. Appeals are taken from the decree by the executor, by Burdick and Sutton as trustees, and by A. W. Burdick individually.

The executor appeals, as he states in his notice, from the whole of the decree, "except so much of said decree as settles the account of said executor, from which last-named portion he does not appeal." The claim of the trustees to the $5,000 was set out by the executor in the petition accompanying his final account, but, so far as the bill of exceptions shows, no action was asked in regard thereto. But, if action had been solicited in regard to it, I do not see how it could affect the matter here, for the executor has not appealed from the decree which settles his final account and determines how much remains in the hands of the executor belonging to the estate. This determination was clearly within the jurisdiction of the court. That decree is not before us on this appeal, and, whatever errors we may suppose were committed by the probate court in reaching the conclusion, we cannot interfere with it. To attempt to do so would be an arbitrary proceeding without authority. The probate court has jurisdiction, as between the executor and those claiming the estate, to determine what belongs to the estate. This is implied in the power to settle the final account, and by its decree determine what remains in the hands of the executor to be distributed. Still, since the probate court has no jurisdiction to determine the rights of those claiming adversely to the estate, if serious questions upon such claims arise, the duty of the court might be to delay the final decree until such claims can be determined in another forum. Where there is in the hands of the executor money which the executor claims does not belong to the estate, he should himself take steps to test the right, if serious question exists; and, if he is improperly charged, his remedy is to appeal from the decree settling his final account. I know of no other way in which it can be reached. His counsel says the probate court exceeded its jurisdiction in determining that this money belonged to the estate. I do not think so; but, if it did, the decree affected by the error was the decree settling the final account of the executor, and determining that he had in his hands $1,600 belonging to the estate after full administration. Since we cannot change or modify that decree on this appeal, no relief in that direction can be afforded. If we could here determine that the money belonged to the trustees, it would only establish another claim against the executor. It would not vacate the finding that he also has $1,600 belonging to the estate which must be distributed to the heirs or legatees. The executor had an opportunity to test the right of the estate to the money in question. He claimed that it was assets of the estate, and the trustees that it was not. It was his duty, if he deemed his claim just, to get it for the estate; and he had no right to compromise the claim of the estate by consenting that the trustees should have it, provided they would pay the debts and the expenses of administration out of it. I do not think such is really the effect or meaning of the agreement of compromise. But such is the claim of the trustees. Having been permitted to inventory it as assets of the estate, and administer it as such, the executor could not return the surplus to the trustees. To do so would be to assume the responsibility of maintaining the title of the trustees against the estate. The executor was not at liberty to assume such a position.

But appellant contends that the claim of the wife to a share of the funds, as community property, is a claim adverse to the estate, and that the probate court has no power to distribute her share of the community property, since, as he claims, she does not take by succession, but as survivor of the community. Counsel argue correctly that the probate court, in the matter of the administration of estates, has jurisdiction of the estates of dead men, and can distribute only to heirs, devisees, or legatees, or to those claiming through them. And the decree of distribution is conclusive only as to the succession or testamentary rights. Chever v. Ching Hong Poy, 82 Cal. 68, 22 Pac. 1081. The probate court, therefore, has no jurisdiction or power to deal with the wife's portion of the community property at all, unless she takes, upon the death of the husband, as heir. It could not, then, determine what is community property or what is separate property, and could not authorize a valid sale of community property to pay debts. The fact that the proposition is so novel and so startling raises a very strong presumption against it. To hold with the appellant would upset titles all over the state. A proposition more destructive of property rights could not be imagined. Fortunately, it has not sufficient plausibility to excite alarm. The estate of the wife in the community property is a creature of the statute, and is, of course, just what the statute has made it. It has always been pretty much what it now is, though formerly, upon the dissolution of the community by the death of the wife, one-half of the property descended to her heirs. Even then, however, it was held that the title was in the husband, and the wife's interest in it was a mere expectancy. In Packard v. Arellanes, 17 Cal. 525, it was said: "It is true the wife is a member of the community, and entitled to an equal share of the acquests and gains; but, so long as the community exists, her interest is a mere expectancy, and possesses none of the attributes of an estate either at law or in equity." The legal title to the community property is in the husband. He has the absolute dominion and control of it, and the wife has no right or title of any kind in any specific property, but a possible interest in whatever remains upon a dissolution of the community otherwise than by her own death. This cannot be classified as any species of estate known to the law. Civ. Code, § 700. Part 4 of the Civil Code treats of the acquisition of property, and section 1000 defines five modes in which property is acquired: (1) Occupancy; (2) accession; (3) transfer; (4) will; or (5) succession. Each of these modes is treated under a title specifically devoted to the subject, laying down rules for the acquisition of property in the particular mode treated of. The last two relate to the acquisition of property from deceased owners. Title 6 treats of the acquisition of such property through testamentary disposition. The next is title 7, which treats of succession. The first section under this title is section 1383: "Succession is the coming in of another to take the property of one who dies without disposing of it by will."

The learned amici curiæ, who, by permission, presented an argument upon this subject, argues, from this section, that only property which the deceased owner might have disposed of by will can be inherited. But this is an unauthorized addition to the statute. Property which belonged to a decedent, which he could not dispose of by will, is property not disposed of by will, and within the words of the statute. Suppose the previous provisions in regard to testamentary disposition of property had limited the right to one-half of a testator's estate, and this section had remained as it now is; would not the moiety, which he could not dispose of by will, pass by succession? Infants and insane people die owning property, and they cannot exercise the testamentary power. The section follows the provisions in regard to wills, and means that the only other mode of coming to the estate of a deceased owner is by succession, and must be construed as applying to all cases which the language is broad enough to cover. Section 1400 provides that the preceding sections as to the inheritance of husband and wife from each other only apply to separate property. This clearly implies other succeeding sections which apply to property of husband and wife which is not their separate property. Otherwise, instead of "preceding sections," the language would have been "of this title." The next section gives the entire community property to the husband on the death of the wife, "without administration." What was the necessity of this provision, "without administration," if it does not go by succession? The following section (1402) disposes of the community property upon the death of the husband. As to the disposition of one-half of it, no one disputes that it is succession; but the language is the same in regard to the moiety given to the wife. It "goes" to her just as it "goes" to the descendants. This section is referred to in section 1274, Civ. Code, and it seems to be there expressly determined that both husband and wife take some interest in the community property by succession. All property, "to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will, except as otherwise provided in sections 1401 and 1402." This is an express legislative declaration that the disposition of the community property made in sections 1401 and 1402 is succession. Another consideration makes this equally clear so far as the succession of the wife is concerned. In section 1402 it is provided that, upon the death of the husband, her share is equally subject to his debts, the family allowance, and the charges and expenses of administration. In the Code of Civil Procedure ample provision is made for the payment of all these charges from the estate of the deceased. There is no provision for calling upon the widow to contribute. Estates composed of what was community property in whole or in part are certainly common. If it had not been intended that the entire community property should be administered as estate of the husband, so important a matter could not be overlooked. Yet the probate laws only authorize the administrator to take charge of the property of the deceased (sections 1443, 1581), and the final settlement of the accounts of the administrator is conclusive only upon those interested in the estate, and the decree of distribution only upon heirs, legatees, or devisees. The Codes are in pari materia and must be construed as one. This plain intent that the title of the wife to one-half of the community property shall be administered as part of the estate of the husband, added to the continuous and uniform practice of near half a century, must place this matter beyond all doubt. The suggestion that the husband takes from the wife her share of the community property upon her death by succession may seem inconsistent with the proposition that, during her life, she had no estate of any kind in the property. That she had no estate in the community property, vested or contingent, was held by this court, when the law was that, upon her death, one-half of the community property was inherited by her next of kin. The change was made by amendments which are codified in sections 1401 and 1402, Civ. Code, and which merely change the succession. It was competent for the legislature to provide the mode in which the wife's expectancy should pass to the husband. It might have done this by creating a right by survivorship as an incident to the estate, but it has done this by providing for a succession. Since the wife could not incumber it or contract with reference to it, there can be no essential difference.

A. W. Burdick and A. M. Sutton as trustees, and A. W. Burdick in his own right, have taken appeals from the entire decree. Obviously, the appeal taken by the trustees must be dismissed. They are not named in the will and claim no rights under it, and have presented no claim against the estate. They are not, and could not have been, aggrieved persons. The order refusing to postpone the decree of final distribution was not appealable. The application was to "suspend the order of final distribution," because it was claimed that the money belonged to a trust fund. A. W. Burdick, as legatee under the will of Steven Powell Burdick, had no interest in such a contention, and, as legatee, was not injured. As trustee he cannot be heard here. The court found the money in the hands of the executor to be community property, and distributed it accordingly. There is no evidence in the record which tends to show that the finding of the court was erroneous, and the bill does not show that it contains all the evidence which was before the probate court

The appeal of the trustees is dismissed, and as to the other appellants the decree is affirmed.

We concur: McFARLAND, J.; VAN FLEET, J.; HENSHAW, J.

HARRISON, J. (concurring). The wife's interest in the community property upon the death of the husband has many incidents similar to those of an heir, but I do not think that, under the language and spirit of the laws of this state, she can be said to be his heir to her share of that property, or that her interest therein comes to her by virtue of a "succession" to the property of her husband. The property that is acquired by the labor of the wife during the marriage, equally with that acquired by the labor of the husband, becomes community property; and, although section 172, Civ. Code, gives to the husband the management and control of the community property,—that acquired by her labor as well as that acquired by his,—yet by the terms of the same section he cannot give away, or convey without valuable consideration, any portion of this property, unless she gives her written consent thereto. While a voluntary or fraudulent conveyance is binding upon his heirs, and, in the absence of creditors, cannot be questioned by the administrator of his estate, yet he cannot by such act deprive the wife of her share of the community property. Only one-half of the community property is subject to the testamentary disposition of the husband, and, if the bonds of their marriage are dissolved by a judicial decree which makes no mention of property, the wife becomes the absolute owner of one-half thereof, as co-tenant with the husband. De Godey v. Godey, 39 Cal. 157. It was said in this case: "The theory upon which the right of the wife is founded is that the common property was acquired by the joint efforts of the husband and wife, and should be divided between them if the marriage tie is dissolved either by the death of the husband or by the decree of the court. Her mere right in the community property is as well defined and ascertained in contemplation of law, even during the marriage, as is that of the husband. It is true that the law confers upon the latter the authority to manage and control it during the existence of the marriage, and the power to sell it for the benefit of the community, but not, as we have seen, so as to defraud the community of it. In the case at bar, then, the right of the respondent to a share of the property in question, if it be proven to be community property, is clear. It accrued to her as having been acquired in part by her own efforts before the decree of divorce was rendered. That decree, as rendered, did not deprive her of it." Although this interest of the wife in the community property may not fall within the common-law definition of an "estate," it is not to be classed as a "mere possibility," like the expectancy of an heir. It is true that, in Van Maren v. Johnson, 15 Cal. 311, it was, by way of illustration, termed a "mere expectancy," and this illustration was again used in Packard v. Arellanes, 17 Cal. 525; but, as was said in De Godey v. Godey, supra: "While, perhaps, no other technical designation would so nearly define its character, it is at the same time an interest so vested in her as that the husband cannot deprive her of it by his will, nor voluntarily alienate it for the mere purpose of divesting her of her claims to it." That her interest in the community property is more than a mere possibility is also shown by section 167, Civ. Code, by which the community property is exempted from liability from the contracts of the wife made after marriage; but it is not exempt, by the Code, from liability for her contracts made before marriage.

It is a misapplication of terms to say that the property which the wife has "acquired," during the marriage, by her skill or labor, and of which her husband had not in his lifetime any power of voluntary conveyance, except with her consent, or of testamentary disposition, is inherited from him; and to refer her rights in the community property to "succession," under the language of section 1383, Civ. Code, begs the entire question. "Succession," by the terms of that section, can be applied only to a case where the property succeeded to belonged to the decedent, whereas the entire provisions of the Civil Code are at variance with treating the husband as the owner of the community property. If he were the owner, he would have the absolute dominion over it, with the right to use it or dispose of it according to his pleasure (Civ. Code, § 679); but, as above seen, these attributes of ownership are denied him. Section 682, Civ. Code, specifies the community interest of husband and wife as one species of property which is owned by several persons. The necessary implication therefrom is that the husband and the wife are the "several persons" in whom is vested this ownership of the community property. This ownership is not absolute in either, but in each of them is qualified by reason of its being shared with the other. Civ. Code, § 680. This interest of the surviving wife in the community property, instead of being adverse to the administrator of the estate of her husband, is subordinate thereto for all purposes of administration, and is subject to the supervision and control of the court in which the administration is pending. By section 1452, Code Civ. Proc., the executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate during the administration; and section 1402, Civ. Code, declares: "In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration." Theller v. Such, 57 Cal. 447, and kindred cases have, therefore, no application, as the property involved in those cases was held not to be subject to the administration or to the debts of the decedent. The husband has the sole management and control of the community property in his lifetime, and alone can render that property chargeable with debts. Upon his death the entire community property, as well as his separate property, is subject to the control of the court for the purposes of administration of his estate, and is taken into the possession and management of his administrator for these purposes, and at the close of the administration the wife receives, at the hand of the court, in the same manner and at the same time as does the heir, her share of the community property,—the one-half of the surplus after paying the debts and expenses of administration. She receives it, however, not as the heir of her husband, but in her own right, as her half of the property which was acquired by herself and her husband during the marriage, but freed from all restrictions in its use and enjoyment, and with the same title as if the marriage had been dissolved by a decree of divorce.

As the court which had control of the administration, and of the community property for that purpose, is also authorized to determine what charges, debts, and expenses are to be paid out of this property, and the amount thereof, it must follow that the judgment of that court, determining the amount of the property which she is entitled to receive at the close of the administration, is binding upon her, and may also be invoked by her as a determination of her right to the same. Whether this be called a decree of distribution, or a judgment or order fixing the amount or extent of her interest in the estate and her right to receive the same from the administrator, is immaterial. It is the final determination of the court upon a subject within its jurisdiction, and is as binding upon her as if she had been specifically named in section 1666, Code Civ. Proc. If a court has jurisdiction to take the management and control of property, and to determine the amount of charges thereon, and direct their payment out of the property, and return the surplus to the parties entitled thereto, its judgment in determining the amount of such surplus, and designating the persons to whom it is to be given, is necessarily conclusive upon them; and they take their portions of the sulplus under and by virtue of the judgment, and not adversely thereto.

Upon the other questions discussed by Mr. Justice TEMPLE in his opinion I concur with him, and I also concur in the judgment.

I concur: GAROUTTE, J.

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112 Cal. 437

GOODNOW v. PARKER et al. (No. 18,340.)

(Supreme Court of California. April 16, 1896.)

EQUITY—POSSESSION OF REAL PROPERTY—RECOVERY—APPEAL—EXECUTION OF VERBAL AGREEMENT—LIMITATIONS.

1. Alleged error in overruling a demurrer to a complaint cannot be urged on an appeal from an order denying a new trial.

2. A motion to strike out evidence because it appeared therefrom that "the action was barred by the statute of limitations as set out in the defendant's answer" did not go to the sufficiency of the complaint, but to the effect of the evidence.

3. An action to compel a conveyance in accordance with an agreement to partition lands is not barred after two years by Code Civ. Proc. § 339, because not in writing, where the agreement was in fact executed by a proper division of the land according to the intention of the parties.

4. T. and P. were tenants in common of certain land, described as lot 2 of a grant which by the calls contained 667 acres, but from which, after survey by the United States, 60 acres were excluded. They agreed to partition the lands by an east and west line; and, when the surveyor pointed out to them the mistake in the grant, a line was run, marked partly by a fence and partly by a furrow, dividing the land into equal parts of 303½ acres each. Deeds of partition had already been executed, however, deeding to T. the south half, and P. the north half, of original lot 2. Shortly afterwards, T. deeded to plaintiff the south half, following the description of the partition deed; but the true dividing line was pointed out by T., and plaintiff bought and paid for 303½ acres south of that line. The 60 acres which had been excluded by the government survey were taken largely from the south half of the original grant. Plaintiff cultivated his land to the true division line for two years. P. then entered on the strip between the partition line and the line intersecting the original grant, and, within four years thereafter, plaintiff sued to compel a conveyance of the strip by P. *Held*, that the action was not simply to correct a mistake in the partition deeds, but, in equity, to recover possession of land, the legal title to which was in P., and therefore within Code Civ. Proc. § 318, barring an action to recover real property or the possession thereof, unless, within five years before the commencement of the action, plaintiff or those under whom he claims had been seized or in possession of the property in question.

Commissioners' decision. Department 1. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by J. P. Goodnow against O. E. Parker and others to compel a conveyance and to quiet title. From a judgment in favor of plaintiff, defendant Parker appeals. Affirmed.

R. Clark, for appellant. J. C. Ball and J. W. Armstrong, for respondent.

HAYNES, C. Action to compel a conveyance and to quiet title. The land in controversy is within "block or lot No. 2 of Wm. Gordon's subdivision of the Rancho Canada De Capay, as laid down on the map recorded December 12, 1871, Records of Yolo County, Book M of Deeds, p. 2." At the time this subdivision was made, the grant had not been finally surveyed by the United States; but, by such final survey, a portion of the lands included in said block 2, as subdivided and platted by Gordon, was excluded from the grant. The precise date of the segregation of the grant does not appear, but from the testimony of Mr. Nurse it was as early as 1872. On June 4, 1872, Gordon conveyed said block 2 to William H. Troop by the above description, including the reference to the recorded plat, containing 667 acres. On October 11, 1872, Troop conveyed an undivided one-half of said block to R. H. Newton, by the same description, and on September 5, 1876, Newton conveyed his said undivided one-half to the defendant Parker. On December 14, 1876, Troop and Parker, in pursuance of a verbal agreement to partition the lands owned by them as tenants in common by an east and west line which should give to each an equal number of acres, executed to each other deeds by which Parker acquired the north half and Troop the south half; but these deeds each followed the description above given, and referred to the recorded plat of Gordon's subdivision, each deed stating the number of acres to be 333½, while said block contained but 607 acres after excluding the lands outside of the grant as finally surveyed and patented, the lands thus excluded being public lands of the United States, in which neither party had any interest, and to which they had no title, though they were included in the conveyance from Gordon to Troop. Troop and Parker employed Mr. Nurse, a surveyor, to run the line separating their respective portions; and this was so done as to give each an equal number of acres of the land included in that part of block 2 which was within the grant as finally confirmed and surveyed, viz. 303½ acres each. On February 13, 1877, Troop conveyed the south half of said land to the plaintiff, Goodnow, but this deed followed the description contained in all the preceding deeds, and purported to convey the south half of block 2 according to the map of Gordon's subdivision, and therefore the public lands above mentioned were included in the description. The court found that the description in these several conveyances, including the partition deeds, so far as they included lands outside of the grant, was the result of mutual mistake, and that, as to the partition deeds, it was the intention of both parties to divide only so much of block 2 as was within the grant as finally surveyed, the division to be so made as to give each an equal number of acres; that if the lands, as described in the deeds, and as delineated on Gordon's recorded map, were divided by an east and west line so as to leave an equal number of acres on each side of it, nearly or quite all of the public lands included in Gordon's survey would fall to the south half, so that Parker would have 333½ acres, and Troop would have but 273½ acres, after deducting the public lands, while an equal division of the lot, after excluding the public lands, would give each 303½ acres. The court further found that the line made by Nurse equally divided the land within the grant. Troop and Parker built a fence upon part of the line (the remainder being marked by a furrow), and entered into possession of their respective portions according to said division. In addition to a general denial, which put in issue all the allegations of the complaint, the defendant pleaded in bar a judgment rendered in 1880, in an action wherein said Goodnow was plaintiff and said Parker was defendant, and alleged that all the matters at issue in this action were fully adjudged and determined adversely to the plantiff. He also pleaded several statutes of limitation, specifying section 318, subdivision 4 of section 338, subdivision 1 of section 339, and section 343, of the Code of Civil Procedure; and, as another defense, alleged that the partition agreement was not in writing, and was therefore invalid, under subdivision 5 of section 1624, Civ. Code. These issues were also found against the defendant. The appeal from the judgment was taken too late, and is not pressed. Upon defendant's motion for a new trial, several rulings upon evidence are specified as being erroneous, and the specifications of particulars in which the evidence is insufficient to justify the findings include nearly, if not quite, all the facts found.

The first point made by appellant is that the complaint does not state a cause of action; and one of his specifications of error is that the court erred in overruling his demurrer to the complaint. But that question is not reviewable upon an appeal from an order denying a motion for a new trial. Ashley v. Olmstead, 54 Cal. 616; Hayne, New Trials, p. 24, § 1, and cases there cited. It is said, however, that "objection was made at the trial to the introduction of any evidence on the pleading, for that it appeared from the evidence that more than three years had elapsed since the discovery of the mistake before suit was commenced." At the folio to which counsel refers, there appears to have been a motion made by defendant to strike out all of Mr. Troop's testimony, "on the ground that it appeared that the action was barred by the statute of limitations as set out in the defendant's answer, and that the action was res adjudicata." This motion was denied, and defendant excepted. The motion did not go to the sufficiency of the complaint, but to the effect of the evidence, and was properly denied; but, if the objection had gone to the sufficiency of the complaint, the ruling would still have been right.

Defendant's specification of particulars wherein he claims the findings are not justified by the evidence are very numerous, and cover almost every fact found. The general facts hereinbefore stated were found by the court, and are amply sustained by the evidence, and only some special points stated in appellant's brief need be noticed.

It is claimed that the evidence does not justify the finding that Troop and Parker intended to divide only the land within the grant. It is clear that they owned no land outside of the grant as surveyed and patented and the presumption is that they intended to divide only that which they owned. The defendant expressly testified that that was their intention. It does not affect the question that, when they agreed to make the partition, they supposed they owned all within the calls of their deeds. The surveyor discovered and informed them of their error, and made the corrected line dividing equally that part of lot 2 within the grant, and that line was marked upon the ground with the knowledge and apparent consent of the defendant by participating in the erection of the fence. The fact that they supposed they owned all within the Gordon survey, when in fact it included about

60 acres of government land, is conclusive of appellant's further contention that there is no evidence of a mutual mistake as to what they owned.

It is also claimed by appellant that there is no evidence that the line indicated by the notes of Nurse's survey is the line claimed by plaintiff. We see no controversy upon that point except that arising upon the testimony of Troop, Sr., who testified that he was present when the line was run, and drove the stakes; but his evidence clearly discloses the fact that the line which he staked was the "trial line," which was about 100 feet south of the corrected line. The witness afterwards saw the fence and furrow, and erroneously supposed that was the line upon which he had driven the stakes. It is not material whether Troop or Goodnow ever demanded of Parker that he execute a deed for the disputed ground, or whether a deed was tendered to him for execution.

It is further contended by appellant that plaintiff never bought the land in question, and therefore cannot be the owner. The evidence is positive that, when he was negotiating the purchase, Troop showed him the fence and furrow as the line; that he bought and paid for 303½ acres, which was the quantity shown by Nurse's survey; that, when he went into possession, he plowed and sowed his land up to the line marked by the furrow, and occupied to that line for about two years, when the defendant took his crop.

No other specification of insufficiency of the evidence need be specially noticed, except that made to the finding that plaintiff's action is not barred by the statutes of limitation.

That plaintiff's action is not barred by the provisions of either section 318 or 319, Code Civ. Proc., is clearly justified by the evidence. Troop conveyed to the plaintiff on February 13, 1877, and he summer-fallowed up to the Nurse line, and occupied to that line for nearly two years, or at least until the harvest of 1878, and this action was commenced January 26, 1882. Those sections require seisin or possession within five years before the commencement of the action.

Appellant's contention that plaintiff's action is barred by section 339, Code Civ. Proc., is grounded upon the fact that the agreement to partition the land was not in writing. The agreement was in fact executed, however, by a proper division of the land according to their intention, the error being only in the conveyances. Section 343, Code Civ. Proc., provides as follows: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued." This section does not apply, as the case must be governed by section 318, or by section 338, subd. 4, of the Code of Civil Procedure; and the question as to which of them applies must be determined by the true nature and purpose of the action. If section 318 applies, the action is not barred, as already stated; but, if subdivision 4 of said section 338 should be given the construction and application contended for by appellant, the action is barred. Said section prescribes a limitation of three years, and said subdivision reads as follows: "(4) An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." There seems to be no controversy that the parties to the partition, Troop and Parker, first became aware that the partition deeds included in the description lands not owned by them, or by either of them, when Nurse made the survey. These deeds were executed before the line of partition was surveyed by Nurse. That line was accepted and treated by both parties, for a time at least, as the true line. The defendant admitted upon cross-examination that the intention in running that line was to divide the lands "owned" by the parties. But it is also reasonably clear that, when the corrected line was made by the surveyor,—the one upon which the fence and furrow were made,—it was discovered that the description contained in all the deeds included land which belonged to the United States; and the mistake in the description, which was clearly mutual, was then discovered. The date of that discovery is not precisely fixed, but it was after December 14, 1876, the date of the partition deeds, and prior to February 13, 1877, when Troop conveyed to the plaintiff. If, therefore, subdivision 4 of said section governs this case, it is barred.

But I think it is not an action for relief upon the ground of fraud or mistake, within the meaning of that section, but that it is an action for the recovery of real property, and that the correction of the mistake in the deeds is merely incidental to that action. Troop was the actual owner of all the land within the grant lying in block 2 south of the true dividing line established by Nurse, and Parker was the owner of all on the north side. By mutual mistake, Parker acquired the legal title, but not the ownership, of a part of the land lying south of the line. If the plaintiff had had the legal title to the disputed portion, having been ousted from its possession, he could have recovered the possession in ejectment; but without the legal title his only remedy was in equity, not only to obtain possession, but to recover the property; and these were the objects and purposes of the suit, and that section of the Code which relates to actions for those purposes is the one to which we must look. Chapter 2 of the title relating to the time of commencing civil actions relates to the time of commencing actions for the recovery of real property; and section 318, Code Civ. Proc., found in that chapter, is as follows: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within five years before the commencement of the action." This section distinguishes between actions "for the recovery of real property" and actions "for the recovery of the possession thereof." Either of these actions may be maintained at any time within five years, not necessarily from the inception of the right of ownership or of possession, but, if the plaintiff, or his ancestor, predecessor, or grantor, "was seized or possessed" within five years before the commencement of the action, an action for either of these purposes may be maintained. The limitation is not from the date when the fraud or mistake occurred, nor from the date of the discovery of the facts constituting the fraud or mistake, but from the time when the plaintiff lost the seisin or possession, though such loss of seisin or possession resulted from the advantage taken by the defendant of such fraud or mistake. If the plaintiff had been permitted to peaceably occupy to the line of division for the space of five years after the line was run, the mistake could not affect his right to the possession of the disputed land; but, upon defendant's theory, he might have acquiesced in the line of division, and permitted the plaintiff to quietly and peaceably occupy to that line for three years, and then oust the plaintiff, refuse to correct the mistake, and cut off all right of the plaintiff to recover either the property or the possession, notwithstanding he had lost the possession but a week or a day before he brought his action. In Smith v. Matthews, 81 Cal. 120, 22 Pac. 409, the plaintiff's grantor made a conveyance to the defendant's grantor, and, by a mistake in locating one of the monuments, too much land was included in the deed; but the land thus improperly included remained in the actual possession of plaintiff and his grantors. The court said: "The right of the plaintiffs to have their title to the land quieted, as against a claim asserted by the defendant under this deed, was not barred, and could not be while the plaintiffs and their grantors remained in the actual possession of the land, claiming to be the owners thereof, and the actual owners, as against the defendant, of all interest therein except the mere naked title."

What has been said upon this point is greatly strengthened by reference to chapter 3 of said title, in which section 338, Code Civ. Proc., is found. This chapter opens with section 335, which is as follows: "The periods prescribed for the commencement of actions other than for the recovery of real property are as follows." This section, as well as the title of the chapter, clearly shows that the limitations therein fixed do not apply to actions where the effect would be to cut off any portion of the limitation of five years. In City of Oakland v. Carpentier, 13 Cal. 540, 552, the court considered section 17 (Wood, Dig. 47), which is the same as subdivision 4, § 338, Code Civ. Proc., except that the words "or mistake" have been inserted after the word "fraud." That was an action to set aside or cancel a deed upon the ground of fraud, to which was pleaded said statute of limitations. The court said: "We think that this provision has no relation to an equitable proceeding to set aside a fraudulent deed of real estate when the effect of it is to restore the possession of the premises to the defrauded party. In such a case the action is substantially an action for the recovery of the real estate; indeed, it is literally." In Stewart v. Thompson, 32 Cal. 261, the action was to cancel certain conveyances alleged to be clouds upon plaintiff's title. The court, by Sanderson, J., said: "We consider that the limitation of three years does not apply to an action of this character. It is true that the clouds in question have their inception in fraud; but fraud is not a universal characteristic of the cause of action, and cannot therefore be adopted as a test of the true nature of the action, when its position in the various categories presented by the statute of limitation comes to be considered. We so held, in effect, in Hager v. Shindler, 29 Cal. 60. * * * If fraud exists, it does so merely as a feature in the case, and not as a test of the true nature of the cause of action, within the meaning of the statute." A similar principle was laid down in Clausen v. Meister, 93 Cal. 555, 557, 29 Pac. 232. There are cases affecting real estate, however, where the statute under consideration has its proper application, and where, but for this provision, the plaintiff would be remediless. The case of Duff v. Duff, 71 Cal. 513, 12 Pac. 570, is an illustration. There, William Duff, who resided in the state of Michigan, and owned real estate in this state, gave a power of attorney to his brother Richard, who resided here, authorizing him to sell and convey said real property. Richard conveyed portions of it to each of two other brothers, without consideration, but concealed from his principal the fact of such conveyances; and William died in Michigan, without knowledge of the fact. These conveyances were made at different dates, extending from July, 1866, to April, 1872. William's widow first learned of the facts concerning these conveyances in April, 1879, and brought her action within three years thereafter; and it was held that the complaint stated facts sufficient to constitute a cause of action, and this notwithstanding the conveyances were made more than five years before. In Boyd v. Blankman, 29 Cal. 20, the statute of five years was pleaded by the defendant, and the plaintiff replied the discovery of the fraud within three years. The judgment in favor of the defendant was reversed. In Moore v. Moore, 56 Cal. 89, the plaintiff was induced by fraud and imposition to execute certain conveyances without consideration, by which she conveyed away all her interest in the property of her deceased husband. These deeds were executed in November, 1871, and the fraud was not discovered until October, 1877, and her action was commenced within three years thereafter. The form of the action does not appear from the case as reported. A demurrer to the complaint was sustained by the court below, and judgment entered for defendants. This court reversed the judgment. People v. Blankenship, 52 Cal. 619, cited by appellant, was an action brought by the state to cancel a patent issued to the defendant for state lands, upon the ground that the patent was fraudulently procured. No other relief was sought, and no other relief was pertinent or necessary under the complaint. The reported facts are meager, and the opinion of the court is brief, and no authorities are cited. The question arose upon demurrer to the complaint, based upon the statute of limitations here under consideration. The effect of a cancellation of the patent would appear to be the same as the cancellation of the deed in City of Oakland v. Carpentier, supra, viz. to restore the land to the rightful owner, and that hence it was an action to recover the property, to which the three-years limitation did not apply. The court, however, regarded it as an action for relief upon the ground of fraud. From the fact, however, that none of the earlier cases we have cited are mentioned or referred to, we infer that they were not called to the attention of the court, and that the question here under discussion was not considered, and that, therefore, it should not be held to have overruled the prior cases, and especially since the construction we have adopted in this case is supported by the later cases above cited.

We think the findings upon the issue of the several statutes of limitation pleaded by the defendant are justified by the evidence, and that plaintiff's action is not barred.

If we are right in our conclusion that plaintiff's action is not barred by the statute of limitations, it is immaterial whether Troop or the plaintiff had the means of discovering the mistake in the deeds or not, and therefore the question of laches need not be considered.

The plea of a former adjudication, interposed by the defendant, is not sustained. The action there was ejectment, brought by the present plaintiff against the present defendant, to recover possession of the same land involved in this action. The complaint alleged ownership in fee, ouster, etc. The answer denied all the allegations of the complaint. The action was tried by the court without a jury, and the findings were: First, that the plaintiff was the owner, and entitled to the possession; second, that the allegations of the complaint alleging the ouster and withholding were untrue; and that defendant have judgment for his costs. And judgment was entered accordingly, on May 27, 1878. It therefore appears from the judgment roll in the former case, put in evidence by the defendant in this case, that the fact of ownership and right of possession were adjudicated in favor of the plaintiff, and that the defendant had judgment, because it was further found that he did not enter upon or oust the plaintiff from the land in question, and did not withhold it from him. If, therefore, the defendant subsequently entered and took possession of the same land, it is obvious that the former adjudication could not aid him; while it would appear to be conclusive against him upon the fact of ownership, and of plaintiff's possession at the date of the judgment.

The motion of defendant to strike out the testimony of the witness Sargent was properly denied. His testimony tended to show that the line of Gordon's survey and of the United States survey, on the eastern end of block 2, did not correspond. The fact that his testimony was not conclusive, that he testified from recollection as to his observations at the time of the survey, that in many respects it was weak, and entitled to little weight, did not make it either incompetent, irrelevant, or immaterial.

Appellant also contends that plaintiff did not accept his deed from Troop under a mistake, but that he knew he was getting the one-half of the block according to the Gordon survey. It is true, he was told that the grant was short, and there was some talk about the liability of Gordon or his heirs for the shortage; but it is quite evident that he did not comprehend the description contained in the deed, or its effect. The evidence is clear that Troop showed him the Nurse line; that he paid only for the land within the grant south of that line; that the line was marked upon the ground; that he helped to build the fence through the clover field upon it, and plowed and cultivated the land to the line thus marked. He may have understood that his deed included land which did not belong to the grant, but it seems to be evident that he understood and believed that it included all the land south of the line shown him, and up to which he cultivated it. These acts of the parties at the time of the transaction are more reliable as evidence of the understanding and intentions of the parties than the recollection of witnesses as to conversations occurring 14 or 15 years before the trial. We think the court rightly found upon this point; but, if it be conceded that there is a conflict of evidence, that fact would not aid appellant.

It was not necessary that the judgment should have directed a conveyance from Troop to the plaintiff, as the legal title was not in him, but was in Parker alone. Nor is the liability of Parker affected by the fact that he conveyed to Helen M. Griswold, she having reconveyed to Parker before this action was commenced. The court found that she took with notice of the error in the conveyance, but whether she did so or not does not affect Parker's liability.

No other questions need be noticed. We find no error which would justify a reversal of the order denying a new trial, and advise that it be affirmed, and that the appeal from the judgment be dismissed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

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112 Cal. 447

In re McKINNEY'S ESTATE. (Sac. 48.)

(Supreme Court of California. April 16, 1896.)

CONTEST OF WILL—TAXATION OF COSTS.

1. Where the probate of a will is contested before the executors have been appointed, they have no power to deal with the assets, or make any contracts with attorneys, as executors; and whether the costs shall be paid by the parties, or out of the assets of the estate, is discretionary with the superior court, as provided by Code Civ. Proc. § 1720.

2. By Code Civ. Proc. § 1332, it is provided that, in contests after probate, if the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court shall direct; and where it was found that the will revoked was obtained through the undue influence of one of the executors, an order taxing the costs to the executors was properly entered.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; J. K. Law, Judge.

Proceedings to contest the will of Joseph McKinney, deceased. The probate was revoked, and from an order settling the account of the executors, in so far as it disallowed specified items, the executors, Douglass Luce and Joseph Brichetto, appeal. Affirmed.

Nicoll & Orr and James A. Louttit, for appellants. J. H. & J. E. Budd and Kile & Plummer, for respondent. Baldwin & Thompson, for respondent administrator.

BELCHER, C. Joseph McKinney died in San Joaquin county, leaving an estate therein of the value of about $40,000, and also leaving an alleged last will, in which Douglass Luce and Joseph Brichetto were named as executors. The will was presented for probate, and was contested by a woman who claimed to be the widow of the decedent. The case was tried, and the decision and judgment were against the contestant. The will was then admitted to probate, and the persons named as executors were appointed as such, and entered upon the discharge of their duties. Shortly thereafter another contest was instituted, by a brother and other heirs of the decedent, upon the ground, among others, that the execution of the will was procured by the undue influence of the said Douglass Luce. The trial upon the issues raised in this contest resulted in an order revoking the probate of the will and setting the same aside. Thereupon a special administrator of the estate was appointed, and the discharged executors were required to render a full account of their receipts and disbursements for and on account of the said estate. An account was accordingly rendered, showing receipts by the executors of sums of money aggregating $7,597.19, and disbursements of sums aggregating $7,588.03. To the allowance of numerous items of these alleged disbursements the special administrator and one of the brothers of the decedent filed objections, upon the ground that the said items were improper charges against the said estate, and were expenses incurred, if incurred at all, in an attempt to uphold, as the last will and testament of said deceased, a writing procured by the artifice and undue and fraudulent influence of one of the said executors, and not in any legitimate or proper administration of the affairs of said estate. The matter of settling the account came on regularly to be heard by the court, and in its order, subsequently made, it was recited that, "it satisfactorily appearing that numerous items of expenditure incurred by the said executors in attempting to establish a certain paper writing as the last will and testament of Joseph McKinney, deceased, which paper writing has been adjudged and declared to be not the last will of said deceased, but to have been obtained through the undue influence of at least one of the said executors, it is therefore ordered that all of the items so expended, being unnecessary expenditures in the administration of said estate, in the attempt to establish said paper writing so obtained as the last will of Joseph McKinney, deceased, be disallowed, as follows, to wit,"—then setting out a list of the items disallowed, aggregating about $2,000. The order further recited that, "it appearing to the court that the executors of said estate have employed attorneys in the administration of said estate, the sum of $500 is hereby allowed to said executors to be paid for such services rendered in the administration of said estate, but no sum is allowed as attorney's fees for services rendered by any attorney in behalf of the executors in either contest of the alleged will of Joseph McKinney, deceased." From this order, in so far as it disallowed the specified items of their account, the said Luce and Brichetto appeal.

The items disallowed consisted of witness fees, jury fees, reporter's fees for taking down testimony and transcribing his report, and money paid for services as detectives, on the first contest; and witness fees and a special shorthand reporter's fees for taking down the testimony and transcribing his report, on the second contest; and attorneys' fees for their services from the commencement of the proceedings to probate the will. The item for services of detectives was $200, marked paid to White & Dunlap. As to this item, Mr. Brichetto testified that, on the first contest, they had a jury trial, and had to employ detectives then to hunt up the record of the contestant, so as to prove that she was no widow. And Mr. Dunlap testified that the $200 was paid to him "for the services of Officer Carroll and Officer Klench of this city, and a detective named Howland that they employed in Oakland," and that "it was through the services of these officers and detectives principally that we were able to secure the testimony to show the falsity of the claim of the bogus widow." The item for special shorthand reporter's fees was $120, marked paid to F. D. Nicoll, and the item for transscribing was $36, marked paid to Edward Hood. As to the $120 Mr. Brichetto testified that the money was paid C. E. Doan, who took the testimony during the trial of the last contest, 12 days, at $10 per day. And Mr. Nicoll testified that Mr. Doan's services were rendered to the estate in taking the testimony: "He was employed by the executors, by myself and Mr. Louttit, as attorneys for the executors, for that purpose. We considered his services necessary. We recognized the fact that the lady reporter was somewhat inexperienced, and in a contest involving so long a trial we know it necessary on behalf of the estate to have another reporter, whose notes would act as a check in conjunction with the official reporter. Mr. Doan was also used by the attorneys for the contestants during the examination, and was frequently called to read the testimony for them. We found, as we had anticipated, that, by reason of inexperience, the official reporter, along in the trial, at times, was unable to readily read her notes, and it was really necessary that we should have the assistance that we had by the employment of Mr. Doan." And as to the $32 marked paid to Mr. Hood, the witness testified that it was "for the transcription of some testimony ordered by Mr. Louttit, as attorney for the executors." The items for attorneys' fees were $600 marked paid to J. A. Louttit, and $500 marked paid to Nicoll & Orr. As to these items it was proved that Mr. Louttit, at the commencement of the probate proceedings, was employed by the executors to act as their attorney in managing the business of the estate, and that he continued to do so up to the end of the last contest, and that Mr. Nicoll was employed as an attorney in the case during the first contest, but did not appear therein, but did appear and take part in the last contest, and that from the time of his employment he assisted in transacting the legal business of the estate.

The Code of Civil Procedure contains the following provisions: Section 1616: An executor or administrator "shall be allowed all necessary expenses in the care, management and settlement of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in courts." Section 1720: The supreme court "may in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require." Section 1332: "The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs."

In Estate of Simmons, 43 Cal. 543, it was held that the employment of an attorney for the mere purpose of procuring letters of administration is a contract made in advance of any authority on the part of the client to deal with the assets of the estate in any wise, and, whether the application be successful or not, the estate is not to be charged with the fees of the attorney for the applicant. In Henry v. Superior Court, 93 Cal. 569, 29 Pac. 230, it appeared that a woman died leaving a last will in which one McKay was named as executor. The will was presented for probate, and a special administrator was appointed. Before the day set for hearing a contest was instituted, and thereafter McKay applied to the court for an order, which was granted, directing the special administrator to pay to the attorneys of McKay, out of the funds of the estate in his hands, a sum of money for counsel fees, witness fees, and other expenses to be incurred in the trial of the issues pending. It was said by this court: "It is safe to assume that parties interested as devisees and legatees will always take the necessary steps and provide necessary funds to procure the attendance of witnesses to establish the validity of the will, if it is worthy of probate. Our conclusion is that, until the will has been admitted to probate, the court has no power to appropriate the funds of the estate to aid either the proponent or contestant."

When the first contest in this case was tried, the appellants had not been appointed executors of the will, and had no power to deal with the assets of the estate, or make any contract with attorneys or otherwise, as such. And, after they were appointed, as executors, the court was authorized, under section 1720 of the Code, supra, in its discretion, to order the costs to be paid by the parties, or out of the assets of the estate. The court exercised its discretion and refused to order the costs of the first contest to be paid out of the assets of the estate, and in this we see no such abuse of discretion as would authorize a reversal. After a will has been admitted to probate, and executors appointed, it undoubtedly is their duty to defend and uphold the will. In re Whetton's Estate, 98 Cal. 203, 32 Pac. 970. But by section 1332 of the Code, supra, which relates to contests after probate, it is expressly provided that, if the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs. Here the appellants resisted the revocation, and the law made it the duty of the court to determine whether the costs should be paid by them or out of the assets of the estate. The court exercised its discretion, and determined that the costs should not be paid by the estate; and, in view of the finding that the will was obtained through the undue influence of one of the executors, we do not think that it can be said that its discretion was abused. We advise that the order appealed from be affirmed.

We concur: SEARLS. C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

112 Cal. 528

AUSTIN v. PULSCHEN et al. (No. 15,835.)

(Supreme Court of California. May 4, 1896.)

VENDOR'S LIEN—MORTGAGE—PRIORITIES.

Plaintiff, who was in possession of land under a contract of sale, agreed to sell the same on condition that the vendee discharge a lien thereon for the purchase price, which plaintiff's vendor had not fully paid, and pay an additional sum to plaintiff, a part thereof in cash and the rest in notes, and that the latter should retain possession of the premises as security until the notes were paid. The vendee borrowed money from another, whom he already owed, giving him a mortgage on the land for the entire amount, and, after paying off the lien of the original vendors, and the cash payment agreed to be made to plaintiff, received deeds from the latter and from the parties whose liens he had paid, the mortgage and deeds being all delivered on the same day, plaintiff having no knowledge of the mortgage, and the mortgagee being unaware that his mortgagor had not paid plaintiff in full. *Held*, that such mortgagee was an incumbrancer in good faith, without notice, and his mortgage superior to any lien which plaintiff might have for the payment of the purchase money by her vendee. McFarland, J., dissenting. 42 Pac. 306, affirmed.

On rehearing. Affirmed.

For former opinion, see 42 Pac. 306.

TEMPLE, J. Action to foreclose a vendor's lien. Judgment was entered for plaintiff foreclosing the lien, but subject to a mortgage in favor of defendant McDonald for $4,500. The land was owned by Bruce and Kent. Henderson contracted to purchase from them, and paid a portion of the purchase price, but left $5,000 unpaid. Henderson sold one-half to plaintiff for $5,000, one-half paid in cash. A deed was to be made by Bruce and Kent upon payment of the other half with interest. March 28, 1891, plaintiff agreed to sell the property to Pulschen for $5,300, of which $2,700 was to be paid to Bruce and Kent in satisfaction of their claim upon the land. Three hundred dollars was to be paid to plaintiff in cash upon the delivery of a deed from her to Pulschen, and $2,300 according to the terms of two promissory notes then executed by Pulschen. It was expressly agreed that plaintiff should retain possession of the premises as security until all the purchase money was paid. The contract between plaintiff and Pulschen does not appear to have been in writing. Pulschen applied to defendant McDonald for the money which would enable him to carry out the agreement with plaintiff. It seems he already owed McDonald $1,500. He required $3,000 more for immediate use in his agreement. McDonald referred the matter to his attorneys, Dorn & Dorn, who, after having examined the records, advised him that he could safely take the mortgage if Pulschen would first procure deeds from Bruce and Kent and from Mrs. Austin. Proceedings were then taken to procure those deeds. Bruce and Kent signed and acknowledged a deed April 11th. This was, however, not delivered until April 17th, when the plaintiff also signed it. And on that day the money was paid by Pulschen, which he thus obtained from McDonald, as follows: To Bruce and Kent, as principal, $2,500, and as interest, $200. To plaintiff, $300, which was in pursuance of the agreement between herself and Pulschen. On the same day Pulschen acknowledged and delivered a mortgage to McDonald upon the premises for $4,500. It is found that at the time McDonald did not know that Pulschen had not paid plaintiff in full, and plaintiff did not know that Pulschen had mortgaged, or was about to mortgage, the property to McDonald.

Under such circumstances, is McDonald an incumbrancer in good faith and without notice? The transactions, it will be seen, were practically simultaneous. The deeds, it is true, bore a different date, but the findings conclusively show that the mortgage and the deeds were all delivered on the 17th of April. Indeed, it fairly appears that McDonald, or his attorneys for him, paid the money to Bruce and Kent and to Mrs. Austin, for McDonald was advised that he could not safely loan the money until deeds were obtained from them; and he did not until such deeds were had, and they were procured by the use of the money which he advanced. It is claimed that the fact that plaintiff was in possession of the premises was sufficient to put McDonald upon inquiry. So it did, and to protect himself against any claim she might have he insisted upon getting, and did get, her deed. When one in possession of land makes an absolute conveyance of it, the presumption is that he did so on an adequate consideration. Unless there is some circumstance which indicates the contrary, persons may deal with the grantee on that supposition, and are not under obligation to inquire. That a grantor should be in possession when he makes his deed is the natural and usual condition of things. If he remains in possession afterwards, that fact gives rise to a different inquiry. Here, when McDonald took his mortgage, plaintiff had not remained in possession after her deed, for they were practically simultaneous. Whether the fact that a grantor remains in possession after the execution of his deed has the effect of putting parties dealing with the grantee on inquiry is a mooted question. 2 Pom. Eq. Jur. § 617. In this state, where a deed absolute on its face may be shown to be a mortgage by parol, the courts will probably feel themselves bound to hold that it does have that effect. Still I cannot see how one could be put on inquiry until the possession has continued long enough to indicate to one who knows only the fact of possession that the grantor has remained in possession.

But for still another reason plaintiff cannot enforce her lien upon the premises. On the 18th day of May, 1891, Pulschen made a deed of the premises to defendant Rosencrantz. On the 14th day of July, 1891, Rosencrantz paid plaintiff $270 for certain personal effects and for possession of the premises. She then delivered the premises to him, and executed and delivered to him two unacknowledged deeds to said premises. And it is found that Rosencranz entered into possession of the premises, and has ever since remained in possession. Of course, if Mrs.

Austin ever had a vendor's lien she can assert no such claim after making those two conveyances. It is suggested that the finding does not say that plaintiff executed conveyances to Rosencrantz. The finding is that she executed and delivered deeds to said premises. The same word is used in the same sense in two other findings in this case, and in these cases the use has not been criticised. But the criticism is unfounded. A contract under seal is not a deed in this state. The only use of the word here is the popular sense, meaning a conveyance of land, and in that sense its use has become common by lawyers and laymen. As used in the findings, it is not ambiguous.

I have discussed the case as though Mrs. Austin had once a vendor's lien, but in my opinion she was never entitled to the vendor's lien, which is the creation of courts of equity to secure to a vendor his purchase money. The title to the land was never in her, and by her agreement with Pulschen was never to come to her. It was agreed that she was to be secured by being left in possession until she was paid. She had then other security, and was therefore never entitled to a vendor's lien. As no defendant has appealed, the judgment in plaintiff's favor will not be disturbed.

The alleged erroneous rulings in regard to the introduction of testimony were upon immaterial matters and are correct.

In regard to the motion to set aside the order granting a rehearing and for a remittitur, it is sufficient to refer for a consideration of the question raised to In re Jessup, 81 Cal. 466, 21 Pac. 976, and 22 Pac. 742, 1028. The judgment is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.; GAROUTTE, J.; HENSHAW, J.

McFARLAND, J. I dissent, and adhere to the opinion heretofore rendered by the court in bank after the first rehearing (42 Pac. 306), which approved the opinion of Commissioner Vanclief (39 Pac. 799). Heretofore, those who favored the contention of respondent McDonald only went so far as to hold that he ought to be subrogated to the position of Bruce and Kent (see dissenting opinion, 42 Pac. 307); but now it is to be held that the judgment be affirmed, which makes the whole amount of his mortgage, including the old personal debt to him from Pulschen, superior to the lien for the debt of the latter to appellant for the purchase money of the very land out of which McDonald is now to receive his old and apparently worthless claim. Respondents' side of the case has assumed from time to time many new phases; but under none of them can appellant, in my opinion, be compelled to lose her purchase money and her lien therefor. She sold to Pulschen in the faith that he would pay the $2,300 evidenced by his two notes. The representations of Pulschen that he could and would pay them were, as the court found, "false, and were made with intention to deceive plaintiff." When McDonald took his mortgage from Pulschen, as the court found, "said Pulschen on said date informed said McDonald that he was about to purchase said described premises from said plaintiff." She was then in possession, and her contract from her grantor was of record; and McDonald was bound to know the condition of the purchase money on the sale from her to Pulschen. She paid at least $2,500 for this land to Henderson. How much more she paid does not appear, although it appears that the $2,500 was for a "balance." Of this amount she has received only $300, and will probably receive no more; for, if the property were sufficient to pay all, this litigation would hardly have occurred. It is said now that appellant never had a vendor's lien, because she never had the legal title, and retained possession as security. But she had, under any view, an equitable title, was in possession, and sold to Pulschen; and under these circumstances had full right to a vendor's lien. "One who sells an equitable right to land retains a lien on it for the consideration whenever, under the same circumstances, the vendor of the legal title would hold an equitable lien. The same principle and reason apply to both cases." Stewart v. Hutton, 3 J. J. Marsh. 179. Also other cases cited in note to 2 Sugd. Vend. (7th Am. Ed.) p. 857. Moreover, substantially, and in legal effect, she had the legal title, and conveyed it to Pulschen; for, as found by the court, "at the request of said plaintiff" the legal title was conveyed to him by Bruce and Kent. If Bruce and Kent had conveyed to her, and she had immediately conveyed to Pulschen, so that there would have been two deeds instead of one, would not the effect have been the same? Pulschen contracted with appellant for the legal title, and got it; and McDonald's counsel advised him that it would be necessary to get a deed from her, and she also joined in the conveyance. Therefore, Pulschen, for the purpose of avoiding a vendor's lien, could not deny her title, and his successors with notice would be in the same position. I cannot see how appellant lost her vendor's lien by retaining possession of the land. By so doing she did not take any security other than her vendor's lien; and her possession was simply notice of her lien to all the world, for when the vendor retains possession of the land subsequent purchasers from the vendee are put on inquiry as to whether the purchase money has been paid. Hopkins v. Garrard, 7 B. Mon. 312. And the court finds that appellant was in possession "ever since said 25th day of October, 1889, to the 14th day of July, 1891,"—the latter date being nearly three months subsequent to the date of McDonald's mortgage, which was April 16, 1891.

As to the finding that appellant afterwards, on July 14, 1891, "signed and delivered" to one Rosencrantz "two unacknowledged deeds to said premises," it is not necessary to say more than was said in the opinion of the court to be found in 42 Pac. 306. What the nature of those "deeds" thus blindly mentioned in the findings were does not appear; but the court below attached no importance to them, for it found that appellant did not thereby "waive any lien," and that Rosencrantz was a mere mortgagee of Pulschen to the extent of $600.

It was contended in the petition for rehearing that McDonald should be subrogated to the lien of Bruce and Kent for $2,700. Now, in the first place, the judgment does not go upon any theory of subrogation. It gives McDonald a priority as to the whole of his mortgage for $4,500 and interest, and makes no attempt to segregate the amount of the Bruce and Kent claim. In the next place, the answer of McDonald sets up no right of subrogation. It makes no reference whatever to the claim of Bruce and Kent, and intimates no right to be put in their place. It denies that appellant had any claim of any kind to the premises; denies that Pulschen ever purchased from appellant; avers that at the time Pulschen mortgaged to him Pulschen owned the property "free and clear from any and all liens, incumbrances, claims thereto or thereon of any kind, name, and nature whatever"; and stands upon his mortgage as the first and only lien on the premises. Clearly, therefore, if there is to be a subrogation the present judgment should be reversed; and McDonald, if he chooses now to rely on subrogation, should amend his pleading so as to present that issue. Moreover, for another reason, the pleadings and findings should be different if the theory of subrogation is to be adopted. So far as the facts upon which subrogation could be awarded can be gathered from the present findings, they are these: The claim of Bruce and Kent for a balance of $2,500 purchase money arose upon a bond given by them to convey to Henderson a tract of land consisting of 20 acres. Now, the appellant bought from Henderson the undivided one-half of that tract, with the privilege of selecting either the north or south half in severalty, and she did select the south half, "and entered into possession of said south half of said lot, and ever since said 25th day of October, 1889, to the 14th day of July, 1891, continued in the possession of the same"; and this south half constitutes "the premises" upon which she seeks to enforce her vendor's lien, and which is involved in this action. Now, would equity allow respondent to enforce the whole of the old claim of Bruce and Kent against appellant's one-half of the property? It is, I think, quite apparent that the matter of subrogation could not be equitably disposed of without amended pleadings and specific findings upon issues thus raised. Under any view, therefore, the judgment should be reversed.

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5 Cal. Unrep. 351

KENDALL v. EARL et al. (No. 18,392.)

(Supreme Court of California. May 4, 1896.)

PRINCIPAL AND AGENT—RATIFICATION—NEGLECT TO DISAVOW AGENT'S ACTS.

Plaintiff consigned goods to defendants, with instructions not to sell below a certain price without first advising him. Defendants sold at a price lower than that named, and without consulting plaintiff, but notified him immediately after the sale. Plaintiff was absent from home when defendants' letter arrived, but, after his return, made no objection to the sale, until several months had elapsed. *Held*, that plaintiff's failure to disavow defendants' acts immediately on the learning of the facts of the sale was a ratification precluding recovery of damages therefor.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by William S. Kendall against Joseph Earl and others to recover damages for breach of contract. There was judgment for defendants, and plaintiff appealed. Affirmed.

Johnson, Johnson & Johnson and A. M. Johnson, for appellant. C. H. Oatman, for respondents.

HAYNES, C. Plaintiff resides at Sacramento, Cal., and grows fruit in that county. The defendants are commission merchants doing business at Chicago, Ill. On October 9, 1889, plaintiff shipped to defendants 22,758 pounds of dried French prunes, and 3,937 pounds of soft-shell almonds, under the terms stated in the following contract:

"Sacramento, Cal., October 9, 1889. Earl Bros. Co., Chicago, Illinois—Gentlemen: I shipped you per S. P. and U. P. R. R., in C. P. car 1282, 22,980 lbs. dried French prunes, and 4,000 lbs. of soft-shell almonds, to be sold by you on commission, at 4 per cent. to you. On said consignment I have received an advance, per check of George Dietrich, of $1,200.00, on which advance you are to charge me interest, after thirty days, at 7 per cent. per annum. This consignment you are not to sell, unless at the following prices: For the prunes, 9 cts.; for the almonds, 14½ cts. per pound,—without advising me of the offers made for these goods at figures below those named, and I instruct you to accept a less sum than the figures named above, after receiving such advice from you. W. S. Kendall.

"This is correct, and we agree thereto. Milton Brown."

Milton Brown was an agent of defendants, and no question is made as to the validity of the contract. In November, 1889, the defendants sold the prunes for 6½ cents per pound, and the almonds at 11 cents, without communicating with the plaintiff; making a difference against the plaintiff of $678.47, to recover which sum plaintiff brought this suit. A jury trial was waived, and the court made the following finding: "That all the facts alleged in the complaint are true, but that, after the sales by the defendants of the prunes and almonds as alleged in the complaint, the plaintiff ratified, approved, and confirmed the acts of the defendants in making such sales." Judgment was entered for the defendants, and this appeal is from an order denying plaintiff's motion for a new trial, and the only question is whether the evidence is sufficient to justify the finding that plaintiff ratified the sale made by defendants. There is no appeal from the judgment.

The sale of the almonds, with the price at which they were sold, was reported by the defendants to the plaintiff by letter dated at Chicago, November 15, 1889; and the sale of the prunes was in like manner reported, under date of November 25, 1889. The almonds were sold November 14th, and the prunes November 21st, and the prices at which they were sold were the market prices at the dates of sale. The evidence tended to show that from the time these sales were made the market remained about the same, or at least with slight fluctuations, until in March, when there was a slight improvement; but as to whether, in that month, the prices named in the contract could have been realized, the evidence was materially conflicting. Several other shipments were made by plaintiff to defendants of prunes and other fruits, and almonds, upon which defendants also made advancements. As before stated, defendants informed plaintiff of the sale of the almonds by letter dated November 15th, and of the sale of the prunes by letter dated November 25th. On November 28th the receipt of both of said letters was acknowledged by plaintiff's clerk, in which defendants were informed that Mr. Kendall was out of town, and would reply more fully in person, when press of business would allow, as no one else understood it. The plaintiff testified that at the time these letters were received he was at Los Angeles, "and was gone a good while"; that he did not remember what time he came back; that he was in Pasadena on Christmas day, and returned some time between that and January 2, 1890, and on that day wrote the defendants, without any mention of the defendants' letters received in his absence, as follows: "If you can dispose of my prunes held by you at 7½ cts. per pound, or over, please do so. Your markets seem to range a trifle higher, but I had rather let them go. So, if you can do so at the figures named, close out the entire lot, and make returns at once, and oblige, yours, W. S. Kendall." On March 8th defendants sent plaintiff an account of sales, and a check for $1,856.69, and on March 17th plaintiff replied thereto; and in that letter he made the first reference to the sale of the prunes and almonds mentioned in the contract of October 9th, and made an account of the loss thereon, amounting to $706.74, and demanded payment thereof. Concerning his delay in protesting against the sales in violation of the contract under which the said prunes and almonds were shipped, the plaintiff testified that, when he returned and learned of defendants' letters of November 15th and 25th, he saw Mr. Brown, and asked him how the defendants came to sell the goods in violation of the contract, and told him he thought it was not right; that Brown said he could not understand it, and he did not think it was right, and that he "would notify the defendants of the matter,—would communicate with them about it." He further testified that he had at that time six or seven thousand dollars' worth of his goods in defendants' hands, "and was not in a position to raise a row about it." On the part of the defendants, the evidence was to the effect that the goods in question were sold, at the time they were sold, by an oversight, in not noting upon the books that they were to be held. Mr. Earl, one of the defendants, and who testified that he was more familiar with the facts than any of the other members of the firm, testified that he had no recollection of receiving, through Mr. Brown, any notice that plaintiff objected to the sale, or that he would hold defendants responsible. It does not appear that Mr. Brown had any other connection with the defendants than an agency to solicit consignments, nor is there any evidence tending to show that he did communicate to defendants the fact of plaintiff's dissatisfaction, other than the following reference in defendants' letter of March 27, 1890, in reply to plaintiff's demand for the payment of said difference, viz.: "At the time the almonds were sold, our Mr. Brown saw you in Sacramento, and, we believe, showed you the letter he had received from us, and you did not say anything to him then, only that you did not think we ought to have sold them; but otherwise you made no claim at all, and we thought you were reasonably well satisfied, or you would have said more to Mr. Brown about it at the time."

In applying the principle of ratification to the unauthorized acts of an agent, a distinction is made between those cases where third persons may be injured by the delay of the principal to disavow the unauthorized act, and those cases where only the principal and agent are affected by the transaction. Where innocent third persons are, or may be, injured, reasonable promptness in repudiating the transaction, after full knowledge of the facts, is more imperative; and the same rule applies where the principal, with like knowledge, receives a direct benefit from the unauthorized act of his agent. So, too, the character of the transaction,—whether it be of a mercantile character, or an isolated transaction, not affected by the usages of trade,—has been considered, in determining what is a "reasonable time" within which the transaction must be disavowed. Story, in his work on Agency (section 258), says: "In respect to silence, whether it operates as presumptive proof of ratification may essentially depend upon the particular relations between the parties, and the habits of business and the usages of trade. In the ordinary course of business between merchants and their correspondents, it is understood to be the duty of the one party receiving a letter from the other to answer the same within a reasonable time; and, if he does not, it is presumed that he admits the propriety of the acts of his correspondent, and confirms and adopts them. This presumption seems now, in favor of commerce, to be universally acted upon. And, therefore, if the principal, having received information, by a letter from his agent, of his acts touching the business of his principal, does not, within a reasonable time, express his dissent, to his agent, he is deemed to approve his acts, and his silence amounts to a ratification of them. Nor is this principle peculiar to our jurisprudence. It has received the sanction of the Roman law, and has also been fully recognized by modern commercial jurists on the continent of Europe." To the same effect, see Whart. Ag. § 86. In Ralphs v. Hensler, 97 Cal. 303, 32 Pac. 243, quoting from Ward v. Williams, 26 Ill. 447, the court said: "In general, where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done in his name; * * * else he will be bound by the act, as having ratified it by implication." See, also, Searing v. Butler, 69 Ill. 575; Prince v. Clark, 1 Barn. & C. 186, 8 E. C. L. 80; and Gold Min. Co. v. National Bank, 96 U. S. 640, 644. Appellant cites sections 964 and 965 of Pomeroy's Equity Jurisprudence. The learned author there treats, in the first of these sections, of express confirmation or ratification, and, in the latter, of "acquiescence and lapse of time"; but he is treating the subject very broadly, and in relation to equitable actions of a widely different character, as shown by the two California citations in note 1, p. 1404, viz. Borland v. Thornton, 12 Cal. 440, and Phelps v. Peabody, 7 Cal. 50, both of which were actions to enjoin the collection of judgments. Nevertheless, the principles laid down in the latter section, on page 1404, in no wise conflict with the authorities above cited. Appellant also cites Whittemore v. Hamilton, 51 Conn. 153, in which the court, referring to the section we have cited from Story on Agency, say: "But we think it must be understood that the principle was intended to apply only to those cases where the alleged principal receives a direct benefit from the act of the alleged agent, or where the latter appears to have been prejudiced by the neglect of the former to give him notice of dissent." The case there was very different, and did not involve the relations or principles involved in this case. There, Hamilton released a mortgage owned by Whittemore (and which was assigned to Hamilton as collateral security), to enable the mortgagor to complete a building upon the mortgaged premises, Hamilton relying upon his verbal promise to execute a new mortgage for the same amount as soon as the building should be completed. The mortgagor failed, and the promised mortgage was never executed. The court, immediately following the passage above quoted from the opinion, stated the true ground of the decision as follows: "If one holding property pledged to secure a debt should destroy it, or convert it to his own use, or give it away to another, whereby it becomes lost to the owner, does he ratify the act by mere neglect to give notice to the wrongdoer of his dissent? As well might the principle be applied to a trespass, or any other tort."

It is also urged by appellant that defendants did not render an account of sales until March 8th, and that he made his formal claim for the deficiency on the 17th. He was, however, notified of the sales, and the prices received, in November, and must have known that he was credited with the proceeds. He had received an advance of $1,200 upon the prunes and almonds in question, upon which he was to be charged interest, after 30 days, at 7 per centum per annum, and upon another shipment, made November 7th, he had received an advancement of $3,000. Whether the plaintiff received any other payments prior to March does not appear, but he must have known that defendants would retain at least the $1,200 advanced, and thereby interest would be stopped thereon, and this fact furnishes an additional reason why he should have promptly disavowed the sale. The reason given by plaintiff for not expressing dissent earlier, viz. that he had $6,000 or $7,000 worth of his goods in their hands, and that he was in no position to make complaint, is not sufficient to excuse the delay, but is suggestive of a purpose or intention to delay the expression of any disavowal of the unauthorized sales. The order denying a new trial should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(5 Cal. Unrep. 334)

TULARE BUILDING & LOAN ASS'N v. COLEMAN et al. (Sac. 75.)

(Supreme Court of California. April 28, 1896.)

MORTGAGES—FORECLOSURE—PLEADING—DILATORY PRACTICE.

In foreclosure, after a demurrer to the petition had been overruled, defendants were granted 15 days to answer, and on their motion were given 5 days more. They filed an answer May 2, 1895, which plaintiff moved to strike out because unverified. Defendants confessed the motion, and asked leave to file an amended answer, purporting to have been verified April 3, 1895, by a defendant, who claimed no interest in the premises. There was no showing why the verified answer, which stated no defense, was not filed in the first instance, it being an exact copy of the other. *Held*, that the court did not err in denying leave to file the amended answer.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Action by the Tulare Building & Loan Association against Harry E. Coleman and others, in foreclosure. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Lamberson & Middlecoff, for appellants. Davis & Allen, for respondent.

VANCLIEF, C. Action to foreclose a mortgage executed by the defendant Henry E. Coleman, to secure his promissory note for the sum of $2,000, and interest at 8 per cent. per annum, payable to the plaintiff (a corporation) eight years after date, but provided that, if default be made in the payment of any part of said interest as it became due and payable, then the principal and interest should immediately become due at the option of the holder, and that such option might be exercised without notice. The complaint was duly verified. On March 18, 1895, the defendants appeared, and filed a general demurrer to the complaint. The demurrer was overruled on April 12, 1895, and defendants were allowed 15 days to answer. On April 27, 1895, the court, on motion of defendants, granted five days' additional time in which to answer. On May 2, 1895, the defendants served and filed an unverified answer. Thereafter, on due notice, plaintiff's attorneys moved the court to strike out the answer, on the ground that it was not verified. Thereupon defendants' attorneys consented to the striking out of the answer, and at the same time produced and asked leave to file what they denominated an "amended answer," which purported to have been verified by the defendant Witkowski, on April 3, 1895, 24 days prior to the filing of the unverified answer. The so-called "amended answer" was an exact copy of the unverified answer which had been filed, except that the word "amended" was added thereto. The court ordered the unverified answer to be struck out, but denied leave to file the proffered amended answer, on the ground of inexcusable negligence on the part of defendants; there being no showing nor pretense of any excuse for not having filed the verified answer, instead of the other, in the first instance. After hearing evidence for plaintiff, the court gave judgment in its favor, from which the defendants bring this appeal on a bill of exceptions, and contend that the court erred in denying their motion for leave to file the so-called "amended answer."

For the following reasons, I think the court did not exceed a proper exercise of its discretionary power in denying the motion:

1. By what the court was justified in regarding as mere dilatory tactics, the defendants had secured a delay of a month and a half.

2. The proffered amended answer appears to have been verified in San Francisco on April 3, 1895, and there is no pretense that it might not have been filed long before the unverified answer was filed; and that it was not so filed, instead of the latter, is evidence of a degree of negligence indicating bad faith.

3. Witkowski, who verified the answer, was made a party defendant, on the ground that he had or claimed some interest or claim upon the mortgaged premises; but in the answer he makes no claim of any interest in or lien upon the premises, and no reason appears why the answer was not verified by an interested party.

4. The proffered verified answer does not deny the execution of the note or mortgage, nor that defendant had failed to pay the interest, installments, and fines, as alleged in the complaint, but alleges as an affirmative defense that plaintiff had agreed with defendants to collect certain rent to become due to them "upon property situated in the city of Tulare, California, and to credit the amount of said rents" upon the interest and installments as they became due; but that plaintiff "neglected and failed to collect said rents, and neglected to apply any of the same" as per agreement; that, at all times after making said agreement, "defendants were out of said county of Tulare, and at a great distance from the city of Tulare," and were not notified by plaintiff that it had neglected to collect and apply said rents; and "that, by reason of said plaintiff's neglect to perform its contract herein mentioned, these defendants have been damaged in the sum of $231.07"; and that defendant Coleman "is entitled to have said amount of $231.07 offset against any claim of said plaintiff against him for any fines and interest that plaintiff may be entitled to charge upon said sum of $92.03 of installments and interest, as aforesaid."

The leased property from which rents were to be collected by plaintiff is not described except as above; nor are any lessees named; nor is it alleged that the lessees were either able or willing to pay rent, nor that Coleman had not collected the rent before the commencement of this action; nor is it alleged where or how far distant from the city of Tulare the defendants were during the time the rent should have been collected, nor even that they did not have notice during their absence that the rents were not paid. It is not claimed that the judgment is for a greater amount than was due and unpaid according to the terms and legal effect of the note and mortgage. Therefore, besides the inexcusable negligence, it is too plain to admit of argument that the proffered answer stated no defense, and that the court did not err in denying leave to file it. It follows that the judgment should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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5 Cal. Unrep. 337

KENNEDY v. CONROY. (Sac. 58.)

(Supreme Court of California. April 28, 1896.)

FRAUDULENT CONVEYANCE — CHANGE OF POSSESSION — CONSIDERATION — CANCELLATION OF DEBT—PREFERENCE BY INSOLVENT.

1. A stepfather delivered to his stepson, who had been living with him on his ranch, a lease thereof, reserving two rooms in the house thereon for himself, and at the same time gave him, for value, a bill of sale of sheep and hogs running on the ranch. The lease was never recorded, and they continued to live together on the ranch without any change in their relations or in the possession being manifest to the world. *Held*, that the bill of sale was void, under Civ. Code, § 3440, declaring all sales of personal property void as to creditors where there is not actual and continued change of possession.

2. Cancellation of a pre-existing debt is a valuable consideration.

3. A preference of creditors by an insolvent is valid.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; J. E. Prewett, Judge.

Action by James P. Kennedy against W. C. Conroy. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

John M. Fulweiler and F. P. Tuttle, for appellant. B. F. Myres and Ben. P. Tabor, for respondent.

VANCLIEF, C. This is an action to recover damages for the conversion by defendant of certain sheep and hogs alleged to be the property of the plaintiff. The defendant justifies the taking of the property upon the ground that he was sheriff of the county of Placer, and as such seized and sold the property under an execution against C. Quinn, whose property he alleged it was at the time of such seizure. On the 12th day of August, 1893, Quinn executed and delivered to plaintiff a lease demising to him a farm in Placer county for the term of two years and two months, and on the same day made and delivered to plaintiff a bill of sale of live stock and other personal property then on said farm, including the sheep and hogs in question. The consideration named in the bill of sale is $2,600, and the testimony tends to show that Quinn was indebted to plaintiff at the time the bill of sale was executed (though in what amount does not appear), and that the cancellation of the pre-existing debt was the consideration for the sale. These instruments were executed and delivered to plaintiff at the town of Lincoln, and plaintiff (who is the stepson of Quinn) testified: "When I received this bill of sale, Mr. Quinn turned the stock over to me on the ranch in the presence of witnesses. He turned the stock over to me on the ranch. The witnesses were Cornelius Kennedy and Owen Corcoran. No, it was not on the ranch that he turned the stock over to me; it was in the town of Lincoln. The stock was not in Lincoln, but that is where the witnesses were when they witnessed it. They witnessed the bill of sale, No, it was not witnessed by them. They were witnesses to the stock. Statements were made in their presence by him to me in Lincoln." In the lease of the farm Quinn reserved from its operation two rooms in the farm-house for the use and occupation of himself and his wife as a home and residence, and Quinn was there when the defendant seized the animals. There is nothing in the record to show how many rooms there were in the house, nor whether the rooms so reserved by Quinn were the same rooms that he and his wife had previously occupied. The lease was not recorded. Plaintiff was 26 years old, had lived with Quinn since his boyhood, and worked on the farm, having charge of the sheep and hogs, which were on the place before the execution of the bill of sale. After the making of the bill of sale, plaintiff had charge in the same way. The hogs and sheep remained on the ranch in the same condition that they had been in before he took the bill of sale. There was no change in the manner of using or keeping them. One witness testified that he went to work on the Quinn ranch about the 24th of August, 1893, and worked there two months; that he was employed by plaintiff, who paid him for his work. Another witness testified that he had seen the hogs and sheep on the ranch of Mr. Quinn; that plaintiff was working on the ranch prior to August 1, 1893, and shortly after that, on the ranch, witness heard Quinn say that he delivered and sold all this stock to plaintiff; that plaintiff seemed to be in charge; that Mr. Quinn was not doing anything at all, except little chores around home. On the 23d day of November, 1893, the defendant levied upon the property. On the 28th day of November, 1893, the plaintiff served a notice upon defendant that the property levied upon was his property, forbidding defendant to sell it, and demanding its immediate return. But said notice was not verified by the oath of the claimant, or any other person, nor did it state the matters pertaining to the right of possession or grounds of title required by section 689, Code Civ. Proc., as amended March 2, 1891. It was admitted that the defendant was, on the 22d day of November, 1893, and thence hitherto continued to be, the duly elected, qualified, and acting sheriff of the county of Placer, Cal. The court below rendered judgment in favor of the defendant and denied plaintiff's motion for a new trial. The appeal is from the judgment, and from the order denying the motion for a new trial.

Appellant contends that there was an actual change of possession from Quinn to appellant on the 12th day of August, 1893, which continued until the property was taken by the respondent, in November, 1893, and cites a number of California cases in support of such contention. But a careful reading of those cases discloses the fact that in each of them there are some circumstances which in a marked manner differentiate it from the case in hand. Thus, in Montgomery v. Hunt, 5 Cal. 366, from which appellant quotes in his points and authorities, the court said: "The cattle remaining on the ranch followed the actual possession of it by Meacham, and were no longer in the possession of Weston." The presence of Meacham on the ranch was sufficient to put the world upon notice of the changed condition of affairs respecting the cattle. In this case Quinn remained on the farm after the bill of sale was executed, and there was no change in the conditions apparent. The rule laid down in Stevens v. Irwin, 15 Cal. 503, and ever since adhered to in this state, requires that the change of possession shall be so manifest "as to give evidence to the world of the claims of the new owner." The court below held that the sale to appellant was void, under section 3440 of the Civil Code, for want of the necessary change of possession; and I am satisfied that such conclusion was warranted by the evidence. See Woods v. Bugbey, 29 Cal. 467; Regli v. McClure, 47 Cal. 612; Gray v. Corey, 48 Cal. 211; Grum v. Barney, 55 Cal. 254; Merrill v. Hurlburt, 63 Cal. 494; Bell v. McClellan, 67 Cal. 283, 7 Pac. 699; Ruddle v. Givens, 76 Cal. 457, 18 Pac. 421; Bunting v. Saltz, 84 Cal. 170, 24 Pac. 167; Pearce v. Boggs, 99 Cal. 340, 33 Pac. 906; Howe v. Johnson, 107 Cal. 67, 40 Pac. 42. It may be conceded that the consideration for the sale was sufficient. The cancellation of a pre-existing debt has been held to be a valuable consideration. Schluter v. Harvey, 65 Cal. 158, 3 Pac. 659. So, too, it has been held that a debtor, though insolvent, may make a payment to a creditor which will have the effect of defeating the collection of other debts against him. Ross v. Sedgwick, 69 Cal. 250, 10 Pac. 400; Dana v. Stanfords, 10 Cal. 278. But, although the transaction between Quinn and appellant may have been entirely honest, with a view to the payment of Quinn's debt, and without the intention of hindering or defrauding creditors of Quinn, yet, if the transaction falls within the inhibition of section 3440 of the Civil Code, it must be governed by it. As was said in Woods v. Bugbey, 29 Cal. 479: "If in fact there was not an actual and continued change of possession given, the statute pronounces the transfer fraudulent as to creditors, and the courts have no right to seek to evade its force and effect. No excuse or explanation for want of an actual and continued change of possession can be entertained." Some exceptions were taken at the trial to the rejection and admission of evidence, but I think the court did not err in any of its rulings. I think the order and judgment should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are affirmed.

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112 Cal. 455

SOUTHERN PAC. R. CO. v. ALLEN. (No. 15,714.)

(Supreme Court of California. April 17, 1896.)

RAILROAD-GRANT LANDS—CONTRACT TO CONVEY—CONSTRUCTION—RIGHTS OF PARTIES.

1. A contract of sale of unpatented railroad-grant lands required the vendee to pay one-fifth cash, and balance on a future day certain, with interest on deferred payments, and provided that after performance of all conditions he was to receive a deed, which the vendor agreed to make, on demand, after it had received patents, and then, after reciting that the vendor frequently failed to receive patents to its grant lands, provided that, if it was finally determined that patents would not be issued to it, the vendor was then to repay, without interest, all moneys paid on the contract. *Held*, that on nonpayment by the vendee of the balance of the price on the date fixed for payment, though the issuance of a patent was still undetermined, the vendor was entitled to recover the same. Henshaw and Temple, JJ., dissenting. 40 Pac. 752, reversed.

2. A contract for conveyance of railroad-grant lands, when a patent is obtained, for an agreed price, payable within a certain time,—all moneys paid on the contract to be repaid, without interest, on final determination that no patent will issue for the lands,—is not void for lack of mutuality of consideration. 40 Pac. 752, affirmed.

3. Where a contract of sale of land required payment of part of the price in cash, and balance within five years, with interest on deferred payments, payable annually in advance, the vendor, by suing to recover interest due on deferred payments before expiration of the time allowed for payment of the price, did not rescind the contract.

Beatty, C. J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; John M. Seawell, Judge.

Action by the Southern Pacific Railroad Company against Darwin C. Allen. From a judgment for plaintiff, defendant appeals. Heard in bank after reversal in department. 40 Pac. 752. Affirmed.

Robert Harrison, for appellant. Wm. F. Herrin and Jos. D. Redding, for respondent.

VAN FLEET, J. This is an appeal from the judgment, upon the judgment roll. The action is to compel the payment of moneys alleged to be due under contracts for the purchase of lands, and, in default of payment, to foreclose defendant's rights under the contracts, and for general relief. The action is on more than one contract, but they are alike in terms, and one will serve as a type of all. Plaintiff agreed to sell, and defendant to buy, a certain piece of land. At the date of the contract, defendant paid one-fifth of the purchase price, and one year's interest upon the unpaid portion, and agreed to pay the same interest annually in advance until the completion of the purchase, or the termination of the contract, together with all taxes and assessments levied upon the land, and to pay the remainder of the purchase price "on or before the 1st day of February, 1893." Defendant is given the right of immediate possession of the land, and, upon the performance of all the conditions of his contract, is to receive a deed for the land, which deed plaintiff agrees to make, upon demand, "after the receipt of a patent therefor from the United States." The contract proceeds: "It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described, as part of a grant of lands to it by the congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that, in consequence of circumstances beyond its control, it sometimes fails to obtain patents for lands that seem to be legally a portion of its said grant; therefore nothing in this instrument shall be considered as a guaranty or assurance that patent or title will be procured; that, in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay, without interest, to the party of the second part, all moneys that may have been paid to it by him on account of any such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part, as per schedule on page three hereof; that, said lands being unpatented, the party of the first part does not guaranty the possession of them to the party of the second part, and will not be responsible to him for damages or cost in case of his failure to obtain and keep such possession."

This action was brought upon default of defendant in paying the second, third, and fourth years' installments of interest. It was commenced before the expiration of the five-years limitation for the payment of the balance of the purchase money, but was brought to trial and decided after the lapse of that period. Defendant, by answer, denied title in plaintiff, and, by cross complaint, alleged false representations by plaintiff of its title, injury to himself therefrom, and concluded with an offer of rescission, and demand for a return of the moneys paid by him. The findings are in favor of plaintiff, except as to the fact of possession by defendant of the lands described in the complaint, and against the answer and cross complaint; and the decree requires defendant to pay within six months the amount found due as unpaid interest, or be debarred and foreclosed of all right and interest in and to said lands, and in and under the contracts.

The only question really involved in the case is as to the construction of the contracts sued upon. It is contended by the defendant that he was under no obligation to purchase the land, or to pay the remainder of the purchase price, unless the plaintiff should, within the five years, obtain a patent for the land, and that as the plaintiff had failed to obtain a patent within that time, and as the action was not tried until after the expiration of that time, the defendant was entitled to a rescission of the contract. But, clearly, the contracts will not bear any such construction. The defendant contracted, unconditionally, to pay the remainder of the purchase price "on or before" a certain day named, and to pay interest annually in advance on the remainder; but the plaintiff contracted to convey to defendant only "upon the receipt of a patent," and was to repay the money only "in case it be finally determined that patent shall not issue." The defendant, therefore, was not entitled to terminate the contract, or to require a repayment of the moneys paid, until the question of the issue of a patent to the plaintiff should be "finally determined." The findings state that proceedings are now pending in the United States land department for the issue of patent to the plaintiff, and that it has not been finally determined that such patent shall not issue. At the time, therefore, at which defendant contracted to pay the balance of the purchase price, plaintiff was not in default, nor was it in default at the time of the trial. It will thus be seen that under these contracts the times fixed for the payment by defendant of the balance of the purchase price, and the installments of interest on that balance, might all arrive before the happening of the event upon which plaintiff agreed to convey, or before the happening of the event upon which plaintiff agreed to return the money paid. A certain day was appointed for the payment of the balance of the purchase price, and the interest thereon in advance. But the issuance of the patent to plaintiff, or the final determination that such patent should not issue, were events, the time of the occurrence of which was uncertain, and which might take place long after the expiration of the five years. The case is therefore strictly within the well-established rule that "if a day be appointed for payment of money, or a part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or the act is to be performed, an action may be brought for the money, or for not doing such other act, before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent." Donovan v. Judson, 81 Cal. 334, 22 Pac. 682; Railroad Co. v. Butler, 50 Cal. 574; Platt v. Gilchrist, 3 Sandf. 125; Loud v. Water Co., 153 U. S. 564, 576, 14 Sup. Ct. 928; Coleman v. Rowe, 5 How. (Miss.) 460; Couch v. Ingersoll, 2 Pick. 301; Bean v. Atwater, 4 Conn. 10; Edgar v. Boies, 11 Serg. & R. 450. The whole framework of the contracts shows that both parties understood that the question whether or not patents would issue was one of uncertainty, and that it was impossible to know in advance when that question would be "finally determined." Defendant, with full knowledge of that fact, contracted to make his payments at all events, and within certain specified times; merely reserving the right to a repayment of the money in case the particular title contracted for should fail. Under these circumstances, the obtaining of patents could not be a condition precedent to his obligation to make the deferred payments.

The defendant further contends that the contracts were void, ab initio, for want of mutuality or consideration, or amounted, at most, to mere offers to purchase on his part. This contention cannot be sustained. Plaintiff claimed title to these lands, but its title had not been perfected by patent. Defendant had the same opportunity as plaintiff of knowing the nature and probable validity of that claim. Under these circumstances, plaintiff agreed to convey to defendant when it should obtain a patent, and to permit defendant to enter into possession of the land at once. In consideration of these promises, defendant agreed to purchase when a patent should be issued, paid at once one-fifth of the purchase price and one year's interest on the balance, and agreed to pay the remainder (with interest thereon annually in advance) on or before a given date, with the right to a repayment, without interest, in the event of an ultimate failure to obtain a patent. These promises were strictly mutual, and each constituted a sufficient consideration for the other. Plaintiff, by its contract, surrendered its right to contract with or sell to any one else, and yielded to defendant the present right to possession which it claimed. These concessions were clearly a detriment to plaintiff, and, in a legal sense, an advantage to defendant, and they, therefore, furnished a consideration for defendant's promise to pay.

Defendant also claims that the bringing of this action was a rescission of the contracts, which entitled him to a return of the money already paid. But since, under the contract, plaintiff was entitled absolutely to receive the money at the times agreed upon, and to have the benefit of its use until the final determination of the question of the issuance of patent, it was entitled to enforce the collection of the money by this action, and, in the event of a failure to pay, to have defendant foreclosed of his rights under the contracts. Keller v. Lewis, 53 Cal. 118; Fairchild v. Mullan, 90 Cal. 194, 27 Pac. 201; Hansbrough v. Peck, 5 Wall. 506. The decree gave the defendant the alternative of paying within six months, or suffering foreclosure, and this was in accordance with equity. It may be, in view of the fact that the action was tried after the expiration of the time for the payment of the last installment of the purchase price, that the decree should have required the defendant to pay the balance of the principal, as well as the unpaid installments of interest; but the error, if any, in that particular, is in favor of defendant, and cannot be considered on his appeal. It follows from these considerations that plaintiff is entitled to the relief granted by the court below, and that the judgment must be affirmed. It is so ordered.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.

HENSHAW, J. I dissent, under the conviction that the interpretation given to this contract in the opinion rendered by department 2 is proper and sound. It was there said (Railroad Co. v. Allen, 40 Pac. 752): "Plaintiff agreed to sell, and defendant to buy, a certain piece of land. At the date of the contract, defendant paid one-fifth of the purchase price, and one year's interest upon the unpaid portion, and agreed to pay the same interest annually in advance until the completion of the purchase, or the termination of the contract. The time of payment for the unpaid part of the purchase price was 'on or before the first day of February, 1893'; that is to say, within five years from the execution of the contract. Upon performance by defendant of the conditions of his contract, he was entitled—First, to take and hold possession of the land; and, second, to receive a deed for the same, upon demand, and after payment of the remaining four-fifths of the purchase price, which deed plaintiff agreed to make 'after the receipt of a patent therefor from the United States.' The contract proceeds: 'It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described as part of a grant of lands to it by the congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that, in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant; therefore nothing in this instrument shall be considered a guaranty or assurance that that patent or title will be procured; that, in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay, without interest, to the party of the second part, all moneys that may have been paid to it by him on account of any such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that, said lands being unpatented, the party of the first part does not guaranty the possession of them to the party of the second part, and will not be responsible to him for damages or costs in case of his failure to obtain and keep such possession.' * * * Under such circumstances, defendant agreed to buy and pay for these lands at any time within five years, should plaintiff's claim ripen into a perfect title by the issuance of a patent. Plaintiff agreed, as the consideration flowing from it—First, to convey to defendant, and thus to forego its right to contract with or sell to any one else; second, to yield to the defendant in the meantime such possession, use, and enjoyment of the lands as would otherwise belong to it. Defendant, to secure these advantages to himself, paid one-fifth of the purchase price, and agreed to pay interest upon the remainder of it. If, at any time within five years, plaintiff's title was perfected, defendant had the right, upon payment, to compel a conveyance of it to himself. If, at the expiration of five years, the result had not been reached, defendant was entitled to repayment of his moneys, without interest, while plaintiff, for foregoing its right to make other contracts, and for yielding to defendant its right to the occupancy and enjoyment of the lands, was to be compensated by the use, without payment of interest, of the defendant's moneys held by it. It is true, these terms are not explicitly declared in the contract, as here set forth, but they fairly state the expressed agreement of the parties."

There is no doubt but that, in a contract for the sale of land, the covenant to convey and the covenant to pay may be made independent, but there is likewise no doubt but that the general rules of interpretation require these covenants to be construed as interdependent, unless the contrary is made clearly to appear upon the face of the contract; and, where doubt arises as to the intent of the parties, that doubt should be resolved by a construction holding them to be interdependent—First, as expressing the meaning most probably intended by the parties; and, second, as being the interpretation consonant with the spirit of equity and fair dealing. The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return. In Hill v. Grigsby, 35 Cal. 656, this court said: "It is very correctly said in Bank v. Hagner, 1 Pet. 455, that 'in contracts of this description the undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears'; and the reason assigned, as well as the rule, would be applicable here, were the words of the covenant of doubtful import. 'A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the purchase money enforced upon him, and yet be disabled from procuring the property for which he paid it.' The authorities in support of these principles are very numerous, and there is a greater degree of uniformity among them than is usual on a question presented, as this has been, in so many different aspects." A man purchases real property for purposes of improvement and permanent ownership, or for barter and sale. He may, and frequently does, pay the purchase money in speculation, whether or not the title he receives shall prove a good title, but he at least buys something. No case has been called to our attention, and none is cited in the prevailing opinion, in which he pays the purchase price upon a speculation as to whether the vendor shall give him something or nothing. For it will be noted that the plaintiff does not agree at any fixed time, or at all, to convey to defendant such title as it has, or may then have, but merely to convey to it its title when perfected by the issuance of a patent. If it obtains no patent, it conveys nothing. In all the cases which are cited, and in which the question of land sales is considered, it was some interest in land, or claim of title, which the vendee was purchasing, and which he agreed to pay for in advance. Here it is quite otherwise, and it may be instructive to see just what effects must logically follow the interpretation given by the prevailing opinion. Allen, at the end of five years, has paid the full purchase price for the land, with interest. He has been permitted to take possession of it, but has not been secured or warranted even in that. He has no title to the land whatsoever. He cannot compel a conveyance to him of the company's claim or interest in the land. There is no definite future time fixed, upon the arrival of which he may recover either his money or the land. He has parted with his money and the use of it for 10, 20, 30, or 50 years, until it "shall be finally determined that a patent is not to issue." Meanwhile he has no interest to sell, so that it is impossible for him to retrieve himself. He dare not improve the land, because he is not secured in possession or improvements, and he cannot even sell or assign his rights under the contract itself, for that is forbidden by its terms. At the end of an undetermined time, if plaintiff, who is called upon to use only ordinary diligence, fails to obtain a patent, defendant receives nothing but the principal of the purchase price. If that time covered a number of years, as it well might, the use of the money of which defendant was deprived, and which plaintiff has gained, would equal or exceed the principal itself, and yet for this loss defendant receives nothing. It is not easy to believe that a sane man would so contract, and, if this be the true interpretation, the contract is one without parallel. Upon the other hand, it may be readily gathered from the contract itself that the parties assumed that the question of the issuance of the patent would be determined within five years, and that, if determined by or within that time, the corresponding rights and liabilities of the parties to it would attach. If not then determined, the transaction should be at an end, and plaintiff would have had the use of the full purchase price (or its equivalent in interest) for its agreement to sell to defendant, and to yield him possession, while for these considerations defendant would have paid this money, with the right to the return of the principal sum at the end of five years,—a time long enough in which to bring the contract to an end in one or another way. The lapse of five years without issuance of a patent is intended to be, so far as the rights of the parties to this contract are concerned, in and of itself, a final determination that the patent is not to issue. So construed, the covenants are clearly dependent. The one interpretation manifestly exposes the defendant to such untoward danger and loss that it is inconceivable that a man of ordinary intelligence would have bound himself by it. The other expresses a fair business contract, such as any two individuals might enter into. In the prevailing opinion, it is said that the contract clearly will not bear the latter construction. That it is the equitable construction is not, and cannot be, questioned. Upon the other hand, there should be the clearest and most satisfying language in the contract, to warrant the interpretation given it. That language I am unable to find, and if there be an existing doubt, under all the authorities, and under the law of this court above quoted, the doubt should be resolved against the contention that the covenants are independent.

TEMPLE, J., concurs

BEATTY, C. J. I dissent, but upon a different ground from that stated by Justice HENSHAW. As to the construction of the contract, I concur in the views of the majority; but I do not think that the breach of this particular kind of a contract of sale gives the vendor the right to go into equity to claim specific performance, or to foreclose the right of the purchaser. In ordinary contracts for the sale of land the vendor has the right either to rescind, or to foreclose, for failure of the vendee to make deferred payments, because in ordinary contracts of sale the vendor is able to perform the contract on his part by making a conveyance. But when, as in this case, the vendor is not ready to convey, and may never be able to do so, I think he should be limited to rescission, or to his action to recover the installments due, and that he has no right to claim the relief awarded by this judgment.

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5 Cal. Unrep. 341

EASTERBROOK v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 187.)

(Supreme Court of California. May 1, 1896.)

SPECIAL ASSESSMENTS—PAYMENT UNDER PROTEST—ACTION TO RECOVER.

Pol. Code, § 3819 (Laws 1893, p. 32), authorizing actions against counties to recover taxes paid under protest, does not apply to special assessments levied by the city and county of San Francisco, for a specific purpose, in a designated district, to be collected in proportion to benefits, and, when collected, placed in a special fund, over which the city and county have no control, and which can only be used in payment of the principal and interest of bonds for which the city and county are not liable.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; James M. Seawell, Judge.

Action by D. E. Easterbrook against the city and county of San Francisco to recover back money paid under protest for special assessments levied for the widening of Dupont street, in the city of San Francisco. From a judgment in favor of defendant, on refusal of plaintiff to plead further after demurrer to the complaint was sustained, plaintiff appeals. Affirmed.

Haven & Haven, for appellant. H. T. Creswell, W. C. Belcher, and Freeman & Bates, for respondent.

SEARLS, C. This is an action brought by the appellant to recover from the respondent money paid under protest for Dupont street taxes, levied under authority of the act of March 23, 1876, entitled "An act to authorize the widening of Dupont street, in the city of San Francisco" (St. 1875–76, p. 433). A demurrer was interposed to the complaint by defendant, which was sustained by the court; and, plaintiff declining to amend, judgment was entered in favor of defendant, from which judgment plaintiff appeals. The cause comes up on the judgment roll, and the sufficiency of the complaint constitutes the sole question for consideration.

The action is prosecuted under section 3819 of the Political Code, adopted February 27, 1893, which is in part as follows: "At any time after the duplicate assessment book has been received by the tax collector, and the taxes have become payable, the owner of any property assessed therein, who may claim that the assessment is void in whole or in part, may pay the same to the tax collector under protest, which protest shall be in writing, and shall specify whether the whole assessment is claimed to be void, or, if a part only, what portion, and in either case the grounds upon which such claim is founded; and when so paid under protest the payment shall in no case be regarded as a voluntary payment, and such owner may at any time within six months after such payment bring an action against the county in the superior court to recover back the tax so paid under protest," etc. The residue of the section provides that if a judgment be recovered against the county in such a case, and a portion of the tax has been paid over to the state treasury, the treasurer shall be allowed therefor, and the amount so paid over deducted in the next settlement of the county treasurer with the controller, as provided in section 3871 of the Political Code.

Plaintiff filed a written protest, averring that the entire tax was void; and, within six months after paying the tax, brought this action, to recover the tax so paid from the city and county. The question in the court below seems to have turned, not upon the validity of the tax, but upon the liability of the defendant, if the invalidity be conceded. The statute under which the tax was levied provided for the widening of Dupont street (now Grant avenue), in the city and county of San Francisco. The act provided that the value of the land taken for the widening of the street, and the damages to improvements thereon, or adjacent thereto, injured thereby, and all expenses whatsoever incident to the widening of said street, shall be held to be the cost of widening the street, and shall be assessed upon a described and limited district adjacent to the street to be benefited by such widening. The mayor of the city and county of San Francisco, the auditor and county surveyor of said city and county, and their successors in office, were constituted a "Board of Dupont Street Commissioners," with power, among other things, to determine the damages sustained by the several owners on account of property taken and damaged; also, to determine the benefits to be derived by the several lot owners within the district described in the statute, by reason of the improvement, "relatively to the benefits accruing to other lots of land within the said designated district." The expenses were to be met by issuing 20-year coupon interest-bearing bonds of the city and county of San Francisco (interest, 7 per cent. per annum, etc.), to be designated as the "Dupont Street Bonds," to be delivered to the persons in whose favor damages were awarded; or, upon their refusal to accept such bonds, they were to be sold, and cash payments made to the persons so damaged. The liability of the city and county was guarded against by section 22 of the act, as follows: "The completion of the work described in this act shall be deemed an absolute acceptance by the owners of all lands affected by this act, and by their successors in interest, of the lien created by this act, upon the several lots so affected, and it shall operate as an absolute waiver of all claim in the future upon the city and county of San Francisco for any part of the debt created by the bonds authorized to be issued by this act, and their successors in interest. This shall be regarded as a contract between said owners and the holders of said bonds and said city and county, and this provision shall be stated on the face of the bonds." These bonds and the accruing interest thereon were to be met by the levy of an annual tax upon the lands in the designated district, to be adjusted and distributed according to the enhanced values of the respective parcels of land as fixed by the commissioners. The taxes, when collected, were to be paid over to the treasurer of the city and county, and to "constitute a part of the 'Dupont Street Fund,' and to be paid out by said treasurer only in payment of the coupons attached to said bonds, as the same from time to time become due"; and the sums collected to meet the principal were to be received, treated, and paid out in like manner.

From these brief references to the statute, it is apparent (1) that what is termed the "tax" is a special assessment, levied for a specific purpose, upon a designated district, to be collected in proportion to benefits; (2) that, when collected, it is placed in a special fund, and can only be used in payment of the principal and interest of the bonds provided for in the statute; (3) that the city and county is not liable for the payment of the bonds, and has no control over the specific fund raised for their liquidation. Under these circumstances, we do not see that the city and county can be held liable in this action. The case is, we think, brought within the spirit of the rule enunciated by the United States circuit court in Liebman v. City and County of San Francisco, 11 Sawy. 147, 24 Fed. 705, and in Elberg v. San Luis Obispo Co. (decided by department 2 of this court, August 3, 1895) 41 Pac. 475, and Pacific Mut. Life Ins. Co. v. San Diego Co. (decided August 21, 1895) Id. 423. A rehearing was granted in the last two cases above mentioned; and, after mature consideration by the court in bank, the conclusion reached by the department has been approved. We recommend that the judgment appealed from be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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5 Cal. Unrep. 344

MYERS v. NELSON et al. (Sac. 31.)

(Supreme Court of California. May 1, 1896.)

HIGHWAYS—OBSTRUCTION.

Where owners of land adjacent to a highway construct a system of artificial ditches, converging at a culvert crossing such highway, so as to discharge an unnatural quantity of water on the lower lands on the opposite side of such highway, the owner of such lower lands cannot dam the culvert on the highway for the purpose of protecting her lands from such overflow.

Commissioners' decision. Department 1. Appeal from superior court, Butte county; John C. Gray, Judge.

Action by Elizabeth Myers against J. M. Nelson and J. C. Richardson to enjoin defendants, who are, respectively, road supervisor and his employé, from digging up and removing earth which plaintiff had placed across a culvert crossing a highway, for the purpose of preventing the flow of water through such culvert on her land, in which a preliminary injunction was allowed. From an order dissolving such injunction, plaintiff appeals. Affirmed.

W. H. Carlin and M. E. Sanborn, for appellant. H. V. Reardon, for respondents.

BRITT, C. Defendant Nelson is a member of the board of supervisors of Butte county and ex officio road commissioner in and for his supervisor district. Under the direction of said board, it is his duty to take charge of the highways in his district, keep them clear from obstructions and in good repair, and employ the help necessary for that purpose. Pol. Code, §§ 2641, 2645. Defendant Richardson is employed by Nelson in caring for the highways of the district, and it is admitted that in the matters laid to their charge here they acted officially, and under the instructions of the board of supervisors. There is a highway under the superintendency of said Nelson running from east to west along the line between sections 10 and 15 of a certain congressional township, which highway has existed as such for more than five years, regularly laid out and constructed by order of said board. It occupies a strip of land four rods in width along the boundary between said sections, two rods in each section, it seems; and the roadway or traveled portion thereof has been graded and elevated about eighteen inches above the surface of the surrounding soil; this being necessary to its use during the rainy season. Such elevation was effected by taking the earth from either side of the roadway, and within said strip four rods wide, leaving upon each side of the roadway a depression or gutter lower than the adjacent surfaces. The country for some miles around slopes gently from northeast to southwest. At the lowest point on said section line is a culvert through and under said roadway for the purpose of carrying off surface water accumulating in the highway. The bottom of such culvert was on a level with the bottom of the gutters on the sides of the roadway, and we may infer that the result of this arrangement was to allow any water accumulating on the north side of the roadway to flow through the culvert to the south side thereof, where, if not further obstructed, it would find its way to the somewhat lower land to the south in section 15. This land—480 acres in area—is the property of plaintiff, but the right of way for said highway along the said northern boundary of the same was granted by her predecessors in interest to said county. The surface of the land of plaintiff, and also that of several sections lying north and northeasterly therefrom, is marked with low ridges and shallow depressions or "sinks," which cause the natural drainage of the same to be "slow, gradual, and incomplete." Within a period of five years next before the commencement of the action (which was November 26, 1894), divers persons, owners and occupants of said lands lying north and northeasterly of plaintiff's, have from time to time constructed ditches, "with many lateral connections, and with a slight and even fall of grade in a general southerly and westerly course," converging to a point on said section 10 near the north end of said culvert. The effect of such system of ditches, as claimed by plaintiff, is to collect the surface water from the land, and discharge it in unnatural volume and greatly accelerated flow at said point of convergence; and none of it, she alleges, would reach that point naturally, or at all, except by such system of artificial ditches. In order it seems, to prevent the passage of the water brought down by means of such ditches through said culvert and upon her land, plaintiff entered upon the highway at the north end of the culvert, and, by means of earth, filled in the gutter on the north side of the roadway to a level with the surrounding soil, so that the water which would naturally flow in said gutter accumulates and overflows the roadway, and travel thereon is impeded. The defendants, for the "protection, benefit, and maintenance of said public highway," were about to dig up and remove the earth with which plaintiff had caused such gutter and culvert to be obstructed as aforesaid, when plaintiff brought this action to enjoin them from so doing, claiming that the effect of their intended acts would be to cause all of the waters carried through said system of ditches to be precipitated upon her land, and flood the same, to her irreparable injury. A preliminary injunction was allowed, which, on motion of defendants, heard upon the complaint and answer, was dissolved by the court. The order of dissolution is the subject of the present appeal.

Upon the papers before it, the court might fairly have found the facts to be as we have stated; and we think they warranted its action dissolving the injunction. Plaintiff invokes the doctrine, which we have no inclination to deny, that highway officers may not collect in artificial channels mere surface water precipitated by rain over large districts, and throw it upon the property of another (Conniff v. San Francisco, 67 Cal. 49, 7 Pac. 41; Gould, Waters, §§ 261, 272); but here the plaintiff does not claim that either the gutters along the sides of the highway or the culvert have the effect to collect surface water in its natural flow in such manner as to occasion any injury to her. On the contrary, it clearly appears from her complaint that the surface water from the lands above her own would not reach said culvert in any harmful quantity but for the system of artificial ditches constructed for the more rapid drainage of their lands by her neighbors. Defendants are not shown to be in any way responsible for the ditch system which, in point of time, followed the construction of the highway. To restrain the water brought down "through the medium of said system of artificial ditches" (the phrase of the complaint) from reaching her land, plaintiff claims, virtually, that she may use the roadway as a dam, closing up the inlet to the culvert to make the stoppage effectual, to the impairment of the highway and hindrance of public travel. If a herd of cattle had been unlawfully turned loose, so that, by traversing the highway, they might enter on her land, we suppose that she would have no right to impound them in the road, or to enjoin the road commissioner from removing structures she might erect there for that purpose, and that the responsibility for the damage the cattle might do would be upon the persons who set them at large, and not upon the roadmaster. The case put seems not much different from the case at bar. "If the owner of the upper ground wrongfully direct an unnatural quantity of water upon the ground of a lower neighbor, by collecting several streams together, and discharging them at one place, or by any other means, the neighbor below may have an action against him; but he cannot justify the erection of an embankment to stop the water if thereby the water is improperly forced upon another owner." Martin v. Riddle, 26 Pa. St. 415, 417. See, also, Mathews v. Kinsell, 41 Cal. 512; Amick v. Tharp, 13 Grat. 564. The order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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112 Cal. 468

Ex parte JENTZSCH. (Cr. 97.)

(Supreme Court of California. April 17, 1896.)

CONSTITUTIONAL LAW—POLICE POWER.

1. Pen. Code 1895, § 310½, making it a criminal offense for barbers to conduct their business on Sundays or holidays after 12 o'clock m., is not a proper exercise of the police power of the state.

2. Said act is in violation of Const. art. 4, § 25, subsecs. 2, 33, prohibiting local or special laws for the punishment of crimes and misdemeanors in all cases where a general law can be made applicable.

In bank. Petition by Leo Jentzsch for a writ of habeas corpus to secure his discharge from custody under a conviction for violation of Penal Code, § 310½, prohibiting barbers from keeping open their places of business or working at their trade on Sundays after 12 o'clock m. Petitioner discharged.

Henry E. Highton and Darwin C. Allen, for petitioner. H. G. W. Dinkelspiel, for respondent.

HENSHAW, J. Petitioner was convicted under section 310½ of the Penal Code, which is a new section, enacted in 1895, and which provides as follows: "Every person who as proprietor, manager, lessee, employé or agent keeps open or conducts, or causes to be kept open or conducted, any barber shop, bath house and barber shop, barber shop of a bathing establishment, or hair-dressing establishment, or any place for shaving or hair-dressing used and conducted in connection with any other place of business or resort, or who engages at work or labor as a barber in any such shop or establishment on Sunday, or on a legal holiday, after the hour of twelve o'clock m. of said day, is guilty of a misdemeanor." It is contended that the section is in violation of the following constitutional provisions:

Article 1, § 1: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness."

Article 1, § 21: "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

Article 4, § 25, subsecs. 2, 33: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: Second. For the punishment of crimes and misdemeanors." "In all cases where a general law can be made applicable."

In construing so-called "Sunday Laws" courts have variously regarded them, some from a religious view, others from a secular, and still others from an anomalous commingling of both. In this state they have never been upheld from a religious standpoint. Under a constitution which guaranties to all equal liberty of religion and conscience, any law which forbids an act not in itself contra bonos mores, because that act is repugnant to the beliefs of one religious sect, of necessity interferes with the liberty of those who hold to other beliefs or to none at all. Liberty of conscience and belief is preserved alike to the followers of Christ, to Buddhist, and Mohammedan, to all who think that their tenets alone are illumined by the light of divine truth; but it is equally preserved to the skeptic, agnostic, atheist, and infidel, who says in his heart, "There is no God." So it has come to be the established rule in this state to view and construe such laws as civil and secular enactments. Ex parte Andrews, 18 Cal. 678; Ex parte Koser, 60 Cal. 177. Thus construed, these laws, when decreed valid, are upheld as a proper exercise of the police power, as an exercise of the legislative prerogative to regulate the relations, contracts, intercourse, and business of society at large, and its particular members with respect to each other. Herein it is held that the legislature may pass laws for the preservation of health and the promotion of good morals, —propositions which are indisputable.

Says Mr. Justice Field in Ex parte Newman, 9 Cal. 518: "Labor is a necessity, imposed by the condition of our race, and to protect labor is the highest office of our laws." It is this language which respondent quotes and relies upon in support of the validity of this penal statute. Upon the question thus presented of the proper limits of the police power much might be written, and much, indeed, will have to be written, ere just bounds are set to its exercise. But in this case neither time permits nor necessity demands the consideration. Still it may be suggested in passing that our government was not designed to be paternal in form. We are a self-governing people, and our just pride is that our laws are made by us as well as for us. Every individual citizen is to be allowed so much liberty as may exist without impairment of the equal rights of his fellows. Our institutions are founded upon the conviction that we are not only capable of self-government as a community, but, what is the logical necessity, that we are capable, to a great extent, of individual self-government. If this conviction shall prove ill founded, we have built our house upon sand. The spirit of a system such as ours is therefore at total variance with that which, more or less veiled, still shows in the paternalism of other nations. It may be injurious to health to eat bread before it is 24 hours old, yet it would strike us with surprise to see the legislature making a crime of the sale of fresh bread. We look with disfavor upon such legislation as we do upon the enactment of sumptuary laws. We do not even punish a man for his vices, unless they be practiced openly, so as to lead to the spread of corruption, or to breaches of the peace, or to public scandal. In brief, we give to the individual the utmost possible amount of personal liberty, and, with that guarantied him, he is treated as a person of responsible judgment, not as a child in his nonage, and is left free to work out his destiny as impulse, education, training, heredity, and environment direct him. So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic; for the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws none the less dangerous because well meant. We think the act under consideration gives plain evidence of such encroachment. It is sought to be upheld by the argument that it is a police regulation; that it seeks to protect labor against the oppression of capital. The people have passed the law; let not the courts interefere with it. If the people are dissatisfied, they may amend or repeal it.

It is not easy to see where or how this law protects labor from the unjust exactions of capital. A man's constitutional liberty means more than his personal freedom. It means, with many other rights, his right freely to labor, and to own the fruits of his toil. It is a curious law for the protection of labor which punishes the laborer for working. Yet that is precisely what this law does. The laboring barber, engaged in a most respectable, useful, and cleanly pursuit, is singled out from the thousands of his fellows in other employments, and told that, willy nilly, he shall not work upon holidays and Sundays after 12 o'clock noon. His wishes, tastes, or necessities are not consulted. If he labors, he is a criminal. Such protection to labor, carried a little further, would send him from the jail to the poorhouse. How comes it that the legislative eye was so keen to discern the needs of the oppressed barber, and yet was blind to his toiling brethren in other vocations? Steam car and street car operatives toil through long and weary Sunday hours; so do mill and factory hands. There is no Sunday period of rest, and no protection for the overworked employés of our daily papers. Do these not need rest and protection? The bare suggestion of these considerations shows the injustice and inequality of this law. In brief, whether or not a general law to promote rest from labor in all business vocations may be upheld as within the due exercise of the police power as imposing for its welfare a needed period of repose upon the whole community, a law such as this certainly cannot. A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all. As was said in Pasadena v. Simpson, 91 Cal. 238, 27 Pac. 604: "The conclusion is that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." And in Darcy v. City of San Jose, 104 Cal. 642, 38 Pac. 500: "The classification, however, must be founded upon differences which are either defined by the constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity of legislation." In the case of our cities the constitution itself decrees a classification by population, and the differing exigencies of municipal government require that laws operating upon any class should be held general; otherwise the constitutional scheme itself is overthrown. But in a law such as this no reason has been or can be shown why the followers of one useful and unobjectionable employment should be debarred from the right to labor upon certain days, and others in like classes of employment be not so debarred. If it be constitutional to single out one such class, and debar its members from the right to labor on one day in the week, it would be constitutional to prohibit them from following their vocation upon six days of the week. When any one such class is singled out and put under the criminal ban of a law such as this, the law not only is special, unjust, and unreasonable in its operation, but it works an invasion of individual liberty,—the liberty of free labor, which it pretends to protect. Ex parte Westerfield, 55 Cal. 550, in no wise conflicts with these views. There was an additional vice in that law. While the classification was in itself arbitrary, as in this case, the law did not include all who came within the arbitrary classification thus made. It was this ground only which was discussed, and upon which the law was overthrown. Here, however, the designated class is based upon no distinction, and, as is said by Judge Cooley: "Every one has a right to demand that he be governed by general rules; and a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but an arbitrary mandate, unrecognized by the law." The prisoner is discharged.

We concur: BEATTY, C. J.; TEMPLE, J.; McFARLAND, J.; GAROUTTE, J.; HARRISON, J.

VAN FLEET, J., concurs in the judgment.

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5 Cal. Unrep. 348

SUTTON v. NICOLAISEN et al. (Sac. 56.)

(Supreme Court of California. May 1, 1896.)

HIGHWAYS—WHAT CONSTITUTES—USER—REPEAL OF STATUTE.

1. Occasional travel on a road across government land, which has never been laid out, recorded, or worked as a public road, will not constitute it a highway.

2. The provision of Pol. Code, 1876, § 2619, as originally enacted, that "all roads used as such for a period of five years are highways," was repealed by Act March 30, 1874, as to all counties, though the amendment was in terms made applicable to certain counties only. Huffman v. Hall, 36 Pac. 417, 102 Cal. 26, followed.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; J. E. Prewett, Judge.

Action by Richard T. Sutton against Christian Nicolaisen and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Ben P. Tabor, for appellants. A. K. Robinson, for respondent.

BELCHER, C. The plaintiff brought this action to recover damages for trespasses committed by defendants by entering on his land, and tearing down about 30 feet of his boundary line fence, and digging up the soil, and destroying the grass and vegetation growing thereon, and also to obtain an injunction restraining defendants from repeating the said trespasses, and from constructing, as they threatened to do, an open road through and across plaintiff's said land. The defendants, by their answer, denied that they had committed, or threatened to commit, any trespasses upon the land of the plaintiff, or that he had been damaged in any sum whatever; and they alleged that for more than 30 years there had been a public highway, 40 feet wide, the line of which was specifically described, over and across the land of plaintiff, which had been continuously used by the traveling public during all of said time; that defendants were residents and taxpayers in the county in which the road is situated, and were accustomed to pass on foot and with vehicles over the same to their post office and market place; "that on or about the 3d day of April, 1894, said open traveled way was, by some person, obstructed by a wire fence constructed across the same, and by trees felled across and bowlders rolled into said road or way, totally preventing the defendants from traversing the same; that defendants carefully, and with as little injury as possible, removed said obstructions from said road or way; and that said acts are and constitute the pretended trespass complained of by plaintiff." The case was tried without a jury, and the court found that all the averments of the complaint, except as to the amount of damages sustained, were true, and that all the denials and averments in the answer were untrue; that plaintiff had been damaged by the wrongful and unlawful acts of defendants in the sum of $20; "that said defendants, if not restrained, will do plaintiff irreparable injury, and plaintiff has no adequate remedy at law"; "that the land described in defendants' answer is not a public highway"; and "that the defendants, or either of them, have no interest, easements, or right of way therein." Judgment was accordingly entered, awarding the plaintiff damages in the sum of $20 and a perpetual injunction, as prayed for. From this judgment, and an order denying their motion for a new trial, the defendants appeal. In support of the appeal, it is earnestly contended that the findings were not justified by the evidence, and that the judgment should therefore be reversed.

The principal question involved in the case and presented for decision is: Was or was not the strip of land described in the answer shown by the evidence to be a public highway? It was proved that respondent settled upon his land in 1881, and obtained a United States patent therefor in December, 1893. In behalf of appellants, it was proved that one of their number laid out a road over the said strip of land in 1874, and that he and a few other persons occasionally used it thereafter, up to near the time of the alleged trespass, for hauling wood, lumber, and some other freights, for driving live stock, and for passing over it on foot and in vehicles. It does not appear that any road across respondent's land was ever laid out and recorded as a highway; and, in rebuttal, it was proved that the alleged road was only from seven to nine feet wide, and that the road masters of the district in which it is situated had never done any work upon it as a public road. To sustain their theory that the road was a public highway, counsel for appellants rely upon section 2477 of the United States Revised Statutes, and upon section 2619 of the Political Code, as it was originally enacted. The first section above named provides: "The right of way for the construction of highways over the public lands, not reserved for public use, is hereby granted." This section simply grants a right of way for roads, but the question whether a road has been so constructed as to make it a public highway is one that can be solved only by a consideration of the laws of the state. The second section above named provided: "Roads laid out and recorded as highways by order of the board of supervisors, and all roads used as such for a period of five years, are highways." This section was amended by an act passed March 30, 1874, by striking out the words "and all roads used as such for a period of five years"; and, as thus amended, it remained in force until 1883, when the whole chapter upon the subject was repealed. It was provided, however, by the amendatory act, that it should apply only to certain named counties, of which Placer county, in which the road in question is situated, was not one. In Gloster v. Wade, 78 Cal. 407, 21 Pac. 6, the question was raised whether the said amendatory act had the effect to repeal the amended section of the Code as to counties to which the act was not declared applicable. It was held that it did not have that effect, but that, as to all counties not named, the section as originally enacted remained in full force, notwithstanding the amendment. In Huffman v. Hall, 102 Cal. 26, 36 Pac. 417, in which the same question was again raised, a different conclusion was reached, and Gloster v. Wade was expressly overruled. And in Cooper v. Monterey Co., 104 Cal. 437, 38 Pac. 106, the decision in the Huffman Case was approved and followed. Counsel for appellants contend that the decision in Gloster v. Wade was a correct exposition of the law, and should be upheld, and that the two later decisions to the contrary should be overruled. This contention cannot be sustained. It appears that the question involved was very fully considered and ably discussed in the opinion rendered in the Huffman Case, and that the decision was by the court in bank, five justices concurring. It also appears that the decision in the Cooper Case was made by department 1 of the court, and that a rehearing in bank was asked for and denied. These decisions must therefore be accepted as the well-considered and latest expressions of the views of the court upon the question in hand, and as correct expositions of the law upon the subject. It follows that the court below was justified in finding that the strip of land described in the answer was not a public highway, and that the judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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112 Cal. 506

WORMOUTH v. GARDNER et al. (S. F. 157.)

(Supreme Court of California. May 1, 1896.)

PUBLIC LANDS—MEXICAN GRANTEES—PURCHASE RIGHT—LAND OFFICE—DECISIONS—REVIEW.

Under Act July 23, 1866, § 7 (14 Stat. 220), providing that bona fide purchasers of lands held under Mexican grants subsequently rejected or excluded on final survey of the grant, who have taken actual possession and improved according to the lines of the original survey, shall have, where no adverse title except that of the United States exists, the right to purchase on proof of the above facts, it was error, in an action for possession of land under a homestead entry, to sustain a demurrer to an answer and cross complaint which alleged that defendants claimed the land as grantees of bona fide purchasers, prior to plaintiff's entry, of heirs of Mexican grantees; that defendants and their grantees had held continuous possession of, and had improved, the land; that proof of all these facts was made before the land department on application of their grantor to purchase; but that the department, basing its decision on such proof, decided that he was not, as matter of law, entitled to purchase, and denied his application.

Department 1. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by one Wormouth against one Gardner and others. From a judgment for plaintiff, defendants appeal. Reversed.

Hepburn Wilkins, for appellants. E. B. Mahon, for respondent.

HARRISON, J. Upon the former appeal in this case (105 Cal. 149, 38 Pac. 646), the plaintiff's right of recovery was based upon a homestead entry, and the receipt of the receiver of the United States land office for the cash payment thereof. The trial of the cause below, from which that appeal was taken, was had in the year 1892; and, intermediate the decision upon that trial and the decision of this court upon the appeal, a patent for the land described in the complaint was issued to the plaintiff by the United States; and, upon the going down of the remittitur, the defendants filed a supplemental answer and a cross complaint, setting forth this issuance of the patent to the plaintiff, and alleging other facts by virtue of which they claimed that the plaintiff holds the patent in trust for them, and asked that the court decree that he execute to them a conveyance of the said land. To this supplemental answer, and to the cross complaint, the plaintiff filed a general demurrer, which was sustained; and, the defendants declining to amend, judgment was thereafter rendered in favor of the plaintiff. From this judgment, the defendants have appealed.

The facts alleged by the defendants in support of their claim are that in the year 1834 the Mexican government granted to Juan Reed a tract of land called the "Rancho Corte De Madera Del Presidio," which included the demanded premises within its exterior limits; that the said grant was confirmed, and in the year 1885 a patent therefor was issued by the United States to the heirs of said Reed (he having died in 1843); that after the confirmation of the grant, and while proceedings were pending in the land department to ascertain its boundaries, and before the final survey thereof had been made, the grantors of the defendants purchased from said heirs of Reed, in good faith and for a valuable consideration, a tract of land which included the lands described in the complaint, in the belief that the said tract of land was a part of said Mexican grant; that the final survey upon which the patent was issued was made in 1874, and by it the lands so purchased were excluded from the grant; that in January, 1875, one Throckmorton, who had succeeded to the interests of the aforesaid purchasers, made an application to the register and receiver of the United States land office at San Francisco for the purchase of said lands, under section 7 of the act of congress entitled "An act to quiet titles in California," approved July 23, 1866, and that the plaintiff herein was a party defendant upon said application, and contested the same; that Throckmorton's application was rejected by the register and receiver, and also, upon appeals therefrom, by the commissioner of the general land office, and by the secretary of the interior, and that thereafter a patent was issued to the plaintiff for the lands described in the complaint; that, after the institution of the proceedings before the register and receiver, Throckmorton died; and that the defendants herein have succeeded to his interests in the premises.

It is an established rule of law that, upon the issuance of a patent by the United States, the decision of the officers of the land department upon all of the facts necessary to the issuance of such patent is, in the absence of fraud, mistake, or imposition, conclusive; but that if, in making this decision, they have erred in the construction of the law applicable to the facts, or by any mistake of law have given to one the land which, upon undisputed facts, should have been given to his contestant, a court of equity will grant relief against such mistake by disregarding their erroneous rulings of law, and will decree that the person who has received the patent holds the same in trust for the one to whom it should have been issued. Errors of judgment, however, in reference to the weight of evidence or the credibility of witnesses, as well as the inferences or conclusions which the officers may draw from the testimony before them in contested questions of fact, are conclusive upon courts. Johnson v. Towsley, 13 Wall. 72; Shepley v. Cowan, 91 U. S. 330; Moore v. Robbins, 96 U. S. 530; Rector v. Gibbon, 111 U. S. 276, 4 Sup. Ct. 605; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249; Rutledge v. Murphy, 51 Cal. 388; Buckley v. Howe, 86 Cal. 596, 25 Pac. 132. See, also, cases cited under Gould & Tucker's Notes to section 2273, Rev. St. U. S. The parties to this appeal do not either of them controvert this proposition, but differ as to its application to the case before the court; the appellant relying upon the former part of the rule, while the respondent contends that the latter portion controls the case.

Section 7 of the act of July 23, 1866 (14 Stat. 220), provides "that where persons in good faith, and for a valuable consideration, have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved, and continued in the actual possession of the same, as according to the lines of their original purchase, and where no valid, adverse right or title (except of the United States) exists, such purchasers may purchase the same, after having such lands surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts as required in this section, under regulations to be provided by the commissioner of the general land office." Under the provisions of this section, Throckmorton made his application for the purchase of the lands that had been conveyed to him, and contested with the plaintiff the right to receive a patent for the lands in question; and, under the above authorities, the decision of the officers before whom the contest was had is conclusive upon all questions of fact presented to them. It is alleged, however, in the answer and cross complaint of the defendants herein, that the grantees under the heirs of Reed purchased the lands described in their deeds "in good faith, and for a valuable consideration"; and that they "used, improved, and continued in the actual possession of the said lands," including those described in the complaint, "according to the lines of their original purchases"; and that from February 1, 1871, to July 17, 1890, Throckmorton, and, after his death, his executrix, "used and improved and continued in the actual possession" of the lands described in the deeds from the heirs, "substantially according to the lines of said deeds": and that Throckmorton, at the time of his said purchase, believed in good faith that all of said lands were included within the Mexican grant to said Reed, and in good faith entertained such belief until the date of his death; and that the said Mexican grant did purport to grant and convey all of the said lands described in said deeds; and that on July 17, 1890, the defendant Jacob Gardner succeeded to the interest of Throckmorton, and has since that date been in the possession of a certain portion of the land described in the complaint. It is also alleged that, at the hearing before the officers of the land department, all of these facts were established by competent evidence; and that there was no conflict in said evidence, and no evidence which contradicted any part of said evidence; and that the said evidence was true; but that, notwithstanding the same, the register and receiver, and also the commissioner of the general land office and the secretary of the interior, "basing their decision upon the evidence aforesaid, and resting the same upon the proposition of law that under the evidence and facts introduced before them on said application, as aforesaid, the said Throckmorton was not in law or under the law entitled to purchase the said land, denied the application of said Throckmorton to purchase the said land"; and that a patent for said lands was issued to the plaintiff by reason of said erroneous construction of the law.

Upon these facts, it is evident that Throckmorton brought himself within the provisions of section 7 of the act of July 23, 1866, aforesaid, and was entitled to receive a patent for the land; and the demurrer to the answer and cross complaint of the defendants concedes the truth of these averments. The answer and cross complaint do not set forth the facts which were determined by the secretary of the interior, nor does it appear that he made any special findings of fact, or gave any conclusion with reference to the above facts; but upon the allegation that the purchase was in fact made in good faith, and for a valuable consideration, and that competent and uncontradicted evidence of such facts, as well as of the other facts, was presented to that officer upon the application for the patent, we must assume that his findings were in accordance with the evidence, and that his refusal to issue the patent to Throckmorton was by reason of his construction of the law that he was not entitled thereto. Whether Throckmorton did in fact purchase the land for a valuable consideration, or whether, after his purchase, he used and improved and continued in the actual possession of the same, according to the lines of his purchase, were questions of fact to be determined by the secretary of the interior. The good faith of Throckmorton in making the purchase, as well as his belief that the land he purchased was included within the original limits of the Mexican grant, were also facts to be determined by that officer from all the circumstances under which the purchase was made. Whether that officer properly considered the weight to which the evidence before him was entitled, or whether he drew correct conclusions from that evidence, his determination with reference to these facts, whether correct or erroneous, is conclusive upon the judicial tribunals. These tribunals cannot exercise a revisory jurisdiction over him in matters which are within the scope of the authority conferred upon him; but if, upon the undisputed facts, he made an erroneous application of the law pertinent to those facts, his action is open to review. The judgment is reversed, and the superior court is directed to overrule the demurrers, with permission to the plaintiff to answer the cross complaint, if he shall be so advised.

We concur: GAROUTTE, J.; VAN FLEET, J.

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112 Cal. 521

In re WILLIAMS' ESTATE. (Sac. 32.)

(Supreme Court of California. May 4, 1896.)

WILLS—LEGACIES—WHEN DUE—INTEREST—RESIDUARY LEGATEE.

1. Where a will provides that executors shall not be required to pay legacies "until such time as it may be practicable to do so, having regard to beneficial management of my said estate," the legacies become due, without regard to the provision, at the end of one year after the testator's death, by Civ. Code, § 1368, and draw interest thereafter by section 1369.

2. Under Civ. Code, § 1357, subd. 4, "a residuary legacy embraces only that which remains after all the (other) bequests of the will are discharged," and a specific legacy, payable out of the residue after other legacies are paid, is not a residuary legacy, where the gift of the residuum is to another.

3. Legacies become due by the provisions of Civ. Code, § 1368, without an order of the court that they be paid.

Department 2. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

In the matter of the estate of Lewellyn Williams it was sought to charge the residuum with interest on a certain legacy. From a decree disallowing interest, the legatee appeals. Modified.

Garrett W. McEnerney and Stanley, Hayes, McEnerney & Bradley, for appellants. McKune & George and A. C. Freeman, for respondents.

TEMPLE, J. The question involved in this appeal is whether appellant, Mrs. Harvey, is entitled to interest upon a legacy of $10,000 given her by the will of the deceased. Williams died May 6, 1891. By his will, as first executed, he gave in trust for his adopted daughter, Mrs. Auzerais, and her children, $100,000; to Hannah B. Fuller, $10,000; Sophia G. Cutter, $10,000; Mrs. Clinton Hardy, $10,000; Mary Green, $10,000; for a monument, $1,000; lodge of Masons, $1,000; and to Mrs. Auzerais the residue of the estate. The will contained the following provision: "My said executors shall not be required to pay the legacies herein to said Fuller, Hardy, and Green until such time as it may be practicable to do so, having regard to beneficial management of my said estate. The said bequest of one hundred thousand dollars to my said daughter Lucy is not to be reduced or diminished under any circumstances," etc. By a codicil the testator gave additional legacies as follows: To Sarah W. Woart, $20,000, from the residue of his estate; to Hannah B. Fuller, $10,000 additional; to Sophia G. Cutter, $10,000 additional; to Mrs. J. Downey Harvey, $10,000 out of the residue of the estate; to Harriet E. Mowe, $5,000; to Gee Foo, $500; to Charlie, $500; and to Sophia G. Cutter, $2,500, for a monument. The will was probated May 29, 1891. The estate was appraised at $314,645.11. The time for presentation of claims against the estate expired March 29, 1892. The claims presented aggregated $1,579.55, and were all paid prior to May 6, 1892.

It is provided by section 1368, Civ. Code, that legacies are due and deliverable at the expiration of one year after the testator's decease; by section 1369, that they bear interest from the time they are due and payable; and by section 1370, that these provisions are in all cases to be controlled by the testator's express intentions.

The judgment of the probate court refusing interest is defended on various grounds. First. It is contended that the above direction that the executors need not pay certain named legatees their legacies until it is practicable, having regard to the beneficial management of his estate, is an express declaration that the legacies were not due and payable until the executors shall deem, or the court shall find, that such payment is practicable, having regard to the beneficial management of the estate. The first answer to this is obviously that the legacy due appellant is not one of those mentioned, and which it may be claimed may be withheld for the advantage of the estate. To prevent the application of the statutory rule, the intention of the testator must be expressed in the will. But I think that it would not matter if it were admitted that this provision of the will includes all legacies. The Code rule is the common-law rule, which was induced partly by reason of public policy. A pecuniary legacy is a debt due from the estate; not a claim against the testator which must be proved and paid in due course of administration, but a claim against the estate imposed by the will. One year is allowed to the estate, during which time the executors ought to be able to collect and realize the assets and be in readiness to discharge the obligations imposed upon the estate by the will. It would be difficult and impracticable to determine in every case when it would be convenient to pay the legacies, and so a general rule has been adopted which cuts the knot by doing what in general cases is convenient, though in particular cases both convenience and justice would be disappointed. Sitwell v. Bernard, 6 Ves. 520. So, too, it is presumed that the money is earning something for the estate, which the residuary legatee ought not to be able to get at the expense of the special legatee. To allow this would often involve delay in the administration of estates in the interest of the residuary. It is therefore held, in the face of such provisions, that it will be practicable or convenient to pay at the end of one year. This is held even where administration was prevented by contests of the will, or in regard to right to administer. Powell v. Drake, 19 D. C. 334; Kent v. Dunham, 106 Mass. 586; Welch v. Adams, 152 Mass. 86, 25 N. E. 34; In re McGowan, 124 N. Y. 526, 26 N. E. 1098. In Vernet v. Williams, 3 Dem. Sur. 340, the matter is discussed at length, and numerous authorities cited and commented upon. The conclusion is that such words in a will do not affect the rule. The court will conclude that it is practicable and convenient to pay at the end of the year, and not before. In fact, the words may be held to refer to the rule, for it has been uniformly held that "as soon as possible," or "when practicable," means at the end of the year. Rogers v. Rogers, 2 Redf. 27. In Ingraham v. Postell, 1 McCord, Eq. 94, it was said: "It seems to be settled, as a general rule, that the legacy shall carry interest after a year from the date of the death of the testator, even though it appears that it could not by any diligence be collected within that time, because, in contemplation of law, it might have been done." I conclude, upon this branch of the case, that the legacy of appellant is not within the qualification in the will, and, if it were, still it would bear interest. The rule prevailing in courts of chancery and adopted in the Code declares that it is convenient and practicable to pay the same at the end of the year.

Second. It is contended that the legacy to Mrs. Harvey is a residuary legacy, and therefore cannot be paid until the residuum is ascertained. If the legacy is really residuary, we need inquire no further. The suggestion of interest upon a residuary legacy is an absurdity, for there can be no fund from which the interest could be paid. Interest allowed on particular legacies always comes from the residuum, and when the money is retained by the estate its use is presumably to the advantage of the residuary. But nothing can be more certain than that the legacy is not residuary. "A residuary legacy embraces only that which remains after all the (other) bequests of the will are discharged. Civ. Code, § 1357, subd. 4. There can be but one such residuum, and in the codicil containing the legacy to appellant the testator mentions the gift of such residuum to Mrs. Auzerais after all the gifts in the will are fulfilled. This is the residuary legacy, and the only one provided for in the will. The provision that the legacy should be paid out of the residue did not make the legacy residuary. The intent was, doubtless, that the bequests not so qualified should be first paid, and not be held liable for contribution until the qualified legacies were exhausted. In that sense all the bequests are residuary, as to the first in trust for Mrs. Auzerais, and all might have been expressly made so. Suppose, for instance, a will should provide for a legacy to A. of $10,000, and out of the residue to B. a legacy of $10,000, and after the payment of the legacy to B. the residue to C. If there was anything in the estate for C., he would be the only residuary legatee. No other would come within the language of the statute. And no other would come within the reason of the rule as to interest, for presumably the retention of the money by the executor has increased his legacy and diminished that of the other legatees. It is shown and admitted that Mrs. Auzerais received $150,000 as residuary legatee.

Third. It is contended that a legacy is not due and payable until it has been ordered paid by the probate court. The existence of sections 1368, 1369, Civ. Code, is a sufficient answer to this contention. No special statute would be required to inform us that a legacy would be payable at least when it has been ordered paid by the probate court. Section 1646, Code Civ. Proc., referred to, authorizes the executor to retain money in certain cases without paying debts or legacies. Yet the debts are undoubtedly due. Indeed, the purpose of the provision is to authorize the executor to refuse payment of debts and legacies when due, and it is because they were due that it was necessary so to provide. There was no attempt to show that it was in fact impracticable, having regard to the beneficial management of the estate, to pay the legacy to appellant at the end of the year. On the contrary, it plainly appeared that it was practicable, for June 6, 1892, Mrs. Auzerais filed her petition asking the payment to her out of the residuum of $75,000. She showed that there were plenty of assets in the estate to warrant the payment of that large sum to her as residuary legatee. The executor answered, admitting the allegation, and the court made the order authorizing it, and that sum was paid. Of course, the claims of the particular legatees were prior to hers. The court below is directed to modify the decree appealed from by allowing interest on the legacy of appellant as claimed by her.

We concur: HENSHAW, J.; McFARLAND, J.

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112 Cal. 476

BURLING et al. v. NEWLANDS et al. (No. 14,592.)

(Supreme Court of California. April 17, 1896.)

Trust for Creditors — Rights of Creditors — Fraud of Trustee—Demurrer—Deed of Trust Construed — Liability of Estate for Torts of Trustee.

1. One who borrows money for the use of another, giving his own notes therefor, becomes a creditor of the beneficiary for the amount, and where, in such case, after the debtor's death, the trustee of his estate, by false representations as to the insolvency of such estate, induces the creditor to pay a sum of money, and to assign his claim against the estate, in consideration of being protected from further liability on the notes given for such borrowed money, the creditor may, on discovery of the fraud, and that the estate is solvent (provided the trust on which it is held is for the benefit of creditors), repudiate the transaction, and recover from the estate the amount of which it was thereby defrauded.

2. The fact that in such transaction such creditor made and verified a claim against the estate for the full amount of the outstanding notes, and assigned the same to the trustee individually, would not constitute complicity in an attempt to defraud the trust estate, it being done with the understanding that such estate was insolvent, and that the trustee would pay a large part of the indebtedness from his own funds, and he having the right as trustee to charge his estate only with the amount actually paid out.

3. Nor is it a defense to such action that such creditor has not rescinded the agreement by which the trustee assumed payment of the outstanding notes, it being shown that he had ample funds of the trust estate for their payment, and that he had in fact, prior to the making of such agreement, taken up the notes with such funds.

4. A demurrer does not confess a conclusion of law pleaded, nor the construction of a written instrument which is set out in terms, with the circumstances surrounding its execution.

5. A conveyance of all the grantor's property recited that it was made to the grantee "in trust, to collect and receive the rents, issues, incomes, and profits thereof, and every part thereof, and to sell and dispose of the same on such terms and prices as he deems best, and to apply the same, and the proceeds thereof, and of the property hereby conveyed, to such purposes and uses as the said [trustee] may, in his judgment, deem best for our joint and several interests." *Held*, that such instrument did not create a trust in favor of creditors of the grantor, but in favor of the grantor himself.

6. A trust created in writing cannot be varied by subsequent declarations of the trustee.

7. Where the trustee of an estate not held for the benefit of creditors, and who, as trus-

tee, stands in no fiduciary relation to creditors of the grantor in the trust deed, wrongfully obtains money from one of such creditors, such creditor has a right of action therefor against the trustee personally, but not against the trust estate, except to the extent that he can identify the money and trace it to the trust property.

On rehearing. For former opinion, see 39 Pac. 49.

Action by Leonide H. Burling and others against Frank G. Newlands and Frederick W. Sharon, as successors of William Sharon, trustee of the estate of William C. Ralston, deceased. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Joseph M. Nougues, for appellants. James M. Allen and Wm. F. Herrin, for respondents.

BEATTY, C. J. This is an action against the trustees of the estate of William Sharon, deceased, to compel an accounting of the trust estate of W. C. Ralston, deceased, of which estate said William Sharon was trustee in his lifetime, and which, it is alleged, has come into the hands of these defendants, as volunteers, and with notice of the trust. In the superior court a demurrer to the amended complaint was sustained without leave further to amend, and judgment thereupon entered in favor of defendants, from which plaintiffs appeal.

The principal ground of demurrer was that the complaint did not state facts sufficient to constitute a cause of action, and, as we understand, this was the ground upon which it was sustained, and leave to amend refused. It is also the ground upon which the respondents have mainly relied in their oral and printed arguments in this court. It is essential, therefore, to ascertain at the outset what the allegations of the complaint are. The great length of the complaint renders this task somewhat difficult, and the difficulty is enhanced by the manner in which it commingles allegations of fact with legal conclusions, matters of evidence, and inferences not always justified by the facts alleged. I shall endeavor to state the general nature of the case first, and afterwards, in discussing the more specific grounds of the demurrer, to give the full effect of the allegations claimed by defendants to be insufficient.

It is alleged that William Sharon and W. C. Ralston were, for a number of years prior to the death of Ralston, partners under the firm name of William Sharon & Co., and as such jointly interested in various corporations and business enterprises, and owners of large interests in real and personal property. Prior to 1873, Ralston was cashier of the Bank of California at San Francisco, and Sharon its agent at Virginia City, Nev. In July, 1873, Ralston became president of the bank, and Sharon, having removed to San Francisco, became a director. Both prior and subsequent to this time, according to the allegations of the complaint, the affairs of the bank were grossly misconducted by its directors and other officers, and on the 26th day of August, 1875, it failed, and on the next day Ralston was accidentally drowned. Just prior to his death he executed and delivered to Sharon a deed in the following terms: "William C. Ralston to William Sharon. Know all men by these presents: That I, William C. Ralston, of the city and county of San Francisco, state of California, in consideration of the sum of ——— dollars, gold coin of the United States, to me in hand paid by William Sharon, of the same place, and other good and valuable considerations, receipt whereof is hereby acknowledged, do hereby give, grant, convey, and transfer unto the said William Sharon, his heirs and assigns, all and singular my property, both real and personal, in the city and county of San Francisco, the county of San Mateo, and elsewhere, and wheresoever or howsoever situated, in trust to collect and receive the rents, issues, incomes, and profits thereof, and every part thereof, and to sell and dispose of the same on such terms and prices as he deems best, and to apply the same, and the proceeds thereof, and of the property hereby conveyed, to such purposes and uses as the said William Sharon may, in his judgment, deem best for our joint and several interests. To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the said Wm. Sharon, his heirs and assigns, forever. In witness whereof I have, on this twenty-seventh day of August, 1875, hereunto set my hand and seal. [Seal.] W. C. Ralston." It is of the trust created by this deed that the plaintiffs seek an accounting, basing their claim upon the theory that it was an express trust to pay the debts of Ralston, and that their testator and assignor were creditors.

The facts alleged in support of the claim that they were creditors are that Ralston, prior to 1872, employed William Burling, a broker, to borrow money for him to a large amount, Burling giving his own notes to the lenders, and Ralston furnishing the necessary collaterals, consisting principally of stock of the Bank of California, estimated, apparently for the purpose of security, at $100 per share. In 1872, William Burling and James W. Burling became partners under the firm name of Burling & Bro., after which time moneys were procured for Ralston by said firm in the same manner that William Burling had procured them before. When Ralston died there were outstanding notes of this character given by William Burling to the amount of $155,000, and notes of Burling & Bro. to the amount of $1,613,000; in all, $1,768,000; secured to the extent of $1,253,000 by 12,530 shares of the stock of the Bank of California, and to the extent of $515,000, by stocks and bonds of the Spring

Valley Water Company and stocks of certain mining companies. Neither of the Burling brothers ever knew or sought to know for whom they were borrowing these moneys. They dealt exclusively with Ralston, and delivered the proceeds of all loans to him, but received from him no evidence of indebtedness. These are all the material facts bearing upon the question whether the Burlings were creditors of Ralston at the date of his death and of the execution of the trust deed to Sharon. The plaintiffs in this action sue as executor and executrix of William Burling, who died in 1877, and as assignee of James W. Burling, who subsequently became an insolvent debtor. The partnership affairs of Burling & Bro. were wound up and settled in 1879. Relief is sought upon the ground of fraud, alleged to have been practiced by Sharon as follows: On the 27th of August, 1875,—the day of the execution of the trust deed and of Ralston's death,—Sharon called on the Burlings for the purpose of ascertaining the amount of their promissory notes outstanding for moneys supplied to Ralston as above detailed, and was furnished with a schedule of the notes and securities. On the following day he called on them again, and informed them that all the shares of the stock of the Bank of California pledged as collateral for their notes were false and fictitious, having been fraudulently overissued by Ralston, and stated that they would be compelled to pay the full amount of all notes so secured. To this they replied, among other things, that they would dispose of the other stocks and bonds deposited as security for the other notes, and, after applying any surplus of their proceeds to the payment of the notes secured by the bank stock, they would pay or settle the deficiency, and resort to the estate of Ralston for the balance of their claims, including their commissions for brokerage, etc. Sharon thereupon informed them that the stock and bonds of the Spring Valley Water Company and of the said mining companies, held as security for the other notes, had been surreptitiously abstracted from the Bank of California by Ralston, and that, as against the owners, they could not be held except as security for the particular notes for which they were pledged. He further assured them that Ralston had died entirely and hopelessly bankrupt, that his estate was of no value, and that they could not expect to be reimbursed therefrom for any considerable part of the money they would be compelled to pay to the holders of their notes. In answer to their inquiry he denied that he was or had ever been a partner of Ralston, and stated that their joint operations had been all closed in which Ralston had beaten and wronged him to the extent of between two and three millions of dollars. He further stated that Ralston had stolen and embezzled almost the entire paid-up capital of the Bank of California, amounting to nearly $5,000,000.

It is to be inferred from the allegations of the complaint, but is not clearly stated, that at the time of this interview the Burlings knew of the trust deed to Sharon, and of its terms, as well as the circumstances surrounding its execution so far as they affected its construction, and their rights under it. Having made these representations as to the amount of Ralston's indebtedness, the condition of his estate, and the criminal practices in which he had been engaged, Sharon proposed to the Burlings that if they would give him $500,000 he would have D. O. Mills join him in assuming and paying their outstanding notes, but if they would not accede to this proposition they would themselves be compelled to pay whatever deficiency might remain after application of the proceeds of the securities (which he represented as generally worthless), and this, as he pointed out to them, would result in their bankruptcy and ruin. All these statements of Sharon were believed by the Burlings to be true. He was a man prominent in business, reputed to be very wealthy, a director of the Bank of California, and fully entitled to credit in such matters. They knew, moreover, that he had been long and intimately associated in business with Ralston, and that no man living had had equal opportunities to learn the true condition of Ralston's affairs, while they themselves had no knowledge of the condition of Ralston's estate, or means of discovering it. They were, therefore, inclined to make the arrangement suggested, but, in order to obtain better terms, carried on a negotiation lasting nearly four months, during which they had frequent interviews with Sharon. During these various interviews he repeated, reiterated, and amplified his original statements, and these statements were indorsed by D. O. Mills, the president of the Bank of California, by its cashier, and by a number of its directors. Induced by their belief in these representations, the Burlings, on the 24th day of December, 1875, finally agreed to pay to Sharon the sum of $200,000, and to assign to him a verified claim against the estate of Ralston for the amount of their outstanding notes, in consideration of which Sharon agreed that he and D. O. Mills would unite in assuming payment of the Burlings' notes, and would relieve them of all liability arising therefrom. In pursuance of this agreement said sum of $200,000 was paid to Sharon on said date as follows: William Burling, on account of his individual notes for $155,000, paid the sum of $17,533.94, and Burling & Bro. on account of the firm notes for $1,613,000, paid the sum of $182,466.06; and they did make and verify claims against the estate of W. C. Ralston for the full amount of all their promissory notes, and assigned the same to Sharon. It is alleged that all the representations of Sharon by which the Burlings were induced to make this payment were false, and made by Sharon with full knowledge of their falsity, for the purpose of defrauding the Burlings out of the sum demanded by Sharon as a condition of his assumption of their obligations. It is alleged that Ralston's individual indebtedness was comparatively small; that he was a partner of Sharon; that the money borrowed through the Burlings was borrowed principally for the firm of William Sharon & Co.; that Sharon was largely indebted to the firm, and liable for most of Ralston's apparent indebtedness; that the firm had assets of great value, and, in short, that during the whole period of the negotiations between Sharon and the Burlings he had in his hands property justly applicable to the payment of Ralston's debts more than sufficient for the purpose. It is further shown that during these negotiations he was also negotiating with the holders of the Burlings' notes, and that before the payment of the said $200,000 he had actually, as trustee of Ralston, and out of the proceeds of his trust estate, paid off or compromised and settled the last dollar of their said indebtedness, and had had assigned to him all of said notes, with their securities; so that without their knowledge they were, at the date of said payment, absolutely free from the liability from which they were seeking relief.

These are in general terms the facts constituting the fraud alleged to have been consummated by Sharon on the 24th day of December, 1875, on account of which the plaintiffs are seeking relief in this action. But the action was not commenced until October, 1886, nearly 11 years after the cause of action arose, and a large part of the complaint is composed of allegations excusing the failure of the Burlings and their successors to make an earlier discovery of the fraud, and thereby to escape the effect of the statute of limitations and the doctrine of laches. The substance of the general allegations under this head is that neither William nor James W. Burling, nor their successors and representatives, the plaintiffs in this action, ever had any knowledge of the falsity of Sharon's representations, or of any fact to arouse their suspicions, or put them upon inquiry, or supplying any clue to the ascertainment of the truth, until within one year prior to the commencement of the action; that Sharon continued from the date of the settlement of their indebtedness until the day of his death, in November, 1885, by active misrepresentation, and by suppression and concealment of books, documents, and other evidence to lull their suspicions, and to make it impossible for them to discover the true condition of Ralston's estate, and the actual extent of his liabilities. In support of these general averments the plaintiffs detail the discoveries that they have made, the manner in which they were made, and the reasons they were not made sooner.

In order to charge these defendants it is alleged that Sharon, in his lifetime, conveyed all his property to them in trust, to collect the income, pay his debts, and afterwards to distribute, first the income, and finally the body of the estate, to his children and certain other beneficiaries designated in the deed; that under said conveyance the defendants have taken into their possession as part of the Sharon estate a surplus of some millions, belonging to the trust estate of Ralston, which they hold upon the same trust with which it was charged in the hands of Sharon. The prayer is for an accounting of the Ralston estate, and for a decree that defendants pay to the plaintiff out of any surplus thereof the sum of $200,000, with interest from December, 1875. The theory of plaintiffs' action, as disclosed by the whole frame and tenor of their complaint, as well as by the repeated declarations of counsel in the course of the argument, is simply this: That on the 27th day of August, 1875, they were creditors of Ralston in the sum of $1,768,000, and so continued until December 24, 1875; that by Ralston's deed to Sharon of August 27, 1875, all of Ralston's estate was transferred to Sharon for the benefit of Ralston's creditors, or, in other words, that Sharon, by accepting the deed and transfer, became the trustee of an express trust, of which all of Ralston's creditors, including William and James Burling, were the beneficiaries with a vested interest in the trust estate; that their claims to the extent of $200,000, with interest from December 24, 1875, remain unpaid, and therefore that they are entitled to an accounting by the successors of Sharon in the trust, and to full payment out of the trust funds remaining in the hands of the trustees, if sufficient for that purpose, and, if not sufficient, then to a payment pro rata as far as the fund will go. The soundness of this theory, and the validity of the claims based upon it, are contested at every point.

In the first place, it is contended that it does not appear from the complaint that the Burlings were creditors of Ralston when his trust deed was executed, while it does appear that, if they were creditors in any sense at that time, they ceased to be such on the 24th day of December, 1875, when they assigned their claims to Sharon. This contention cannot be upheld. There can be no doubt that the Burlings were creditors of Ralston. They dealt with him alone, and he did not assume to be acting as agent for any other person. The credit was given to him, and when the Burlings advanced him money at his request a promise to repay it was implied, if not made in express terms. They were creditors to the amount of their advances, and their advances equaled the amount of their notes. This would be true independent of any provisions of the Code, and is clearly so under its definition of debtor and creditor. Civ. Code, §§ 3429, 3430. Nor did the Burlings cease to be creditors by reason of their assignment to Sharon, for they have a right to repudiate an assignment procured by fraud. Still less did the settlement of their notes, and the extinguishment of their liability on that account, destroy their status as creditors, for they contributed $200,000 towards the payment of their notes; and the fact that the notes had already been paid, which was concealed from them, and purposely concealed in order to induce them to make the payment, cannot be used to their disadvantage by Sharon or his successors in the trust. The effect of the transaction as to them was just the same as if they had themselves paid their notes to the extent of $200,000; and the advantage to Ralston's estate was even greater, for it appears that Sharon was able to settle the notes at a considerable discount, and that he used the $200,000 contributed by the Burlings to pay off and extinguish mortgages and other liens upon Ralston's property. For the purpose of the argument upon this point counsel assume, and I am assuming, that Ralston's deed created a trust for the benefit of his creditors, and that Sharon was not only his trustee, but a trustee of all his creditors. This being so, the Burlings had a right to deal with him on the credit of the trust estate. If they paid their notes directly or indirectly, in whole or in part, they had an undoubted right to look to the trust estate for reimbursement; and if they were induced by a fraud of the trustee, practiced for the benefit of the trust estate, to part with their claims against it, they had a right, upon discovery of the fraud, to reassert their claims, and were not compelled to rely upon the personal liability of the trustee for his deceit. If they had known, what is now alleged to be the fact, that Ralston's estate was ample for the payment of all his debts, undoubtedly they would have looked to it for reimbursement. Being induced by a fraudulent concealment of that fact, and of the fact that their notes had been already taken up, to part with $200,000,—which went into the trust fund,—the course they then pursued in consequence of that fraud ought not to shut them out from any benefit they would have enjoyed if the deception had not been practiced. The fact that Sharon and his estate have always been amply sufficient to respond to a personal claim against him for the $200,000, which he induced the Burlings to pay, can make no difference. The right of the plaintiffs in the trust fund and the rule of law is the same as if Sharon had been a man of no means or insolvent.

Another point made by respondents in support of their general demurrer is that the plaintiffs are not entitled to equitable relief, because they do not come into court with clean hands. It is contended that by making out and assigning to Sharon a verified claim against Ralston's estate for the whole amount of their notes they entered into a deliberate conspiracy with Sharon to defraud the estate of Ralston out of the value of the collaterals pledged by him as security for those notes and of all the money saved in the settlement with their creditors. But this, it seems to me, is putting a wrong construction on that transaction. If the notes were paid according to the understanding upon which the Burlings advanced their $200,000, the collaterals would be taken up by Sharon, and would go back into the Ralston estate so far as they were originally his property,—that is to say, Sharon would be accountable to the estate for them; and therefore the estate was entitled to no deduction on that account from the amount of the Burlings' notes, and whoever paid them would have a rightful claim against the trust estate for the amount paid. The understanding was that they were to be paid, not bought in at a discount, and they were to be paid by Sharon for the Burlings, who, in consideration that Sharon was to furnish over a million and a half of dollars for their protection, agreed to assign the entire claim to him. The result was that the estate got back all its securities, and was charged no more than it owed. In only one respect can it be said that the estate was to be defrauded. A trustee cannot make a profit out of his trust. He cannot speculate upon the trust estate, and so Sharon, if he had paid the Burlings' notes in full, could not, in any event, have made a charge against the estate of the whole sum, because $200,000 of it had been contributed by the Burlings. It may be said that they, by putting in a verified claim for the whole amount of their notes, were helping him to make that $200,000 for himself out of the trust estate. But he could only make money in that way out of a solvent estate, and the understanding upon which they made the payment was that the estate was utterly insolvent, and that Sharon was going to advance most of the money to pay their notes out of his own pocket, so that by making a claim for the full amount of their notes, and assigning it to him, he would get a dividend of less amount than his advances. In this view of the transaction, it does not seem that they were attempting any fraud upon Ralston's estate. If carried out according to their understanding and intention, the estate was to get back all its collaterals; it was to be charged no more than Ralston was actually liable for; both the Burlings and Sharon were to be heavy losers, and other creditors were to suffer no prejudice in the dividend.

It is further contended in support of the general demurrer that the Burlings could not retract their assignment to Sharon and regain the position of creditors of Ralston's estate without a rescission of the contract by which Sharon assumed and paid their notes; that they cannot rescind without putting him in statu quo; and that they not only have not restored or offered to restore him to his former position, but they cannot possibly do so. It is a sufficient answer to this proposition to say that on the case made by the complaint there was nothing to be restored to Sharon. In paying the Burlings' notes he simply discharged his duty as trustee, and they were all settled before he received the $200,000. He therefore received that sum without parting with anything. What, under these circumstances, were the Burlings to tender back as a condition of reclaiming their $200,000? Upon the assumption of the creation of an express trust for the benefit of Ralston's creditors by his deed to Sharon (upon which the argument has thus far been considered), and aside from the question of laches or the statute of limitations, there is not, in my opinion, any failure to state a cause of action. But was there such a trust? As to this proposition, which is fundamental to the case, we have been favored with very little argument by counsel for appellants. In their opening brief they content themselves with saying: "That Sharon was a trustee of an express trust, and that William and James W. Burling and the firm of Burling Brothers were beneficiaries thereof is admitted. The deed to Sharon and his declarations thereunder place beyond discussion this proposition." And in the subsequent course of the argument the same declaration has been repeated again and again. But counsel for respondents contend that there never was any express trust in favor of creditors, and that neither of the Burlings has ever had any interest in the trust estate by virtue of the trust deed or any declaration of Sharon made thereunder. The mistake of counsel for appellants in treating this as a conceded proposition seems to have arisen in part from his notion that the repeated allegations in the complaint that Sharon was such a trustee and the Burlings such beneficiaries were confessed by the demurrer. But a demurrer does not confess a conclusion of law or the construction of a written instrument, which is set out in terms, together with the circumstances surrounding its execution. As to these matters the court looks to the terms of the instrument and the facts alleged, and draws its own conclusions and places its own construction. Now, here a reference to the terms of Ralston's deed above set forth will show that it does not mention either of the Burlings by name, or the creditors of Ralston as a class. Looking to its terms alone, no one could infer that Ralston had a thought of creditors in his mind. But the circumstances by which he was surrounded give a clue to his motives, and they may be resorted to for the purpose of determining what his intentions were. What, then, is the intention which they disclose? In my opinion, they add nothing to the intention manifested by the deed itself, and that is an intention on the part of Ralston to create a trust for his own benefit. He was, according to the theory of the complaint, the possessor of an ample fortune, more than sufficient to pay all his debts. He was president of a bank which had just failed as a consequence of his mismanagement, but he had not been guilty of the criminal practices alleged by Sharon, and there was no reason why he should take his own life. In fact he did not do so, for it is alleged that his death, following upon the heels of the bank's failure, was accidental. But he was deeply in debt, and his affairs generally were in such a condition that he felt unable to extricate himself from the difficulties by which he was surrounded. In this situation he turned to his friend and business associate, a man of large fortune and available means, who, on account of their joint interests, would have the strongest motives to prevent a sacrifice of his property to the sudden demands of his creditors. To him he said in effect: "Here is all I have Take it, and deal with it in the best manner you can, according to your judgment, for the protection of our joint interests and of my several interest." Of course, it was incidental to the execution of such a trust that Ralston's creditors should be dealt with and satisfied, because otherwise they would exercise their right to set aside the conveyance; but they did not for that reason acquire a vested interest in the estate, which was in no manner charged with the payment of their claims, either in full or pro rata. Sharon, under the authority conferred, had a right to make any terms of composition or settlement with Ralston's creditors that he could secure, and in so doing he dealt with them at arm's length, for Ralston's deed did not, by its terms, or by the circumstances of its execution, make Sharon their fiduciary, and it does not appear that in dealing with the Burlings or other creditors he made any declarations or representations to the effect that he was charged with any duty as to them. As to this point counsel for appellants, at the close of the oral argument upon the rehearing, asked and obtained leave to file authorities in support of his proposition that the Burlings were beneficiaries of an express trust, but he has failed to produce any that are in point. He cites the provisions of the Civil Code relative to voluntary assignments for the benefit of creditors. Section 3449 et seq. But it is clear that they have no application. The assignment did not purport to be for the benefit of creditors, and no inventory or schedule was ever filed. There was never a pretense at any time or by any person that this was an assignment under the statute, and the Burlings especially did not treat it or rely upon it as such.

Considered without reference to the statute, and in the absence of any citation of decided cases or text writers, it would seem to be sufficient to quote the language of Prof. Pomeroy in his discussion of the question as to what words or dispositions are sufficient to create a trust: "No precise form of words is necessary to create a trust, but the intention must be clear. The fact that a trust of lands is created must not only be manifested and proved by a writing properly executed, but it must also be manifested and proved by such a writing what the trust is. The declaration of trust, whether written or oral, must be reasonably certain in its material terms, and this requisite of certainty includes the subject-matter or property embraced within the trust, the beneficiaries or persons in whose behalf it was created, the nature and quantity of the interests which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail." Pom. Eq. Jur. § 1009. In view of this doctrine there seems to be no foundation for the claim that Ralston's deed created a trust for creditors, though it did undoubtedly create a trust for Ralston. It empowered Sharon to sell and dispose of the property for his benefit, to advance money to prevent it from being sacrificed, and generally to deal with it as if it were his own; but Sharon was bound to restore the surplus to Ralston on his demand, and to account to him for the entire estate. If this was the effect of the deed according to its terms, how was it changed by Sharon's subsequent declarations? These declarations are referred to in various parts of the complaint, but never set forth in any definite form. The most direct and certain averment as to what they were is found at folio 1040 of the record, where it is alleged that Sharon declared in writing "that said deed of conveyance was intended by said W. C. Ralston to create a trust for the payment of his debts." In another connection Sharon's declarations in writing, though not directly averred, are set forth in greater detail as follows: "That said Sharon intended to do with the estate of said Ralston, so conveyed to him, as if said Ralston had lived, namely, to cover existing and contingent indebtedness of said Ralston to him, said Sharon, and to secure himself on any deficiency that he might suffer in settling the debts and liabilities of the said Ralston, and to secure said Ralston's proportion in certain joint ventures in which said Ralston and he were associated together, and to pay the debts of said Ralston as far as the estate would pay the same, and to compromise and settle as far as possible all claims existing against it. Whatever might be left after payment and settlement of said debts of said Ralston would be accounted tor to the sole legatee and beneficiary of said W. C. Ralston, his widow; and that whatever benefit could be derived from said estate for said widow from his, said Sharon's, careful administration thereof, would be so divided for her benefit." These declarations are perfectly consistent with the deed as above construed. The deed certainly did create a trust, and one of the objects of its creation and a necessary incident to its execution was payment or settlement of Ralston's debts; but the sole beneficiary was Ralston, and after his death his widow. The creditors did not become beneficiaries with a vested interest in the estate merely because, as an incident to the execution of the trust, their claims must be settled. But, even if these declarations had been more certain and definite than they were to the effect that the trust was for the benefit of the creditors, they must have been ineffectual, because this trust was created by a deed executed by the owner of the property, and the rule is that a trust created in writing cannot be varied by a subsequent declaration of the trustee. Perry, Trusts, § 86. If Ralston, by his deed, made himself and his successors sole beneficiaries of the trust, Sharon could not vest an interest in the estate in other beneficiaries of his own selection. My conclusion is that neither by the trust deed nor by Sharon's declarations did the Burlings become beneficiaries of the Ralston trust, with such an interest in the trust estate as entitled them to demand an accounting of the trustees. It is not clear, from the argument of appellant's counsel, that he relies upon the use of the $200,000 obtained from the Burlings to clear off the liens upon the trust estate as a fact constituting the Burlings beneficiaries. He cites no authority to sustain such a claim, and the authorities cited by respondents are against him. The $200,000 is not earmarked or followed into any property in the hands of the trustees; and, although used for the benefit of the trust estate, there was no agreement that it should constitute a lien, and without such agreement by the trustee there could be no lien. New v. Nicoll, 73 N. Y. 127, and cases cited.

This disposes of all the grounds relied upon by counsel to establish an express trust of the Ralston estate for the benefit of the Burlings, and it remains only to notice some general arguments in support of the sufficiency of the complaint.

It is much insisted upon that the allegations confessed by the demurrer disclose a case of gross fraud practiced upon William and James W. Burling, for which a court of equity should be eager to afford relief. This is entirely true. Accepting the complaint as a correct statement of the facts, it appears that William Sharon did defraud the Burlings of $200,000, for the recovery of which I have no doubt a cause or causes of action accrued to them immediately upon the payment of the money. But it was a cause of action against Sharon personally, and against the $200,000 so far as it could be traced and identified, and no further. As no facts are alleged by which that money could be traced into any specific property now in the hands of these defendants as trustees either of Ralston or of Sharon, the claim of plaintiffs has become a mere personal demand against Sharon, enforceable like other claims of the same character. This, it seems to me, constituted the cause or causes of action, and the only causes of action which the plaintiffs had when this suit, based upon an entirely different theory, and claiming different relief, was commenced. All that is sought here is an accounting of the Ralston estate, and payment out of that fund, while the facts disclose no right to such accounting or payment in that mode, but only a claim or claims against Sharon's representatives. This, however, is not an action against Sharon's representatives; for, although the defendants are designated in the title of the complaint as trustees of William Sharon, all its allegations, its frame and theory, not to mention the repeated declarations and disclaimers of counsel throughout the argument, demonstrate that they are sued, and that the intention is to charge them, not as representatives of Sharon, but as trustees of W. C. Ralston's estate. In that capacity they are clearly not liable. This conclusion renders it unnecessary to discuss the question of laches or the bar of the statute of limitations, for, irrespective of those questions, it must be held that the demurrer was properly sustained.

Appellants have made no point in the argument upon the refusal of leave to amend, probably for the reason that they have never specified, either in the superior court or in this court, any amendment that they could make or that they desired to make. In the absence of such a specification, it cannot be held that the superior court abused its discretion in denying leave to amend. Martin v. Thompson, 62 Cal. 619. Judgment affirmed.

We concur: HENSHAW, J.; TEMPLE, J.; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.

McFARLAND, J. I concur in the judgment of affirmance. I also concur in the conclusion that the deed from Ralston to Sharon did not create a trust in favor of Ralston's creditors, and the only action which the Burlings had, if any, was against Sharon personally. In this view it is not important whether or not the Burlings were creditors of Ralston. Upon the question of the statute of limitations and laches I adhere to my former opinion (39 Pac. 49), as follows: "Moreover, we think that the action is barred by the statute of limitations, and is stale from laches. Of course, the statutory period has run two or three times, unless the case is saved by the clause of section 338, Code Civ. Proc., which provides that in an action based upon alleged fraud the statute does not commence to run until the discovery of the facts constituting the fraud. This action is founded upon the contract between the Burlings and William Sharon, made on December 24, 1875, which was an executed contract; and the statute commenced to run on that day, except so far as its running was delayed by a want of knowledge of the fraud by which said contract is alleged to have been procured. But 'the means of knowledge are the same thing, in effect, as knowledge itself' (Wood v. Carpenter, 101 U. S. 143), and one who makes a charge of fraud, for the first time, many years after its alleged perpetration, must show that within a reasonable time he has used due diligence to discover it, has followed up circumstances which would have put a prudent man upon inquiry, and has not slept upon his rights until the lapse of time and the death of parties charged with the fraud have destroyed the means of a full, fair, and satisfactory investigation in a court of justice. Moreover, in such a case the complaint must state facts from which it will appear to the court that ordinary prudence could not have discovered the fraud within the statutory period. 'The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.' Wood v. Carpenter, supra. Statutes of limitation are in great part founded upon the probability that during the course of many years witnesses will die, and recollections of events long past will become indistinct in the memories of the living. In the case at bar sufficient facts are not stated to show that the alleged fraud could not, with requisite diligence, have been sooner discovered. There was great opportunity for discovering the fraud, if any such existed, before the contract between the Burlings and William Sharon was made. That contract was not made in a hurry. Sharon's representations, alleged now to have been false, were not immediately accepted as true, and promptly acted upon. Negotiations were continued for four months. Ralston, as appears from the complaint, was widely known in business circles, and had been accredited with great wealth. It is averred in the complaint that he was perfectly solvent, and that he had real and personal property, which passed to Sharon under the deed, of the aggregate value of $9,000,000. It is averred, also, that he had real property of the value of $6,000,000. If that was the fact, and the Burlings really had a legal claim against Ralston, it is almost beyond comprehension why they did not discover it, if not before the $200,000 contract, at least before the death of William Burling, or before the lapse of the statutory period of limitation. The slightest examination of public records would have put them on the trial of the fact. It does not appear that they demanded an examination of the books, papers, etc., of Ralston. But no discovery was made, and it does not appear that any reasonable efforts were made for a discovery of the alleged facts upon which this action rests until ten years after the date of the contract, and until after the death of said William Sharon. And it is averred that then 'the means by which they obtained any information was by inquiring among their friends and acquaintances whether they, said persons, had any information relating to the dealings of said Sharon with said trust estate, and whether they had any information regarding the property which was conveyed by said Ralston to said Sharon in trust, as aforesaid.' But such means were always within the power of appellants and the Burlings; and there are no sufficient facts alleged to show that the delay is 'consistent with the required diligence.' See Ang. Lim. §§ 187, 190; Hecht v. Slaney, 72 Cal. 363, 14 Pac. 88; Moore v. Boyd, 74 Cal. 167, 15 Pac. 670. Moreover, apart from the question of strict statutory limitation, the claim of appellants is too stale to be enforced in a court of equity. 'No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere when there has been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has accrued. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transaction having become so obscured by time as to render the ascertainment of the exact facts impossible.' Hammond v. Hopkins, 143 U. S. 250, 12 Sup. Ct. 418. In speaking of this rule this court, in Bell v. Hudson, 73 Cal. 288, 14 Pac. 791, said: 'It is a material circumstance that the claim was not made until after the death of those who could have explained the transaction.' In the case at bar William Burling and William Sharon, 'the principal participants in the transactions complained of,' were both dead before the commencement of the action. It is quite apparent that no court could do 'entire justice' in the premises without the testimony of William Sharon. Of course, if the suit had been commenced within a reasonable time, and William Sharon had died before his testimony could have been taken, the want of his testimony would simply have been one of those natural misfortunes which sometimes come to litigants. But William Sharon lived for 10 years after the transaction complained of. William Burling died two years after the transaction, fully satisfied—as is averred—that it was a fair one. James W. Burling did business for several years afterwards, and until he became an insolvent was also satisfied with the fairness of the transaction. There was perfect acquiescence by all parties for ten years and while Sharon lived. It was not until he died, and his testimony was forever beyond human reach, that the claim of appellants grew up and took the form of a suit against his successors. It is a claim which equity should not now entertain."

112 Cal. 537

BRADFORD v. CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 126.)

(Supreme Court of California. May 5, 1896.)

MUNICIPAL CORPORATIONS — EQUITY — ENJOINING CREATION OF INDEBTEDNESS—CONSTITUTIONAL LAW—POWER OF MUNICIPAL OFFICERS.

1. In a proper case, where it is shown that the municipal officers are about to create an illegal indebtedness against the corporation, and to levy and collect a tax for the payment thereof, such acts may be restrained at the suit of a taxpayer.

2. Under Const. art. 11, § 18, as amended in 1892, providing that no municipal corporation, county, or township "shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof," when the revenue of a city necessary for a given year has been determined, and such revenue collected and expended before the expiration of the fiscal year, the city officers cannot, even for the purpose of providing for the pressing wants of the municipality during the residue of such year, incur liabilities to be met from the revenues of a subsequent year.

Commissioners' decision. Department 2. Appeal from superior court of city and county of San Francisco; A. A. Sanderson, Judge.

Action by Wallace Bradford against the city and county of San Francisco and others. Judgment for defendants, and plaintiff appeals. Reversed.

Maurice S. Woodhams, for appellant. Rhodes & Rhodes and McKinstry & McKinstry, for respondents.

SEARLS, C. This action was brought May 14, 1895, to enjoin the defendants, as supervisors and as auditor and treasurer of the city and county of San Francisco, from incurring any indebtedness or expenses against said city and county during the months of May and June, 1895, whereby there shall be a deficiency in the income and revenue of said city and county provided for the fiscal year of 1894–95, and from ordering any supplies or materials for said city and county for its maintenance, or any department thereof, whereby there shall be created an indebtedness in excess of the revenue and income provided for said city and county government for said fiscal year 1894–95, and that the board of supervisors be perpetually enjoined from levying any tax, or making any provision for raising any money, for the payment of such deficiency out of the public funds provided for the fiscal year 1895–96, etc.

Defendants interposed a demurrer to the complaint, which was sustained by the court, and, plaintiff declining to amend, judgment was entered in favor of defendants, from which judgment plaintiff appeals.

There is no necessity for a detailed statement of the allegations of the complaint. It sets forth clearly and in detail that the defendants, composing the board of supervisors, prior to the commencement of the fiscal year 1894–95 made an estimate, as by law required, of the revenues necessary to maintain the municipal government during said fiscal year; that in due time they levied a property tax to raise the revenue so necessary; that, by reason of underestimating the necessary expenses and overestimating the revenue to be derived from all sources, the funds of the city for said fiscal year were practically exhausted on the 1st of May, 1895, with salaries of the officers for the city and county for the months of May and June of said fiscal year, amounting to $280,000, to be paid, and the expenses of the various departments of the municipal government, all of which are set out in detail, to be met, which will leave a deficit at the end of the fiscal year of about $350,000; that the city and county has already incurred debts and liabilities in excess of the income and revenue provided for the fiscal year in the sum of about $205,000. Under these circumstances, the board of supervisors is actively engaged in purchasing and securing the necessary supplies and services for the various departments of the city government during the remaining two months of the fiscal year, and, unless restrained, will do so; and, as an inducement to persons who may furnish services and supplies, they, in concert with the other defendants, viz. William Broderick, who is auditor, and James H. Widber, who is treasurer, are promising and intend, and, unless restrained, will levy a tax for the fiscal year 1895–96 sufficient to pay for all supplies furnished and services rendered during the fiscal year 1894–95; that the auditor will audit, and the treasurer will pay, the claims and demands so illegally contracted and incurred, etc., all of which is claimed to be in violation of section 18, art. 11, of the constitution.

The assent of two-thirds of the qualified electors of the city and county has not been sought or had warranting such expenditure. Section 18, art. 11, of our state constitution, as amended in 1892, reads as follows: "No county, city, town, township, board of education or school district shall incur any indebtedness or liability, in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void." The original section was precisely the same as the amendment, except that it required the principal of indebtedness contracted under it to be paid within "twenty years," whereas the amendment provides that it "shall not exceed forty years from the time of contracting the same."

A preliminary question is presented by the case as made by the complaint, which, although not urged by counsel, needs to be met at the outset of our deliberations. It is this: Will an injunction lie to prevent municipal authorities from levying and collecting an illegal tax? In Linden v. Case, 46 Cal. 171. it was held by this court that an injunction will not be granted to restrain a board of supervisors from incurring liabilities which are not a legal charge against the county. The groundwork of the decision, as enunciated by the learned judge who prepared the opinion, may be said to be: (1) If claims not legally chargeable to the county are allowed, neither the allowance, nor the warrants drawn therefor, create any legal liabilities. (2) If such illegal claims are allowed by the board of supervisors against the county, it will be the duty of the auditor to refuse to draw warrants therefor; and, should he do so, it will become the duty of the treasurer to refuse to pay them. (3) The presumption is, in the absence of allegations to the contrary, that these officers will faithfully discharge their duty in the premises. The same doctrine was maintained upon a similar state of facts, and for like reasons, in Merriam v. Board of Sup'rs, 72 Cal. 517, 14 Pac. 137. The causes for which courts of equity will grant injunctions are assignable to well-known heads. Among these are fraud, breach of trust, multiplicity of suits, inadequacy of the ordinary remedies at law, etc. To entitle a party to relief in equity, he must bring his case under some acknowledged head of equity jurisdiction. In the cases cited above, nothing of this kind was done. The complainants showed an apprehended violation of law on the part of the board of supervisors, but that alone is not sufficient. They failed to show that injury to them of any kind would follow as a legal sequence of such violation of duty.

The case at bar may be differentiated from those mentioned in the following particulars: Here, the presumption that the auditor and treasurer will do their duty, and refuse to audit and pay the illegal demands, is negatived by the express averments of the complaint, which, for all the purposes of this case, are to be taken as true. Here, the illegal tax will be levied and collected, and will become a lien upon the real property of the plaintiff, and is liable to cast a cloud upon the title thereof. Here, the tax, when levied and collected, will cause such an intermingling of the lawful tax with the unlawful that it will be impossible to segregate them, and hence no action to stay the collection of the tax, or to recover back the money unlawfully exacted, can be maintained. Even if money thus paid could be recovered, it would give rise to a multiplicity of suits, which it is an object of equity to avoid. To refuse plaintiff relief here is but to lay the foundation later on, when the tax is levied, for saying to him that, the tax being fair on its face, and there being no constitutional or statutory inhibition as to the extent of the levy, the amount or rate thereof is in the discretion of the board of supervisors, and courts never interfere by injunction with the exercise of discretion by municipal officers. Where a tax is levied for a specific object, and is upon its face in excess of the jurisdiction of the board or officer making the levy, and hence void, the matter can be reached by a writ of certiorari (review). But it is apparent at a glance that no such relief can be had in a case like the present, for the want of such illegality appearing on the face of the record.

We are of opinion that there is nothing in the cases of Linden v. Case and Merriam v. Board of Sup'rs which militates against the right to an injunction in the case at bar.

The question still remains: Will a court of equity restrain the levy and collection of an illegal municipal tax at the suit of a taxpayer and property holder? The authorities on the subject are not uniform, but, upon an examination of a large number of the adjudicated cases, we think the preponderance in number and reason is overwhelmingly in favor of the affirmative of the proposition. Dillon, in his work on Municipal Corporations, treats the subject at length (sections 914–925, 4th Ed.), and reaches substantially the conclusion of the supreme court of the United States declared in Crampton v. Zabriskie, 101 U. S. 601, in which it was said by Mr. Justice Field that, "of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases; and, from the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere, upon the application of the taxpayers of a county, to prevent the consummation of a wrong, when the officers of these corporations assume, in excess of their powers, to create burdens upon property holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate power. The courts may be safely trusted to prevent the abuse of their process in such cases."

The trend of nearly all the later cases is in the same direction. Bayle v. City of New Orleans (1885) 23 Fed. 843; Harrington v. Town of Plainview, 27 Minn. 224, 6 N. W. 777; Willard v. Comstock, 58 Wis. 565, 17 N. W. 401; Scott v. Alexander, 23 S. C. 120; City of Richmond v. Crenshaw, 76 Va. 936; Sackett v. City of New Albany, 88 Ind. 473; Butler v. Detroit, 43 Mich. 552, 5 N. W. 1078; Robertson v. Breedlove, 61 Tex. 316. See Dill. Mun. Corp., supra, where the cases are collected. We conclude, then, that in a proper case municipal officers may, at the instance of a taxpayer, be restrained from contracting illegal debts, and from levying and collecting taxes for the payment thereof, and from enforcing the payment of such taxes.

This brings us to the consideration of the merits of the case at bar. The question presented seems a fairly plain one, and is approached only with that solicitude which follows from a realization of the momentous consequences flowing from its determination. The question, briefly stated, is this: When the revenue of the city and county necessary for a given year has been determined, such revenue collected and expended before the expiration of the fiscal year, can the city officers, for the purpose of providing for the pressing wants of the municipality during the residue of such year, incur debts and liabilities, to be met and discharged from the revenues of a subsequent year? A question somewhat similar in principle arose under the constitution of 1849, which inhibited the legislature from creating any debt in any way (except for the purposes and in the manner therein provided), which should, in the aggregate with previous debts and liabilities of the state, exceed $300,000. The legislature appropriated money which, with the debt due and owing, constituted an indebtedness in excess of $300,000. And in People v. Johnson, 6 Cal. 499, the supreme court held that the attempted appropriation was in conflict with the constitutional provision, and void. It was urged there, as here, that if the constitutional restriction be rigidly enforced, a contingency may arise in which the wheels of government must stop, for want of necessary funds to keep them in operation. The court held, however, that the language of the article there quoted "is too clear and explicit to admit of but one interpretation," and added: "In fact, it would defy the ingenuity of the most subtle intellect to invent a consistent interpretation, other than that which naturally suggests itself from the words of the article," etc. We take much the same view of the section of our constitution quoted above. It is couched in language so plain and explicit as not to be misunderstood, or to leave room for judicial interpretation or other inference than that naturally and irresistibly deducible therefrom. The palpable object of the provision was and is to confine municipal expenditures for each year to the income and revenue of such year, save only in the cases where two-thirds of the qualified electors shall determine, as in the section provided. It places a limit—a check—upon the power of municipal officers to expend money beyond the resources provided for the current year. It is a residuum of power vested in the electors, to be used by them in case of emergency calling for its exercise. The motive which may influence municipal officers to impose a low rate of taxation, so soothing to the taxpayer, and to indulge in the practice of expending large sums of the people's money (a practice always popular with the recipients of public funds), is easily comprehended. To thwart the possibility of such a course may have been an object of the framers of our constitution. Be that as it may, one thing is certain: for causes which seemed good to the framers of our fundamental law, a barrier against indebtedness by municipal officers and local bodies has been created by the constitution. The door has been locked against all indebtedness of these local bodies, and the key placed in the hands of the electors, who alone can use it, and the judiciary may not arrogate to itself the power to undo what has been thus solemnly done. The wisdom or folly of the constitutional provision cannot, in a plain case, furnish us with a factor in the problem for solution. Where the matter is clouded in doubt and uncertainty, such considerations may aid in its solution. We perceive no cause to doubt the object of the provision, or to draw but a single inference from the language used to express the legislative will as contained in section 18.

Counsel for respondent contend with much acumen that the city and county government, having been organized pursuant to law, divided into various departments, and the duty of maintaining those departments devolved upon the supervisors by statutes and ordinances enacted prior to the commencement of the fiscal year 1894-95, no discretion is now vested in the board, and that their plain and manifest duty is to provide those supplies and services, without which the city government cannot exist as an active entity, the disastrous consequence of which is vividly portrayed. We answer this argument by saying the duty of the board of supervisors is, or may be, twofold: First, to provide the funds and revenue to support the government; second, to expend them for such support. The former is the predicate of the latter, without the performance of which primary duty no duty to expend the revenues can arise until the electors shall have authorized such expenditure by a two-thirds vote, etc. It seems to us like a solecism to say that the duty to contract debts and liabilities on behalf of the city exists in a case where the constitution expressly inhibits it. It is true that in Lewis v. Widber, 99 Cal. 412, 33 Pac. 1128, it was held that the payment of the salary of a public officer, whose office has been created and salary fixed by a law of the state, is not within the prohibition of section 18, art. 11, which section it was held refers only to indebtedness or liability incurred by the act or conduct of the municipal body. It will be observed that the constitutional inhibition runs, not against the legislature of the state, but against the cities, towns, etc., against the several local governments enumerated. If, therefore, the legislature shall create offices and fix the salaries to be paid to them from the local treasuries, or devolve other indebtedness or liabilities upon the city within its legislative power, and without their volition, it only remains for the municipal authorities to comply with such laws of the state. The debts and liabilities of which complaint is made in the case at bar are but the ordinary debts created by the municipality itself, and are of the kind which must be paid out of the revenues of the current year, or the constitutional provision is meaningless.

We think the whole question involved is met and decided in favor of appellant in Gas Co. v. Brickwedel, 62 Cal. 641; Shaw v. Statler, 74 Cal. 258, 15 Pac. 833; Schwartz v. Wilson, 75 Cal. 502, 17 Pac. 449; and McBean v. City of Fresno (Cal.) 44 Pac. 358. Inasmuch as there was no injunction granted in the case, and as the fiscal year during which the threatened tax was to be levied and collected has passed, it is highly probable the case has ceased to be important. The principle, however, still remains, and this, together with the question of costs, has been regarded as of sufficient importance to demand a determination in brief form.

We are of opinion the complaint states a cause of action, and entitles the plaintiff to the relief demanded. We therefore recommend that the judgment be reversed, and the court below directed to overrule the demurrer, with leave to defendants to answer.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to overrule the demurrer, with leave to defendants to answer.

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114 Cal. 136

HELLMAN v. SHOULTERS, City Treasurer, et al. (L. A. 8.)[1]

(Supreme Court of California. April 14, 1896.)

STREET IMPROVEMENTS — BONDS—CONSTITUTIONAL LAW — STATUTES — TITLES — AMENDMENT — REPEAL—PROOF OF NOTICE—RESOLUTION OF CITY COUNCIL—PUBLICATION—CONTRACTS.

1. Act March 17, 1891, amending Act March 18, 1885, relative to work on streets, does not deprive one of liberty or property without due process of law, because providing that the city council may, in its discretion, determine that if the cost of improvement be more than a certain amount per front foot, where more than a certain amount of assessment against a lot remains unpaid a certain time after notice, a bond running for not more than 10 years, payable in equal annual installments, with interest at not more than 10 per cent. per annum, shall be issued by the city, representing the amount of assessment against the lot unpaid, with the city as obligor, but payable only out of the fund created by the assessment, or, in case of failure of the lot owner to make payment to the city, enforceable against the lot in the manner provided for delinquent taxes.

2. Act March 17, 1891, entitled an "Act to amend an act entitled 'An act to provide for work on streets within municipalities, approved March 18, 1885,'" is general, because applying to all cities of certain classes, and is uniform, though giving city councils discretion, under certain circumstances, to issue bonds, to represent assessments for improvements, bearing interest not exceeding 10 per cent. per annum.

3. The delegation of power to city councils by Act March 17, 1891, to determine between certain alternative methods for payment of assessments for municipal improvements, is authorized by the provision of the constitution authorizing and directing the legislature to provide for municipal corporations.

4. Act March 17, 1891, entitled "An act to amend an act entitled 'An act to provide for work on streets within municipalities, approved March 18, 1885,'" by adding thereto an additional part, consisting of certain sections, relative to a system of street-improvement bonds, has expressed in its title but one subject, namely, a system of street-improvement bonds.

5. Such act sufficiently expresses in its title its subject, though the title does not go into the details of the act.

6. Such act, though giving only the sections added, does not violate Const. art. 4, § 24, declaring that "no law shall be revised or amend-

[1] Rehearing granted.

ed by reference to its title, but in each case the act revised or sections amended shall be re-enacted and published at length as revised or amended"; the old act being amended only by implication, in that the new act authorizes, in certain cases, the adoption of an alternative procedure, and the inhibition having no reference to amendments by implication.

7. Act March 17, 1891, adding to Act March 18, 1885, relative to work on streets in cities, and consisting of 37 sections, a part relative to a system of street-improvement bonds, consisting of sections 38 to 44, inclusive, is not repealed by Act March 31, 1891, which amended, by re-enacting and publishing in full, certain of the 37 sections of the act of 1885 as amended by St. 1889, p. 157, and expressly repealed all acts and parts of acts in conflict with it; the amendments not making any changes in the act of 1885 in any respect material to the operation of Act March 17, 1891.

8. Nor is Act March 17, 1891, repealed by another act of March 31, 1891 (St. 1891, p. 461), entitled "An act to amend the act of March 18, 1885, by adding thereto new sections to provide the mode of carrying into effect certain provisions of Act 1885, changing grade," merely because the sections thereby added were numbered 38 to 53, inclusive, while the sections added by Act March 17, 1891, relative to a system of street-improvement bonds, were numbered 38 to 44, inclusive; the presumption being that, as such two acts of 1891 referred to very different street work, there was a mistake in the numbering of the sections.

9. Though the record does not show that any proof was made of the giving of notices requisite to give a city council jurisdiction to proceed in a street-improvement matter, the presumption, in an action to enjoin the sale of property to pay the street-improvement bonds, is that the notices were given, and the burden is on plaintiff to show that they were not.

10. An ordinance is a resolution, within Act March 18, 1885, as amended by St. 1889, p. 157, providing that, before ordering any street work to be done, the city council shall pass a resolution of intention to do so.

11. Under Act March 18, 1885, as amended by St. 1889, p. 157, providing that no publication other than that provided for in the act shall be necessary for the validity of any proceedings provided for therein, and requiring a certain publication of a resolution of the city council of intention to do street work, an ordinance passed as a resolution of intention need not be published otherwise than provided by the act, whatever be the provision of the city charter as to publication of ordinances.

12. The validity of street-improvement bonds is not affected by the fact that the street work was done under a contract stipulating that Chinese should not be employed thereon, and that eight hours should constitute a day's work; the contract price not being affected by such stipulation, and it not being legally a part of the contract, for the reason that neither in the resolution of intention to do the work, nor in the specifications, nor elsewhere, prior to the contract, was there any condition relative to such matters.

Department 2. Appeal from superior court, Los Angeles county.

Action by I. W. Hellman against H. J. Shoulters, treasurer of the city of Los Angeles, and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Chapman & Hendrick, for appellant. John T. Jones and Murphy & Gottschalk, for respondents.

TEMPLE, J. This action was brought to enjoin the sale of property to pay street-improvement bonds. The case was submitted to the trial court upon an agreed statement, and upon evidence taken, and certain stipulations. Judgment was rendered against plaintiff, and the appeal is from the judgment and an order refusing plaintiff a new trial.

The general question involved in the appeal is whether the defendant Shoulters, as treasurer, had authority to sell the property for the purpose mentioned. That he had no power to sell is contended—First, because the act under which the proceedings were had is unconstitutional and void; and, second, on the ground that the statute, if valid, has not been complied with. It is also claimed that incompetent evidence was admitted at the trial over the objections of appellant.

The proceedings for the street improvement, to pay for which the bond in question here was issued, were inaugurated by ordinance passed April 13, 1891, by the city council of Los Angeles, declaring the intention of the council to improve Eighteenth street. The procedure was under an act of the legislature passed March 17, 1891, and entitled as follows: "An act to amend an act entitled 'An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for construction of sewers within municipalities,' approved March 18, 1885, by adding thereto an additional part numbered four, consisting of sections thirty-eight, thirty-nine, forty, forty-one, forty-two, forty-three and forty-four, relative to a system of street improvement bonds." Among other things, section 38, which that act purports to add to the Vrooman act of 1885, provides that when the cost of such improvement, as estimated by the city engineer, will be greater than two dollars per front foot, bonds shall be issued to represent the cost of the work. The bonds shall be serial, and extend over a period not to exceed 10 years, and payable in equal annual installments, with interest, payable semiannually, not to exceed 10 per cent. per annum. The installments were to be paid to the city treasurer. Under no circumstances was the city to be liable. The next section provides that, when this method of paying for the improvement is pursued, the determination that bonds shall be issued shall be stated in the notice of intention, and in the resolution ordering the work, in the resolution of award, and in all notices of the proceedings required. "And also a notice that a bond will issue to represent such assessment of fifty dollars or more remaining unpaid for thirty days after the date of the warrant or five days after a decision of said council upon an appeal, and describing the bonds, shall be included in the warrant provided for in section nine of this act." The next section provides for the issuance to the contractor of a separate bond representing, upon each lot or parcel of land delinquent for $50 or more, the amount of the assessment against the same. The form of the bond is given. It provides for payment solely out of the fund created by the assessment; for the payment in annual installments with the interest, and that, should default be made in any annual payment upon the principal, or in any payment of interest, the holder is entitled to declare the whole unpaid amount to be due, and have the lot advertised and sold forthwith in the manner provided by law for the sale of land assessed for state and county taxes. There follows a proviso, "that if any person, or his authorized agent, shall, at any time before the issuance of the bonds, present to the city treasurer his affidavit, made before a competent officer, that he is the owner of the lot or parcel of land in said lot, accompanied by the certificate of a searcher of records that he is such owner of record, and with such affidavit said person notifies said treasurer, in writing, that he desires no bond to be issued for the assessments upon said lot or parcel of land, then no such bond shall be issued therefor," etc. The act further provides that the city treasurer shall report all payments upon the principal due on any bond to the superintendent of streets, who must thereupon credit the same on the record of the assessment, and that the assessment shall be a first lien upon the property affected thereby, and the issuance of the bond shall be conclusive evidence of the regularity of all previous proceedings, and the validity of the lien. The act proceeds, in the next section, to provide that, upon any default to pay an installment or interest, if the holder of the bond demands in writing that the treasurer proceed to advertise and sell the lot, "then the whole bond, or its unpaid remainder, with its accrued interest, shall become due and payable immediately."

Appellant's first point is that the act is unconstitutional and void for several reasons.

(1) "In so far as it attempts to impose a lien to secure a sum of money bearing interest, which the owner cannot pay for 10 years, it is outside of the functions of government." "If," it is said, "the legislature could say that upon the happening of certain events, or upon the failure to do certain things, a man's property should be charged with a sum of money bearing a rate of interest, determined by a municipal council, for ten years, it can fix the charge for a hundred years." This, it is contended, is no part of the power to levy and collect taxes. The power to collect implies a duty on the part of the property owner to pay, and the duty cannot exist unless payment will be received. Therefore, when the statute says that the property owner shall not pay for 10 years, but during that time shall pay interest at a rate to be fixed by the city council, the process is not one of collection, but to compel the property owner to borrow money, and to secure the same by a first lien upon his property, against his will. Counsel think such a statute would be declared unconstitutional, though it does not conflict with any express limitation upon legislative power to be found in the constitution. It is, he says, without the scope of governmental power. It is not necessary, in my opinion, to appeal to a restriction so indefinite and intangible. If the case be such as he contends it is, such a proceeding would, to some extent, have the effect of depriving one of both liberty and property without due process of law. Whenever a municipality issues bonds which constitute a burden upon property within a certain limited district, it can be argued, with some degree of plausibility, that the law is forcing upon property owners within the district the obligations of a contract against their will, and has decreed a lien upon their property to secure it. But counsel for appellant concede that the issuance of such bonds, under proper conditions, is a valid exercise of power. At any rate, it has often been done, and the bonds thus issued held valid. So far as concerns the question of legislative power, I find it difficult to distinguish this case from that considered in Lent v. Tillson, 72 Cal. 404, 14 Pac. 71. The bonds issued in this case are municipal bonds. The city of Los Angeles is the obligor. True, the bonds are payable only out of a special fund, and such is usually the case with bonds issued to pay for local improvements. The incidence of the tax is quite different from that provided in the Case of the Dupont Street Bonds, but I cannot see how that fact affects the question of legislative power. I do not see why the property may not be assessed once for all levies under the act, nor why all taxes may not be levied in advance, to be paid annually. The mode may be unwise, and capable of working inequality and hardship, but that is not a matter for the court. If the matter were left to me, I should say the law is unwise, and absolutely incapable of any beneficial operation, but those are questions exclusively for the legislature.

(2) The agreement to pay interest is the contract of the city, and the rate is a matter of contract. It is conventional interest. If these views are correct, they dispose of several points earnestly discussed by counsel. I agree with appellant that the bond cannot be sustained on the ground that it is a contract made by the property owner, or a lien imposed by his consent. If a strong man has a weak one in his power, and gives his victim the choice of being kicked or cuffed, he cannot defend his battery on the ground that the injured man consented. So, in proceedings to subject property to a burden in invitum, the exercise of a choice of alternative modes of payment offered does not prove consent to the taking. If it were material, I should also agree with appellant that the act does not provide that all owners may object to the issuance of the bond, and thereby pre-

vent the extension of the lien. The act does not in terms provide that any owners may do so, but that only a person who files a certain affidavit, accompanied by a certificate, may do so. No provision is made for those who own property but do not have the record title, nor for lien holders, nor for the case of tenants in common who do not agree in regard to the matter. The fact that all may pay the tax at any time before it becomes delinquent does have a bearing upon the reasonableness of the ordinance, and upon the question raised in regard to the fairness of the discrimination between property owners whose tax is more than $50 and those whose tax is less than that. An opportunity is afforded to all taxpayers to pay, and thus escape the extension of the lien. There is no constitutional provision which expressly requires the uniform operation of municipal ordinances. Nevertheless, where they unjustly discriminate they are sometimes declared unreasonable, and therefore void. I do not think it could be said that the discrimination here noticed is unreasonable.

(3) It is contended that the law is unconstitutional and void because it violates Const. art. 1, § 11, which provides that all laws of a general nature shall have a uniform operation; also, that it violates subdivision 7, § 25, art. 4, which prohibits local or special laws "authorizing the laying out, opening, altering, maintaining or vacating roads, highways, streets, alleys, town plats, parks, cemeteries, graveyards or public grounds not owned by the state"; also, that it is prohibited by the thirty-third subdivision of that section, which prohibits local or special laws in all cases where a general law can be made applicable. Counsel contend that general laws can be made applicable to street improvements, as is shown by the fact that from time immemorial they have been. The lack of uniformity complained of is not altogether, or even chiefly, that the law is made applicable to cities of one or two classes. The act provides that, when the estimated cost of a street improvement shall exceed two dollars per front foot, the city council may, in its discretion, determine that bonds shall be issued to represent the cost of the improvement. They may also fix the rate of interest which the bonds shall bear. This, it is contended, destroys all semblance of uniformity. One street in which the cost exceeds two dollars per front foot may be improved under the rule prescribed in the supplemental act, while the adjoining street is being improved under the provisions of the Vrooman act. Upon still another street work may be in progress for which bonds are provided bearing a different rate of interest. It is only laws of a general nature which must have a uniform operation. And it has been uniformly held that a law is general which applies to all of a class, the classification being a proper one, and that the requirement of uniformity is satisfied if it applies to all of the class alike. In People v. Judge Twelfth District, 17 Cal. 547, it was said: "The word 'uniform' in the constitution, does not mean 'universal.' The section intends simply that the effect of general laws shall be the same to and upon all persons who stand in the same relation to the law; that is, all the facts of whose cases are substantially the same." Therefore, I take it, if the subject of the law is municipalities, and the law operates alike upon all municipalities upon which it was intended to operate at all, each requirement that the statute shall be a general law, and that its operation shall be uniform, it satisfied. Street work has always been a matter of municipal control, and the charters of all cities have provided something in regard to the method of doing it. Where, as in the Vrooman act, the method was provided in a general law which applied to all cities, but which did not constitute a specific section of the charter of any, it was still recognized as a matter of municipal interest, and as something which might appropriately have constituted a part of such charter. And in fact it was made an essential part of each by the general law. In section 6, art. 11, of the constitution of 1879, it was provided that municipal corporations should only be formed under general laws, and that "cities and towns heretofore and hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws." By section 8 of the same article, certain municipal organizations were provided for, whose charters could be amended once in two years in a mode specifically indicated in the constitution. Soon after the constitution was adopted the question arose as to whether this very Vrooman act was a general law, within the meaning of this provision. On one hand it was contended that laws were not "general," within the meaning of this provision, which only applied to all cities and towns, as to them changing their powers, but that such general laws were only laws general in the sense that they extend throughout the state, and the requirement was that such laws should operate alike within and without municipalities. But this court held in Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615, that the Vrooman act was a general law, within the meaning of that constitutional provision. This ruling has been steadily adhered to ever since. It is now, therefore, the settled law of this state that a statute which changes the powers and duties of municipal officers in important respects is a general law, and has a uniform operation, if it is made applicable to all cities, or to all of a class. If the Vrooman act was a general law in that sense, then this supplemental act must be so. If the subjects upon which the law is to operate are municipalities, it is obvious that the fact that alternative modes of procedure are open to the choice or submitted to the judgment of the council is no proof of lack of uniformity.

(4) It is objected to the act of the legislature under which the work was done that it is void because it improperly delegates legislative power to the city council, in that it vests in the council the power to create and extend the lien of the assessment, and to fix a special rate of interest. In contemplation of law, the city is the debtor, and the rate of interest is conventional. The bond act is not, therefore, a local or special statute regulating the rate of interest on money, nor does it authorize the council to regulate the rate of interest. As to the matter of the lien, the bond act is no more a local act authorizing, creating, or extending a lien than is any act providing a lien for municipal taxes. All such bonds, made payable by taxation upon land in a prescribed district, are in effect a lien upon such land; for, although the assessments are annual, when made they constitute a first lien, and whoever buys the property must take subject to the burden until the bonds are paid. It is fair to the counsel for the respondent to say that they do not take the view here advanced, but claim that the extension of the lien and the exaction of interest are penalties for delinquency, and, further, that the lot owner, by failing to pay within 30 days, and by failing to object to the bond in the mode provided, consents to the extension of the lien, and the condition as to interest. It is also suggested that there is a delegation of legislative power, in that the act vests the council with the discretion to pursue one of several schemes for improving streets. All powers, or at least all powers of a legislative character, exercised by the city council, are delegated powers. The right to so delegate all powers which are of a municipal nature is expressly given to the legislature, when by the constitution it is authorized and directed to provide for municipal corporations. The power to improve streets is admittedly in the category of municipal powers. The entire matter might have been confided to the local council. Here the authority of the local legislature is limited to certain alternative methods, all within the authority which can be so delegated.

2. Appellant further contends that the bond act is void because not passed by the legislature in the mode prescribed by the constitution. It violates, he says, section 24, art. 4, because (1) two subjects are expressed in the title; (2) no subject is sufficiently expressed in the title; and (3) it amends the Vrooman act, but does not re-enact and publish at length the sections amended.

(1) The act, we have seen, purports to be an act to amend the Vrooman act by adding certain sections thereto, relative to a system of street-improvement bonds. If the reference to the former act expresses a subject, it is by reference to the title of that act; and if the further subject mentioned in the title is included in, or logically may be so included, then two subjects are not expressed in the title. And such is plainly the case. The title of the former act is stated in the title of the bond act. It is an act to provide for work upon streets, courts, etc., within municipalities. Now, it is quite obvious that a system of street-improvement bonds may be one of the modes of paying for work upon streets. The act is therefore to add an additional part to the Vrooman act in relation to a system of street-improvement bonds. That is a matter which is included within the general subject of the former act. I think the law is not open to the objection. The title plainly says that the proposed law has reference to only one subject, to wit, a system of street-improvement bonds.

(2) Counsel for appellant says a title of an act which should simply declare that it was an act relative to a system of street-improvement bonds would not express in its title anything of the nature of the bond act. There might be a system of street-improvement bonds which did not look to an assessment on the property for their payment. They might be simply municipal bonds. I think, in this case, the bonds are simply municipal bonds; but, however that is regarded, the title sufficiently expresses the subject of the act. It certainly is not required that the title shall disclose all details of the act. I see nothing in the constitutional provision which requires that the title shall disclose the purpose and scope of the act. It is enough if it intelligibly refers the reader to the subject to which the act applies, or which is affected by it.

(3) It is claimed that the law is void because it violates that part of section 24, art. 4, which declares that "no law shall be revised or amended by reference to its title, but in each case the act revised or section amended shall be re-enacted and published at length as revised or amended." But an act is not revised, nor a section amended, within the purview of the above inhibition, by an act which adds new sections which leave in full operation all the language of the statute which it purports to amend. A question somewhat similar was considered in Earle v. Board, 55 Cal. 492. The act, called the "Traylor Act," was "An act to add a new section to the Political Code to be known as section 1618, relating to the salaries of school teachers in cities having one hundred thousand or more inhabitants." The Code provided that such salaries should be fixed by the board of trustees of school districts. The Traylor act directly fixed the salaries in the class of cities named. The objection was made that the act was a special and local law. An attempt was made to show that it was a general law, because it was an amendment to the Code, which was general. Mr. Justice Ross, speaking for the court, said that the act was in no sense an amendment to the Political Code, and asked, "If an amendment, what does it amend,—the Political Code, or some particular section of it?" In the title to the bond act, it is stated that it is an act to amend the Vrooman act, but also to amend

it only by adding new sections relating to a named subject. Now, it has been held that an act which thus adds new sections is not an amendment, within the meaning of the restriction. Certainly, the words used by the legislature will not make an act an amendment to a former act when it is in fact not so. The meaning of the language is explained in the title to the act, which shows that it is not necessarily an amendatory act. In my opinion, this wording is false, and does no harm. Certainly, there was no injury done by calling attention to the existing law. But counsel says it is in fact what it purports to be, and does amend the old law in many important respects. Many supposed changes made are mentioned,—mainly, that, while the former act does not expressly say so, it sets out a mode of procedure to be followed in such matters, and thus implies that the procedure prescribed is the only mode in which the council can act in such matters. The bond act provides that in certain cases the council may pursue a different mode. It may provide for bonds, and the various notices required differ, in that in all of them it must be stated that bonds will issue. It is evident that, if this amends the Vrooman act at all, it does so only by implication. It does not purport to amend any section of that act. It simply adds new sections as a whole, relating to a subject which is stated. As already said, every word and sentence of the prior act is left in full operation and effect, although, if this were otherwise, it would not therefore be an amendment. By implication it affects the operation of the Vrooman act, for it empowers the board, in certain cases, to adopt an alternative procedure. But, although it may be admitted that, in a sense, this amends the prior law, it is not within the evils aimed at by the inhibition, and to apply it to statutes which amend others by implication would almost prohibit legislation. To say that every statute which thus affects the operation of another is therefore an amendment of it, would introduce into the law an element of uncertainty which no one can estimate. It is impossible for the wisest legislator to know in advance how every statute proposed would affect the operation of existing laws. This matter is fully discussed by Judge Cooley in People v. Mahaney, 13 Mich. 481. He says: "The mischief designed to be remedied was the enactment of statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty of making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another, in an act or section which was only referred to, but not republished, was well calculated to mislead the careless as to its effect, and was perhaps sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent." On the other hand, as we have seen, to hold that the inhibition refers to amendments by implication is to cause confusion, and unnecessarily to obstruct legislation. It must be held, therefore, that the provision does not apply to amendments by implication. See, on this point, Pennie v. Reis, 80 Cal. 270, 22 Pac. 176; University of California v. Bernard, 57 Cal. 613; Ex parte Pollard, 40 Ala. 100; Anderson v. Com., 18 Grat. 300; School Directors of Union School Dist. v. School Directors of New Union School Dist., 135 Ill. 464, 28 N. E. 49; State v. Geiger, 65 Mo. 313; State v. Hancock, 54 N. J. Law, 393, 24 Atl. 726; Lockhart v. City of Troy, 48 Ala. 584; Cooley, Const. Lim. 180, 181, and numerous cases cited in the notes.

3. It is contended that the bond act was repealed before the proceedings in question here were taken. In fact, it is claimed that it had been twice repealed.

(1) The bond act was passed March 17, 1891, and took effect immediately. Appellant claims that it purported to amend the Vrooman act by adding certain sections thereto. Precisely what the act was, we have considered. It did purport to add to that act sections numbered from 38 to 44. At the same session, and on March 31, 1891, the legislature did amend, by re-enacting and publishing in full, sections 2–5, 7, 9, 24, 26, 34, 35, and 37 of the Vrooman act. This act also took effect from and after its passage, and expressly repealed all acts and parts of acts in conflict with it. Section 3 of the amended act prescribes the procedure in ordering work done, and, as counsel claims, adds two new features. The city council may require an estimate of the cost to be made by the city engineer, and whenever the work is deemed of more than local or ordinary public benefit, or whenever the total estimated cost will exceed the total value of the lots and lands assessed, if charged to the frontage, the council may make the expense chargeable upon a district to be formed. Now, it is said, here is a provision for the very same exigency provided for in the bond act, to wit, a case where the cost will exceed two dollars per front foot, and not a word said about bonds. But these features were already in the Vrooman act when the bond act was passed. The Vrooman act had been amended in that respect in 1889. St. 1889, p. 157. Counsel contends, however, that this fact makes no difference; for the law, as revised, did make material changes in the procedure, and does not include the alternative mode mentioned in the bond act. Therefore the legislature did not wish the continuance of that alternative. The amendments did not, so far as I can discover, change the Vrooman act in any respect ma-

terial to the operation of the bond act. The choice of the alternatives was entirely with the council. I am unable to discover in the revision any indication of an intention to repeal the bond act. Where portions of an act are amended, it is not to be considered as repealed and re-enacted as amended, but the portions not altered are deemed to continue. Pol. Code, § 325.

(2) But appellant says that, if the bond act was not repealed by the revisory act, it certainly was by another act passed also at the same session of the legislature,—March 31, 1891. St. 1891, p. 461. That act was entitled "An act to amend an act entitled [here inserting the title to the Vrooman act], by adding thereto certain new and additional sections to provide the mode of carrying into effect certain provisions of said act changing grades." It proposes to amend the original street act by adding thereto sections 38 to 53, inclusive. The point is that these very numbers from 38 to 44 are used in the bond act. Though both acts treat of matters under the same general subject,—street improvements,—still they refer to very different street work. They do not interfere at all with each other. They do not amend existing statutes, but each proposes to add new sections. It is not a case, therefore, where an amended section provides that section so and so shall read thus. The implication of repeal, if any, arises entirely from the presumption that the legislature did not intend that there should be two sections bearing the same number in the same act. But this implication is not of itself sufficient to effect a repeal. It will rather be presumed that the sections were numbered by mistake.

4. It is contended that, admitting the validity of the act, the bond is void for irregularities in the procedure. In one respect, I hardly understand the mode in which counsel on both sides have presented these questions. The action was brought to enjoin a sale under the bond act, on the ground that there was no valid lien. The act providing for the bonds being valid, it was incumbent upon the plaintiff to show that the proceedings were so defective that there was no valid lien, and that the city council had no right to sell the land. Numerous matters are averred in the complaint, which, being proven, appellant contends, would show that the bonds are void. Among these are allegations that the required notices were not given. No answer was filed, but it was stipulated that all the allegations of the complaint are deemed denied. The burden was therefore upon the plaintiff all the way through, even as to the negative allegations that certain necessary notices were not given. The case was tried upon certain stipulations as to facts. In some parts of the stipulations what notices were given is stated, and, in others, not that certain notices were given, but that certain officials, at named dates, made affidavits stating the facts showing due notice, if such affidavits were competent to prove the facts. Appellant makes the point that these affidavits are not competent to prove what was done. They were not made until long after the orders were made which could be made only after the notices were given. But if the validity of the procedure did not depend upon the fact that proof was made a matter of record, but upon the fact that due notice was given, then the onus was upon the plaintiff to prove no notice was given or that the notice given was insufficient. The best we can do is to suppose that the notices which the affidavits tend to prove were given, and there were no other notices. If, in any respect, there is a failure in this regard, it is a failure on the part of the plaintiff to make out his case. The case cannot be treated as though the bondholder was put to proof of the validity of his bond. The Vrooman act, as amended in 1889, provided that, before ordering any work to be done, the council shall pass a resolution of their intention to do so, which shall be published and posted for two days as directed in section 34 of the act. Section 34 provided for the publication in a paper to be designated by the council, and, further, that "no publication other than that provided for in this act shall be necessary to give validity to any of the proceedings provided for therein." The city charter of Los Angeles declares (section 39) that ordinances finally adopted shall be published in some daily newspaper, or posted, and, until such posting or publishing, no ordinance shall be valid; and, in regard to street work, that the notice of intention shall be published at least 10 days before it shall take effect. Counsel contends: (1) The street law may control as to street work, but the charter must control as to the mode in which the council shall express its intention. (2) The mode adopted was by ordinance, and, although a resolution might be passed under the street law, an ordinance must be adopted in the mode provided in the charter. The street law does not provide for the ordinances. And (3) the two laws are not inconsistent, because the street law provides for no publication of a resolution in order that it may take effect, but for publication after it has taken effect. Therefore both provisions can stand.

The stipulation shows that the notice was published for two days only. An ordinance is also a resolution, or at least, so far as this statute is concerned, they are equivalent. City of Los Angeles v. Waldron, 65 Cal. 285, 3 Pac. 890. The street law provides a complete scheme or procedure for street work, and, so far as it goes, governs. The charter cannot make a different procedure by requiring more or less, otherwise there would not be a uniform operation of the law for all cities of a class. As to publication, the street law expressly provides that no other shall be necessary for the validity of the procedure. The ordinance, in this regard, is in the form suited to the charter of Los Angeles, and provides that the clerk shall cause the same to be published for two days, and thereupon it shall take effect. Counsel says this publication was before it took effect, and the publication required by the street law is after it has become a valid resolution. So far as it affects the proceeding, it is a distinction without a difference. Under either view, the publication is essential to the validity of the resolution, or at least of proceedings under it, and nothing can be done under it until published. Under either view, the resolution is finally passed before publication. Whether we say it is a subsisting ordinance, though it can have no effect as an ordinance, or that it takes effect only after publication, when for the first time it becomes operative as an ordinance, is a matter of taste. As each order was made in the procedure authorizing the improvement to be made, the record does not disclose that any proof had been made that the notices had been given which were requisite to give the council jurisdiction to proceed. Does this raise a presumption, in a proceeding of this character, that they were not given? If the holder of the bond were plaintiff, and it were held that he must go behind the assessment, and show authority to make the bond, such might be the rule. But it has been held, over and over, that the assessment itself makes a prima facie case in favor of its validity. I think, therefore, the laboring oar was with plaintiff to the end, and that merely showing that there was no record proof of notices did not shift the burden. That the fact, and not record evidence of the fact, gives jurisdiction, seems to be settled. Ede v. Knight, 93 Cal. 162, 28 Pac. 860; Estate of Newman, 75 Cal. 213, 16 Pac. 887; Perri v. Beaumont, 88 Cal. 108, 25 Pac. 1109; Heinlen v. Heilbron, 94 Cal. 636, 30 Pac. 8. Looking through this part of the record, however, and conceding that the notices which the affidavits tended to prove were given as stated, and not otherwise, they seem sufficient.

5. Appellant next contends that the contract under which the work was done was void because in it the contractor agreed to employ no Chinese, and no one more than eight hours per day. It is said that these provisions in the contract are void, and render the whole contract so, for such restrictions would naturally increase the cost of the work. That those provisions in our constitution which prohibit the employment of Chinese labor on public works are void, because in conflict with the fourteenth amendment to the federal constitution, is maintained on both sides. We do not find it necessary to affirm either position. Neither in the resolution of intention nor in the specifications, nor elsewhere, was there a condition in regard to what should constitute a day's work, or against Chinese laborers. The condition did not, therefore, affect the price paid. It is of no consequence to the lot owner. Neither was it, on the supposition made, legally a part of the contract. Why it was there, I do not know. Perhaps the contractor desired it. Possibly, such are the prejudices upon the subject that he could procure laborers on better terms with the provision in the contract. At all events, the street superintendent had no power to make a contract other than that authorized by the council, and upon which bids were invited. Chambers v. Satterlee, 40 Cal. 519. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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112 Cal. 548

McKENZIE v. SCOTTISH UNION & NATIONAL INS. CO. (Sac. 42.)

(Supreme Court of California. May 5, 1896.)

INSURANCE — WARRANTY — WATCHMAN CLAUSE — BREACH—EFFECT—CONSTRUCTION.

1. That an employé of insured, who worked about the insured buildings during the day, and slept at night in a house about 350 yards distant therefrom, visited the buildings several times during the night, is not a compliance with a warranty in the policy that a watchman should be kept on duty "constantly day and night in and immediately about" the insured buildings.

2. Breach of a promissory warranty in an insurance policy avoids it, irrespective of its materiality.

3. Civ. Code, § 2629, providing that the insurer shall not be exonerated by the negligence of insured or his agent, does not prevent a policy from being avoided by failure of insured's agent to employ a night watchman about the premises, as directed by insured, under a promissory warranty requiring a watchman to be kept about the insured premises.

4. A sawmill which has stopped running for the winter is "shut down," within the meaning of such term in a provision of an insurance policy, though men are employed about the premises shipping lumber therefrom, and the machinery has not been dismantled and put in shape for the winter.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by W. H. McKenzie against the Scottish Union & National Insurance Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Van Ness & Redman, for appellant. Frank H. Short, for respondent.

SEARLS, C. Action to recover for loss by fire upon insurance policy. Briefly stated, the facts are as follows: "On February 20, 1893, the defendant company executed in favor of one James Karnes its policy of insurance, insuring the said Karnes against loss by fire of a certain sawmill and the machinery therein contained, for one year from and after said date. One of the stipulations of the policy was as follows: 'Warranted by the insured that during such time as the within-described buildings or works are idle or not in operation, whether closed for repairs or during the absence of workmen, or otherwise (except as otherwise herein stated), one or more watchmen shall be on duty constantly, day and night, in and immediately about the said buildings or works; and, if the said buildings or works shall at any time remain shut down for more than thirty (30) days, notice shall be given this company, and permission to remain so shut down be obtained and indorsed hereon, or this policy shall be null and void.' Permission granted for the above-described mill to remain idle until May 1, 1893. On September 22, 1893, Karnes transferred the insured property to plaintiff; and on September 26, 1893, with the consent of the company, assigned to him the policy of insurance thereon. On December 8, 1893, the property was destroyed by fire. The amount of the loss was fixed by appraisal, and the only questions in the case arise out of alleged breaches of the watchman's warranty clause, which we have quoted." The facts in this connection are as follows: The plaintiff took possession of the property under his conveyance of September 22, 1893, in the latter part of October. The mill did not run from the date of plaintiff's purchase until it was burned, on the 8th day of December, 1893; but there was a quantity of lumber on hand which had been previously sawed, and which was transferred to plaintiff, and plaintiff had men employed in shipping this lumber. No application was at any time made by plaintiff, or on his behalf, to the defendant company, for leave to have the insured buildings or works described in the policy shut down or remain idle and not in operation, and no consent thereto was made or given by the defendant, or indorsed on the policy. The plaintiff did inform Mr. Shepard, the local agent at Fresno, that the mill had been shut down. This was shortly after the mill had been shut down. The mill in question was a steam sawmill for sawing logs into lumber, and for making trays, sweat boxes, etc.

The testimony in reference to the watchman at the mill tends to show that plaintiff was not himself at the mill. He says that on the last of October or first of November, as he thinks, he employed one C. H. Smith to go to the mill, take charge of the property, and watch it generally, and gave him authority to employ men, as he wanted them, to move out the lumber. He was employed to watch the mill, and to employ men and prepare the lumber for shipment. C. R. Smith was a witness on behalf of plaintiff, and, after stating that he was experienced as a lumberman and had worked at the mill prior to plaintiff's purchase, said, in substance, that plaintiff employed him on the 7th or 8th of November, 1893, to go to the mill, take charge of the property, and to do everything necessary to its protection, to see to shipping the lumber and everything of that kind, and to send the bills to him. "He told me to keep a watchman up there; * * * to keep a night watchman just as long as I thought it necessary to do it; and to take the night watchman off whenever I thought the property was safe without one; and to use my own judgment in regard to it, and I done so. I kept a night watchman at Mr. McKenzie's expense after I went up there. I think thirteen days I had a night watchman." He then explained that he found the watchman asleep; discharged him; McKenzie (plaintiff) paid him; and after that he (Smith) did the night watching himself. Smith, with three or four men, were working during the day getting lumber out for shipment. Smith slept in a house about 350 to 400 yards from the mill, from which house the mill was only partially visible. Plaintiff told the witness that he did not think it necessary to employ a watchman after the storms came, and said to him, "Whenever it starts to rain or snow, you let the night watchman go;" and, after the 14th of October, Smith "did all the watching that was done, both day and night." His habit was to remain up until 10 o'clock p. m., go to the mill at that hour, look around, go to his house, and to bed, "and then wake up in the middle of the night, perhaps two or three o'clock, and go down to the mill again, and take a walk around down through there, and would then go back and retire for the balance of the night." On the night of the fire (December 8, 1893), Smith and the men in his employ were in the house aforementioned, when he heard the bark of a dog; whereupon he went to the mill, and apparently found everything all right, whereupon he returned to the house, and went to bed; it being then about 11:15 o'clock. At about 12:15 a. m. he awakened, and found the mill on fire; and, when he reached the premises, the tray house was fallen in. The belts, pulleys, etc., had been taken off the machinery, and housed; the cylinders opened and oiled; and all that was deemed necessary to protect the machinery for the winter had been done from the middle to the last of November, or perhaps as late as December 5th. Smith worked during the day with the other men in shipping lumber,—superintending them, and did not "work hard," and at night watched, as before stated. On his redirect examination, Smith stated that plaintiff stated to him "that, in order to protect the insurance policy, he had to have a night watchman, and instructed me positively we had to have a night watchman at the mill; but he gave me discretion to employ a night watchman at his expense, or do it myself," etc. He also gave it as his opinion as a millman that the mill was not shut down when it stopped working, but only when it was dismantled for the winter.

The plaintiff and Smith were the only witnesses in the case. Many of the expressions here referred to or quoted were repeated in one form or another, but the foregoing is believed to be a fair synopsis of the evidence upon the mooted points.

Upon the close of the testimony on behalf of plaintiff, counsel for defendant moved the court to grant a nonsuit, upon the grounds: (1) That it appeared from the evidence that continuously from the 26th day of September, 1893, down to and including the date of the destruction of the property by fire, the insured buildings or works were idle, and not in operation, and that no watchman was on duty constantly day and night, etc., as required by the policy of insurance; and (2) upon the ground that the insured buildings or works were shut down for more than 30 days prior to the time of the fire, within the meaning of the warranty, and that at no time did the insured apply to or obtain from defendant permission that said works should remain shut down, nor was any consent thereto given or indorsed on the policy. The court overruled the motion, to which ruling counsel for defendant excepted, and the ruling is assigned as error. The cause was then submitted to the jury, and a verdict rendered in favor of plaintiff. This appeal is from a final judgment rendered upon the verdict, and from an order of the court denying defendant's motion for a new trial.

We shall first consider what may be termed the "watchman clause" in the policy, which we repeat: "Warranted by the insured that during such time as the within buildings or works are idle or not in operation, whether closed for repairs or during the absence of workmen, or otherwise (except as otherwise herein stated), one or more watchmen shall be on duty constantly, day and night, in and immediately about said buildings or works, * * * or this policy shall be null and void." "Warranties," as is said by May in his work on Insurance, at section 157, "are distinguished into two kinds: Affirmative, or those which allege the existence at the time of insurance of a particular fact, and avoid the contract if the allegation be untrue; and promissory, or those which require that something shall be done or omitted after the insurance takes effect and during its continuance, and avoid the contract if the thing to be done or omitted be not done or omitted according to the terms of the warranty." In the matter of affirmative warranties, depending upon the statements made by the insured in his application, much discussion and some variance of opinion is to be found in the cases, touching their materiality to the risk, whether made for other purposes than a warranty, whether immaterial, unguarded, or superfluous, etc. In the present case we are confronted with no difficulty of this character. The case is one of an express promissory warranty, which has been defined as follows: "An express warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. By a warranty the insured stipulates for the absolute truth of the statement made, and the strict compliance with some promised line of conduct, upon penalty of forfeiture of his right to recover in case of loss should the statement prove untrue, or the course of conduct promised be unfulfilled. A warranty is an agreement in the nature of a condition precedent, and, like that, must be strictly complied with. Whether the fact stated or the act stipulated for be material to the risk or not is of no consequence, the contract being that the matter is as represented, or shall be as promised; and unless it prove so, whether from fraud, mistake, negligence, or other cause, not proceeding from the insurer, or the intervention of the law or act of God, the insured can have no claim. * * * One of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement. The only question is, has the warranty been kept? There is no room for construction, no latitude, no equity. If the warranty be a statement of facts, it must be literally true; if a stipulation that a certain act shall or shall not be done, it must be literally performed." May, Ins. § 156, and cases cited. The foregoing quotation is but the enunciation in brief form of a principle laid down by all the writers on the subject of insurance, and enunciated in the leading cases of this country and England. In Wood v. Insurance Co., 13 Conn. 533, a leading case on the subject of warranty, Sherman, J., said: "If a house be insured against fire, and the language of the policy is 'warranted, during the policy, to be covered with thatch,' the insurer will be discharged if during the insurance the house should be covered with wood or metal, although his risk is diminished; for a warranty excludes all argument in regard to its reasonableness, or the probable intent of the parties." Marshall on Insurance (page 249), in discussing the question, says: "It is also immaterial to what cause the noncompliance is attributable; for if it be not in fact complied with, though, perhaps, for the best of reasons, the policy is void." Parties may contract as they please. When a condition precedent is adopted by them in their contract, the courts will not inquire as to its wisdom or folly, but must exact its strict, or at least substantial, observance.

When we apply these rules of law to the language of the warranty in the present case, and to the acts of the insured in compliance therewith, we are forced to the conclusion that there was neither a literal nor a substantial compliance with the terms of the warranty. The mill was idle and not in operation from the latter part of September until the date of the fire in December. To have a watchman who during the night only visited the works before bedtime, and again at 2 or 3 o'clock in the morning, and who during the rest of the night slept in a house from 350 to 400 yards from the mill, and from which it was only partially visible, is far from complying with a covenant or warranty that "during such time as the within-described buildings or works are idle or not in operation, whether closed for repairs or during the absence of workmen, or otherwise, one or more watchmen shall be on duty constantly, day and night, in and immediately about the said buildings or works." We assume that during the day the witness Smith and the men engaged with him in removing lumber from the mill yard were in such proximity to the mill as to enable them to watch it; but to sleep over a fifth of a mile from it at night, and to only visit it twice during each night, was not to be on duty as a watchman constantly, and immediately about the buildings; and, as was said in Rankin v. Insurance Co., 89 Cal. 203, 26 Pac. 872: "In the case before us the terms of the warranty are explicit as to the time of keeping a watch, and, on the undisputed evidence, we think the court ought to have held that the plaintiffs had not complied therewith." We concur also in the further remark of Paterson, J., in that case, that "we do not need a dictionary, nor law books, nor the testimony of an expert, to tell us that a man who is employed to watch in the daytime, and who is permitted to sleep at night, is not a watchman at night." See, also, Wenzel v. Insurance Co., 67 Cal. 440, 7 Pac. 817; Trojan Min. Co. v. Fireman's Ins. Co., 67 Cal. 27, 7 Pac. 4; Wood, Ins. 439; Id. (2d Ed.) 433–439.

The respondent contends that there was testimony tending to show that plaintiff employed a competent watchman to watch the premises day and night, and, if there was any negligence, it was that of the watchman, and that he is exonerated by section 2629 of the Civil Code. That section is as follows: "An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of his agents or others." The ordinary negligence of the insured and his agents has long been held as a part of the risk which the insurer takes upon himself, and the existence of which, where it is the proximate cause of the loss, does not absolve the insurer from liability; but willful exposure, gross negligence, negligence amounting to misconduct, etc., have often been held to release the insurer from such liability. To set at rest questions involving the different degrees of negligence, and the results following therefrom, we may reasonably suppose, was the object of the framers of our Civil Code. Under section 2629, supra, the nice distinctions often made necessary are dispensed with; and the general proposition is established that no form of negligence on the part of the insured, or his agents or others, leading to a loss, avoids the policy, unless it amounts to a willful act on the part of the insured. The Code thereby sets at rest a fruitful cause of litigation. This section was not intended, however, to absolve the insured from the performance of those acts which he has expressly covenanted to perform. To do this would be not to measure his conduct and obligations under the contract, but to abrogate it. When the insured in the present case warranted, in case the mill was idle and not in use, to have a watchman on duty constantly, day and night, in and immediately about the buildings or works, he bound himself to the performance of specific acts, from the performance of which no negligence could exonerate him. It may well be that had the plaintiff complied with the warranty by keeping a watchman on duty, as specified in the policy, that negligence of the watchman as to the manner of discharging such duty would come within the letter and spirit of sction 2629, supra. Whether this result would follow in such a case it is unnecessary to determine, as the question is not involved. The case at bar does not present an instance of the negligent performance of a contract of warranty, but of an entire omission to perform a vital portion of such contract. The object of promissory warranties is usually to bind the insured to the performance of certain acts which but for such warranty he would not be bound to perform. Ordinary negligence by the insured did not, prior to the adoption of our Code, release the insurer from liability; yet it has always been held that the conditions of an express promissory warranty were binding upon the insured according to their tenor and legal effect. All that our Civil Code has done in relation to negligence is to declare that his negligence shall not, or that of his agent, etc., shall not, exonerate the insurer. But the same Code provides that "a policy may declare that a violation of specified provisions thereof shall avoid it; otherwise the breach of an immaterial provision does not avoid the policy." Civ. Code, § 2611. Section 2612 is as follows: "A breach of warranty, without fraud, merely exonerates an insurer from the time that it occurs, or where it is broken in its inception prevents the policy from attaching to the risk." The whole article of the Code on warranties would be rendered practically inoperative if mere negligence could abrogate the several provisions thereof.

Counsel for respondent relies upon Sierra Milling, Smelting & Mining Co. v. Hartford Fire Ins. Co., 76 Cal. 235, 18 Pac. 267, in support of his contention here. That case involved the liability of an insurance company under a similar clause in reference to a watchman. The facts showed a substantial compliance with the terms of the warranty, and the only thing in the case tending to uphold the contention here is an expression in the opinion not necessary to the determination of the case, wherein the learned commissioner who wrote the opinion, in alluding to the allegations of the answer, says: "To us this seems to be nothing more than an allegation of negligence on the part of the watchman, and for this the plaintiff was not responsible, under section 2629 of the Civil Code." The expression was evidently only used to show that, in the view of the writer, the section referred to qualified the character of the services required by a watchman, who was at his post substantially as required by the letter of the warranty, and has no application to a case in which the watchman required to be on guard was quietly sleeping over 1,000 feet away. As the evidence of plaintiff all showed affirmatively a nonfulfillment of the warranty, the court, in the present instance, should have granted defendant's motion for a nonsuit; and the verdict of the jury, on precisely the same evidence, was contrary to law.

2. We are also of opinion that there was a violation by plaintiff of the further clause in the warranty under which, "if the buildings or works shall at any time remain shut down for more than thirty (30) days, notice shall be given this company, and permission to remain so shut down be obtained, and indorsed hereon, or this policy shall be null and void." The testimony of plaintiff is full and explicit to the effect that the mill was idle and not in use from September 25th to December 8th, the date of the fire. No lumber was cut, and nothing was done in or about the property except to take away and ship lumber previously cut, except that in the latter part of November they prepared the machinery for winter, by removing belts, etc. It is true that the witness Smith gave it as his opinion that the mill was not "shut down" as long as they were shipping lumber; but we see nothing in the testimony to call for the opinion of an expert. To say that a sawmill is shut down when it is not running and is idle is to use an expression which is perfectly plain and easily understood by the average layman, and calls for no expert opinion. To assert the contrary is idle. It would be but little more unreasonable to say that a train standing at a station had not stopped, because freight was being delivered from the cars. The plaintiff said in his testimony: "I told Mr. Shepard that it was shut down. Mr. Shepard is the local agent of the defendant here at Fresno. I told him that the mill had been shut down. This was after the mill had been shut down,—shortly afterwards. I made no application to Mr. Shepard or anybody else to indorse consent upon the policy, and, as a matter [of] fact, I never obtained written consent from Mr. Shepard or anybody else to have the mill remain shut down." Under such circumstances we are of opinion that there was a violation of the second clause of the warranty in not applying for and procuring the consent of the insurer to be indorsed upon the policy for more than 30 days after the works shut down.

We recommend that the judgment and order appealed from be reversed, and a new trial ordered.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

(5 Cal. Unrep. 357)

SPOONER v. CADY. (Sac. 36.)[1]

(Supreme Court of California. May 8, 1896.)

UNLAWFUL ATTACHMENT—DISSOLUTION—LIABILITY OF SHERIFF—ATTORNEY'S FEES—DAMAGES.

1. Where a sheriff, in attaching property, was not guilty of any oppression, fraud, or malice, within the meaning of Civ. Code, § 3294, but acted fairly in all respects, and simply performed the duties required of him as a public officer, exemplary damages will not be allowed against him on dissolution of the attachment.

2. Where the only evidence of money properly expended in the pursuit of personal property which has been wrongfully converted (made a measure of damages under Civ. Code, § 3336) is that plaintiff made a note for a gross sum to an attorney, in full payment of all expenses of the proposed suit, from its commencement to its determination, and it does not appear what, if any, expenses were incurred, except that at the end of the controversy plaintiff had judgment for her costs, the money paid by plaintiff to her attorney cannot be properly taken into account, in estimating her damages.

Commissioners' decision. Department 1. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by Clara Spooner against Frank P. Cady for conversion of personal property. From a judgment in favor of plaintiff, and from an order denying his motion for a new trial, defendant appeals. Judgment modified, and order affirmed.

Goodwin & Goodwin, for appellant. Shinn & Shinn, for respondent.

BELCHER, C. It is alleged in the complaint in this case that on the 28th day of September, 1892, plaintiff was the owner, in possession, and entitled to the possession, of certain described personal property, which was and is of the value of $13,000; that on said day the defendant wrongfully, and without her consent, took said property from the possession of plaintiff; that on the 3d day of October, 1892, plaintiff demanded of defendant the possession of said property, but to deliver possession thereof to plaintiff defendant refused, and still refuses, to her damage, etc.; "that, by reason of said taking and detention of said property by defendant, plaintiff has been compelled to properly and necessarily expend a large amount of time and money in pursuit of said property; and that a fair compensation for the time and money so properly expended by plaintiff in pursuit of said property is the sum of three thousand dollars." Wherefore, judgment is asked (1) for a return of the property, or, in case a return thereof cannot be had, for the sum of $13,000, the value thereof; (2) for the sum of $3,000, as compensation for the time and money properly expended by plaintiff in pursuit of said property; (3) for costs of suit. The original complaint was filed October 3, 1892. The answer denies that on the day named, or at any other time, the plaintiff was the owner, or in possession, or entitled to the possession, of the property described in the complaint, or of any portion thereof, and denies that she had properly or otherwise expended any money or time in the pursuit of said property; and it alleges that defendant was the duly elected, qualified, and acting sheriff of Lassen county, and that as such officer he took into his possession the said property as the property of M. E. Spooner (the husband of plaintiff), to whom it then belonged, under and by virtue of two writs of attachment which were regularly issued out of the superior court of Placer county in actions commenced therein against said M. E. Spooner, and which were placed in his hands for service. And in a supplemented answer, subsequently filed, it is alleged that in October, 1892, the said writs of attachment were discharged, and that on November 15th, following, by order of court, all of said property was delivered by defendant to the plaintiff. The case came on regularly for trial before a jury on August 30, 1894, and evidence as to the plaintiff's ownership and possession of the property at the time of its attachment was introduced on both sides. It was proved that the property—consisting mostly of live stock—was situated on a ranch in Lassen county, which was claimed by plaintiff, and known as the "Spooner Ranch," and that it remained there after the attachment as before, and that while there, in his custody, defendant paid plaintiff, for the pasturage of the stock, the agreed rental value of the land. And it was admitted that all the property attached was returned to plaintiff by defendant, as alleged in his supplemental answer. To show the damage sustained by plaintiff by reason of the attachment, A. L. Shinn, her attorney, testified: That, before commencing the suit, plaintiff asked him what it would cost her. "I told her it was difficult to say what the cost would be; it might be a long suit, and cost her a good deal of money, but I would take the case, and pay all expenses, give my services, and take the chances of getting out. She asked what I would charge, under those conditions. I told her $2,000. She said, 'That is not enough. Make it $2,500.' I said: 'I will not quarrel with you on that. I don't know how I will get out of it.'" That she then gave him her promissory note for $2,500 due one day after date, and that he was to pay all expenses from the first, and that she paid the note in full in November after the property was returned. He further testified that $500 would be a reasonable attorney's fee for commencing the action, and that $1,200 would be a reasonable fee for commencing and prosecuting the action up to its final determination. The court instructed the jury very fully in regard to the law bearing upon the questions presented for decision, and, among other things, told them that, if they should find for the plaintiff, they must find "the value of the property, and assess the damage caused her by the taking and detention of the property. The measure of damages (the property having been returned) is legal interest on the value of the property from the time of taking, and so long as it was held under attachment, and a fair compensation for the time and money properly expended by plaintiff in pursuit of the property, in computing which you may include a reasonable attorney's fee, which attorney's fee must have been actually paid." The verdict was: "We, the jury in the above-entitled cause, find for plaintiff, and find the value of the property taken to be $9,000, and assess her damages at $1,500." Of the damages so assessed, plaintiff was allowed, by an order of court, to waive the sum of $256, and thereupon judgment was entered that the plaintiff recover of and from the defendant the sum of $1,244 damages, and her costs of suit, taxed at $265.55. From that judgment, and an order denying a new trial, the defendant appeals.

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[1] Rehearing denied.

The only question which need be considered is that relating to the damages awarded to the plaintiff. There was no ground for allowing exemplary damages. Such damages may be given in an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed. Civ. Code, § 3294. But here there was no evidence tending to show that the defendant had been guilty of any oppression, fraud, or malice. On the contrary, he appears to have acted fairly towards the plaintiff in all respects, and to have simply performed the duties required of him by law as a public officer. Section 627 of the Code of Civil Procedure provides: "In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury * * * may, at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property." And section 3336 of the Civil Code provides: "The detriment caused by the wrongful conversion of personal property is presumed to be: * * * (2) A fair compensation for the time and money properly expended in pursuit of the property." Assuming, without deciding, that in a case like this the plaintiff is entitled to recover a fair compensation for the time and money properly expended in pursuit of the property, the question then is, does the evidence show such an expenditure of either time or money by the plaintiff as entitled her to the damages awarded? It is apparent that the expenditure must be limited to the time during which the property was detained, and that it cannot be extended beyond the time when the property was returned. There was no evidence that the plaintiff expended any time in pursuit of the property, nor, if she did, as to what was the value of that time. There was no ground, therefore, for allowing her any compensation for time expended. And the only evidence as to money expended was that she gave to her attorney her promissory note, and subsequently paid the same, as before stated. That note was for a gross sum, and was to be in full payment of all expenses of the proposed suit, from its commencement to its final determination. No sum was named or agreed upon as the attorney's fee for his services in the case. And it does not appear what, if any, expenses were incurred, except that, at the end of the controversy, plaintiff had judgment for her costs, in the sum of $265.55. Under these circumstances, could the money paid by plaintiff to her attorney, or any part thereof, be properly taken into account, in estimating her damages? It has been strongly intimated by this court that money paid for attorney's fees in pursuit of property is not within the rule of damages declared by section 3336 of the Civil Code. Greenbaum v. Martinez, 86 Cal. 462, 25 Pac. 12; McDonald v. McConkey, 57 Cal. 325. But the question has never been definitely decided. The general rule is that counsel fees are not recoverable by the successful party in actions either at law or in equity, and it has been held in cases of aggravated trespass, where exemplary damages might be allowed, that attorney's fees for prosecuting the action could not be taken into consideration in estimating the damages. Howell v. Scoggins, 48 Cal. 355; Falk v. Waterman, 49 Cal. 224; Sedg. Dam. (8th Ed.) § 234. In Murphy v. Mulgrew, 102 Cal. 547, 36 Pac. 857, which was an action like this, the court said: "The evidence is insufficient to justify the finding of the court that two hundred dollars is a fair compensation for the time and money expended by the plaintiff in the pursuit of the property. All the evidence bearing upon this question is the fact that plaintiff gave her note for two hundred dollars to her attorneys as a fee for their services in the case. That is wholly insufficient to support the judgment in that regard." Counsel for respondent invoke the rule declared in injunction cases, where the preliminary injunction had been dissolved, and, in an action on the injunction bond, it was held that counsel fees might be recovered. But in Mitchell v. Hawley, 79 Cal. 301, 21 Pac. 833, it is said: "The allowance of counsel fees in suits on injunction bonds is exceptional, and it should not be carried beyond the point to which former decisions have taken it. In the injunction suit in which the bond now before us was given, the attorneys for defendants were given five hundred dollars in gross for all their services in the case. They made an effort to get the temporary injunction dissolved, but failed. Afterwards the injunction was ended by the dismissal of the action." And it was held that the plaintiff was not entitled to recover any sum for counsel fees. In Bustamente v. Stewart, 55 Cal. 115, the court quoted with approval the following language found in High, Inj. §§ 473, 474: "A reasonable amount of compensation paid as counsel fees in procuring the dissolution of an injunction may be recovered in an action upon the bond, if the injunction was improperly or wrongfully issued; the amount being limited to fees paid counsel for procuring the dissolution, and not for defending the action." In San Diego Water Co. v. Pacific Coast S. S. Co., 101 Cal. 216, 35 Pac. 651, it was held, where no effort was made to dissolve a preliminary injunction, except that the case was tried on its merits, and a dissolution of the injunction was made by the final judgment, and the attorneys were simply employed to try the case, and were paid for that purpose, and no other, that counsel fees could not be recovered as damages upon the injunction bond; and see Curtiss v. Bachman (Cal.) 42 Pac. 910. Without deciding whether, under the provisions of section 3336, Civ. Code, attorney's fees can ever be treated as money properly expended in the pursuit of the property, and therefore recoverable, we think it clear that, in view of the authorities above cited, the plaintiff in this case was not entitled to recover for such fees. Interest on the value of the property during the time it was held under attachment would amount to about $78. The case should be remanded, with directions to the court below to modify the judgment by striking out all the damages awarded the plaintiff, except the sum of $78; and in all other respects the judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the cause is remanded, with directions to the court below to modify the judgment by striking out all the damages awarded the plaintiff, except the sum of $78; and in all other respects the judgment and order appealed from are affirmed.

(112 Cal. 565)

AVERY v. MAUDE. (L. A. 93.)

(Supreme Court of California. May 8, 1896.)

MORTGAGES — FORECLOSURE — COUNSEL FEES — PLEADING—JUDICIAL NOTICE—PRESUMPTIONS.

On foreclosure of a mortgage, which provides for the payment of a reasonable counsel fee, plaintiff need not allege nor prove employment of counsel as a prerequisite to a recovery of fees, for the court will take judicial notice that one signing the complaint as attorney is an attorney of the court, and it will be presumed that he was employed by plaintiff, and is to be paid a reasonable fee for his services.

Department 1. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by Louisa S. Avery against A. C. Maude for foreclosure of a mortgage. From that part of a judgment in favor of plaintiff allowing counsel fees, defendant appeals. Affirmed.

Gorham & Pendegast, for appellant. H. C. Campbell and T. W. Lockhart, for respondent.

PER CURIAM. This action was brought for the foreclosure of a mortgage, and judgment was rendered therein in favor of the plaintiff for the amount of the note secured by the mortgage, and also in a certain amount for counsel fees. The defendant has appealed from that portion of the judgment allowing counsel fees, and urges in support of his appeal that it was not alleged in the complaint, or shown at the trial, that the plaintiff had actually paid or agreed to pay any counsel fees whatever, or that she had employed any counsel to prosecute the action. It is alleged in the complaint that by the terms of the mortgage the appellant agreed to pay all costs and expenses of foreclosure, including counsel fees at the rate of 5 per cent. upon the amount of the debt, and that the same should become due upon the filing of the complaint; and it is further alleged that 5 per cent. is a reasonable counsel fee to be allowed the plaintiff. This allegation of the terms of the mortgage is not denied, but the defendant denied that 5 per cent. is a reasonable counsel fee to be allowed the plaintiff, and alleged that the plaintiff had never employed any counsel to prosecute any action, and had never paid or promised to pay any counsel fee, or incurred any liability for such fees. It was not necessary that the plaintiff should either allege in her complaint or show at the trial, as a prerequisite to her right to recover for counsel fees, that she had employed counsel to prosecute the action, or the amount which she had agreed to pay for their services. The complaint in the action is signed "H. C. Campbell, Attorney for Plaintiff." The court would take judicial notice that he was an attorney of the court, and, in the absence of any other evidence, his signature to the complaint authorized the presumption that he had been employed by the plaintiff to prosecute the action, and that she had become liable to pay him a reasonable fee for his services. It was shown at the trial that 5 per cent. upon the amount of the debt would be a reasonable fee in the case, and, as the appellant offered no evidence in support of his averments, the court was justified in allowing that amount. Rapp v. Gold Co., 74 Cal. 532, 16 Pac. 325; Alexander v. McDow, 108 Cal. 25, 41 Pac. 24. The judgment is affirmed.

5 Cal. Unrep. 363

MAGLINCHEY v. SOUTHERN PAC. CO.

(S. F. 295.)

(Supreme Court of California. May 8, 1896.)

RAILROADS — INJURIES TO INFANT — MEASURE OF CARE—INSTRUCTIONS.

In an action against a railroad company for injuries received by a boy 17 years old, while attempting to pass between the cars of a freight train to reach a passenger train which he intended taking, an instruction that no recovery could be had if the boy possessed mental capacity to realize the danger to which he was subjecting himself, because the law is that one going into a place of danger assumes the risk, without any restriction as to the qualified measure of care and caution required of one not of full age, was not objectionable, where such qualifications were repeatedly given, and specifically applied in other instructions.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by William Maglinchey, an infant, by his guardian ad litem, Henry Maglinchey, against the Southern Pacific Company. There was a judgment for defendant, and, from an order denying a new trial, plaintiff appeals. Affirmed.

E. A. Holman and E. H. Shaw, for appellant. W. H. L. Barnes, for respondent.

HAYNES, C. Action to recover for personal injuries. The defendant had judgment, and the plaintiff appeals from an order denying his motion for a new trial. The injury occurred September 30, 1894, and the plaintiff was 17 years of age in the May preceding. He resided with his father in Berkeley, and came to the West Berkeley station, situate at the corner of Third and Delaware streets, to take the local train to San Francisco. He arrived too late for the train he intended to take, and left the station, and went to watch some boys playing marbles, and when he returned to take the next passenger train, and when he was on the opposite side of the street, a freight train came between him and the passenger train, and blocked Delaware street, as he testified; that he waited four or five minutes, and was afraid he would be left, and undertook to cross between two freight cars on the bumpers, when, without notice by bell or whistle or any warning, the freight train started, and his foot was caught between the bumpers, and injured.

The only error specified by appellant is that the court erred in giving to the jury the following instruction: "And further, in this same line of instruction, I say to you that if you find that he was old enough to know what he was doing at this time; that he was old enough to realize, and had mental capacity enough to realize, that he was going into a dangerous place; that he understood the danger that would be likely to occur to him in climbing across this freight car to reach the passenger train, and chose to take the chances of being injured in his endeavor to get over that freight car,—then he cannot recover, because the law in this case assumes that if a man or a youth voluntarily goes into a place of danger, having knowledge and reasoning capacity sufficient to enable him to determine whether it is or is not dangerous, he cannot recover, because the theory on which this action is predicated is that there has been some breach of duty on the part of the railway company, and that the boy in this case himself was free from negligence."

Several instructions requested by plaintiff, stating with great fullness and particularity the qualifications of the general rule as to due care and caution when applied to one not of full age, had been given by the court, the effect of which, appellant claims, was nullified by the instruction excepted to which was last given. A few passages from these instructions may be quoted: "You cannot measure the act of an infant by the standard applied to an adult person of ordinary prudence. * * * The degree of care exercised by an infant does not require the judgment and thoughtfulness that would be expected of an adult. In judging of the conduct of a boy of the years of this plaintiff, it is expected there should be found impulsiveness, indiscretion, and disregard of danger, and his capacity is measured accordingly. A boy may have all the knowledge of an adult respecting the dangers which would attend a particular act, but, at the same time, he may not have the prudence, thoughtfulness, and discretion to avoid them which are possessed by ordinarily prudent persons of mature years. Hence the rule that the child is not guilty of negligence if he exercises that degree of care which, under like circumstances, a person of his age and capacity would exercise. Whether the plaintiff exercised such a degree of care is for you to decide." These qualifications were reiterated in varying language and form of expression in almost every instruction given. The instruction complained of, though not as full and clear as several of the preceding ones, was not inconsistent with them; and the jury cannot be presumed to have forgotten or disregarded them. The proposition is not controverted that the degree of care and prudence to avoid danger, when applied to children, is that which may reasonably be expected of children of like age, experience, and capacity; but as childhood precedes maturity, and grows into it, the standard by which due care is measured also changes, and each year becomes less marked, until it becomes merged in that by which the care and prudence of men are measured, such change being accelerated or retarded by natural or acquired capacity. These things are so familiar to all men, not only from observation but from individual experience, that it is incredible that the repeated and explicit instructions of the court upon that subject should have been forgotten or overlooked. In the instruction immediately preceding the one excepted to, the court said: "Now, taking this case which is about to be submitted to you, it is for you to say, having seen this young man, this young lad of some eighteen years of age, and noticed his demeanor upon the stand, whether or not he, under the circumstances of this case, exercised such care as could reasonably be expected of a boy of his age." The alleged conflict consists solely of the omission to repeat again the oft-repeated qualification above quoted, and not in the statement of some inconsistent proposition which might have misled the jury. The order appealed from should be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

112 Cal. 568

FOX v. HALE & NORCROSS SILVER MIN. CO. et al. (S. F. 296.)

(Supreme Court of California. May 8, 1896.)

JUDGMENT—ENTRY—CONSTRUCTION OF MANDATE

Where, after appeal, an action was remanded, with direction to the trial court to enter a judgment as of the date of its former judgment against certain of the defendants for a certain amount on one of the issues presented, and that there be a new trial as to other defendants and as to all defendants on other issues, such mandate does not authorize the entry of more than a single judgment in the action, which should not be entered until after trial of the issues still undetermined. Harrison and Garoutte, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by M. W. Fox against the Hale & Norcross Silver Mining Company and others. From a judgment against defendants Alvinza Hayward and H. M. Levy, they appeal. Reversed.

W. F. Herrin, Lloyd & Wood, and Garber, Boalt & Bishop, for appellants. W. T. Baggett and L. D. McKissick, for respondent. W. H. H. Hart, for Hale & Norcross Silver Min. Co.

VAN FLEET, J. On a former appeal herein (Fox v. Mining Co., 108 Cal. 369, 41 Pac. 308, where the purposes and history of the action are fully stated), the cause was remanded to the superior court, with these directions: "The judgment appealed from is set aside, and the superior court is directed to enter a judgment as of the date of its former judgment against Alvinza Hayward and H. M. Levy, for the sum of $210,197.50, with interest from that date, upon the issue presented by the claim for having paid an excessive price for milling the ore in the Mexican and Nevada mills; and upon that issue the order denying a new trial as to these defendants is affirmed. As to the other appellants, except the Nevada Mill & Mining Company, the order denying a new trial as to this issue is reversed, and a new trial thereon ordered. Upon the issue presented by the claim for damages sustained by reason of the imperfect and fraudulent milling, the order denying a new trial is set aside as to all the appellants; and the court is directed upon the evidence already taken in the case, and such other evidence as may be presented by either party, to make findings in accordance with the views hereinbefore expressed." Then follow some specific suggestions as to particular facts to be found, not pertinent to be here noticed. Upon the going down of the remittitur upon that appeal, the superior court, on motion of the respondent, and against the objection of the appellants, immediately, and without awaiting the determination of the issues as to which a new trial had been so granted by this court, and before the same had been disposed of, rendered and had entered therein a judgment against the defendants Alvinza Hayward and H. M. Levy, upon the issue as to which the order denying them a new trial had been affirmed, for said sum of $210,197.50, with interest, etc., and making reservation of the other issues as to which a new trial had been granted, substantially in the language of the judgment of this court above recited. From this judgment the defendants Hayward and Levy now appeal.

The main contention of appellants, and the only point we find it necessary to notice, is that the judgment as entered was unauthorized by law or the directions of this court; that there can be but one final judgment in a case, and, as the judgment herein finally determines the rights of the parties as to one of the issues only, leaving and reserving others to be thereafter tried, it is premature and contrary to the course of law. That the judgment as entered is final in form and character as to the issue involved therein no question is made; nor is it controverted that the general rule in this state, as elsewhere, is that there can be but one final judgment in an ordinary civil action or proceeding. It is not necessary for the purposes of this appeal to decide whether or not this case is a suit in equity (as to which see Thomp. Corp. §§ 4472, 4479; 1 Mor. Priv. Corp. § 236a et seq.); nor whether, in a suit in equity in this state, several judgments, each finally determining some of the rights of the parties, can be entered (as to which see Code Civ. Proc. § 647; Thompson v. White, 63 Cal. 505; Watson v. Sutro, 77 Cal. 609, 20 Pac. 88; Trustees v. Greenough, 105 U. S. 527). This court has no power to review its own final judgments; and we cannot now inquire whether our judgment on the former appeal was or was not warranted by law. The only question we can consider on this appeal is whether the judgment now appealed from was entered in accordance with the mandate of this court. It is, however, certain that the cases, if there are any, which can be taken out of the general rule above stated (that but one judgment, final in effect, if not in form, can be entered), must be altogether exceptional and dependent upon some special considerations. No such considerations have been brought to our attention in this case, nor were any such referred to in our former opinion. In construing our former judgment, therefore, the fair presumption is that no direction to enter a final judgment on some of the issues, in advance of the trial on the remaining issues, was intended. On examining the terms of that judgment, we are unable to find any plain or distinct direction of that kind. The court below was directed to enter a judgment as of the date of its former judgment on the issue as to which a new trial was denied; and as to the remaining issues a new trial was granted. No direction was given as to when the particular judgment ordered should be entered; and the presumption is that it was intended that it should be entered at the same time as, and should constitute a part of, the final judgment to be rendered on all the issues in the case, in accordance with the general course of proceeding in like cases. Nothing less than explicit language to the contrary would justify any other interpretation. We are therefore of opinion that the court below was not authorized to enter the judgment appealed from until all the issues between the parties before the court should be determined; and that, when the court shall have filed its findings upon the issues as to which a new trial has been ordered, it will then be its duty to render a single judgment upon the whole case, which shall include the judgment so heretofore directed to be entered.

It may be added, in justice to the learned judge of the court below, and to counsel for plaintiff, that the language of our former judgment was, perhaps, not happily chosen or altogether clear in this respect, and was possibly, standing alone, open to the construction insisted upon by plaintiff. But when regarded in the light of the general rule of procedure applicable in like cases, as above indicated, such construction cannot, for the reasons stated, be indulged. The judgment appealed from is therefore reversed, and the cause remanded.

We concur: BEATTY, C. J.; McFARLAND, J.; HENSHAW, J.; TEMPLE, J.

We dissent: HARRISON, J.; GAROUTTE, J.

(112 Cal. xvii)

FOX v. HALE & NORCROSS SILVER MIN. CO. et al. (S. F. 387.)

(Supreme Court of California. May 9, 1896.)

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by M. W. Fox against the Hale & Norcross Silver Mining Company and others. From a judgment against him, defendant James Cross, executor, appeals. Reversed.

W. F. Herrin, Lloyd & Wood, and Garber, Boalt & Bishop, for appellant. W. T. Baggett and L. D. McKissick, for respondent. W. H. H. Hart, for Hale & Norcross Silver Min. Co.

PER CURIAM. This is an appeal by the executor of the last will of W. S. Hobart, deceased, from a judgment entered against him in said action. The judgment is alike in all substantial respects with the judgment in the case of Fox v. Mining Co. (S. F. 296, just decided) 44 Pac. 1022, and is affected by the same error; and, upon the authority of that case, the judgment herein is reversed, and the cause remanded. Remittitur forthwith.

(112 Cal. 581)

CLINE v. ROBBINS. (Sac. 64.)[1]

(Supreme Court of California. May 9, 1896.)

MORTGAGE—BILL TO REDEEM—FORM OF JUDGMENT —EVIDENCE—HARMLESS ERROR.

1. An action to have a deed absolute on its face declared a mortgage, and for an accounting and other relief, is in the nature of a bill to redeem; and the decree should not be for foreclosure, but that on payment of the amount due within a reasonable time, to be fixed by the court, the mortgage shall be adjudged to be satisfied, and that if not so paid the action shall be dismissed.

2. To allow plaintiff in a bill to redeem to testify to receipts by defendant of income from the property, where his testimony was based on what he had been told by water-rent payers, was harmless error, the difference between the amount to which he thus testified and that admitted by defendant being slight.

Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by John T. Cline against H. A. Robbins to have a deed declared a mortgage, for an accounting, and for other relief. Judgment for plaintiff, and defendant appeals. Modified.

Thos. S. Ford, for appellant. J. M. Walling, for respondent.

McFARLAND, J. This is an appeal by defendant from a judgment in favor of plaintiff. It is averred in the complaint that on November 5, 1890, plaintiff executed a certain deed of conveyance of certain property known as the "Cline Waterworks," and appurtenances, to the defendant; that while said deed, upon its face, conveyed the title of said property to defendant, yet it was intended by the parties to be a mortgage, as security for the payment by plaintiff to defendant of the sum of $785, with interest at 9 per cent. per annum; and that it was understood between said parties that upon the payment of said sum of money and interest the indenture should become void, and defendant should reconvey the property to plaintiff. It is further averred that defendant wrongfully took possession of said property, and has received the income thereof, which should be applied to the payment of the said averred mortgage. It is further averred that said income so received by defendant is more than sufficient to satisfy the amount secured by said mortgage aforesaid. but that if, upon an accounting, there should that statute. The judgment should be affirmed.

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[1] Rehearing denied.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(112 Cal. 577)

WHITE v. WHITE. (S. F. 485.)

(Supreme Court of California. May 9, 1896.)

APPEAL—FILING OF TRANSCRIPT—PRACTICE.

Under rule 2 of the supreme court, requiring an appellant to file a transcript of the record within 40 days after the appeal is perfected and the bill of exceptions and statement (if there be any) are settled, a refusal of the trial judge to settle a proposed bill, or its disallowance, are to be regarded as having the same effect as a settlement, and, unless followed by steps to review such action, or looking towards procuring such settlement, within 40 days thereafter, the respondent is entitled to a dismissal.

Department 1. Appeal from superior court, city and county of San Francisco; C. B. Hebbard, Judge.

Motion to dismiss the appeal for failing to file the transcript within the time prescribed by rule 2 of this court. Motion granted.

T. C. Spelling, for appellant. Henry E. Highton and Walter H. Linforth, for respondent.

HARRISON, J. The judgment from which the appeal is taken was entered in the superior court February 9, 1895, and the appeal therefrom was perfected April 13, 1895. The plaintiff gave notice of his intention to move for a new trial on the 19th of February, 1895, and on March 29th served his proposed bill of exceptions and statement of the case on said motion, to which the defendant proposed amendments. December 6th the proposed bill and amendments came on for settlement before the judge, and he, deeming that the proposed bill did not correctly set forth the proceedings had in the case, outlined the nature of the bill which he would settle, and directed the plaintiff within 60 days from that date to prepare and serve upon the defendant a bill of exceptions in accordance therewith, and gave to the defendant 30 days thereafter within which to propose amendments thereto, after which the usual and statutory proceedings in reference to settlement were to be had. Under this order the plaintiff served his proposed bill of exceptions upon the defendant January 27, 1896. The defendant proposed no amendments thereto, but on February 17th moved the judge to disallow the same, and, after argument thereon in behalf of the respective parties, this motion was granted, and an order made by the judge disallowing the said bill of exceptions. Thereafter, March 2d, the appellant presented the same ex parte to the judge, and requested him to settle and certify the bill, or to fix a day for such settlement; and upon such application the judge refused to settle or certify the same, or any bill of exceptions. No statement or bill of exceptions having been filed, the motion for a new trial was denied February 17th, and no appeal has been taken from that order. After the refusal of the judge to settle the bill of exceptions, the appellant took no further steps or action towards obtaining its settlement, or for the filing of a transcript in this court, and on April 7th the respondent gave notice to the appellant of the present motion to dismiss the appeal.

Rule 2 of this court requires the appellant to file a transcript of the record within 40 days after the appeal is perfected and the bill of exceptions and the statement (if there be any) are settled; and by rule 5 it is provided that, if the transcript be not filed within the time prescribed, the appeal may, on motion of the respondent, and notice thereof to the appellant, be dismissed. Upon such motion the respondent is only required to show in the first instance that more than 40 days have expired since the perfecting of the appeal, and, in the absence of any further showing on the part of the appellant, the appeal will be dismissed. The rule, however, provides that, if there be a bill of exceptions or statement, the appellant may have 40 days after the same is settled within which to file the transcript. As such a case creates an exception to the time limited by the rule, the burden is upon the appellant to show that he is within the exception, and he must show the existence of such facts as will enable him to avail himself of the exception,—either that a bill of exceptions or a statement has been settled, and that 40 days have not elapsed since the date of its settlement, or that proceedings for its settlement are still pending before the judge. If the time within which the bill of exceptions or statement may be proposed or settled has not expired, or if proceedings for its settlement are still pending before the judge and undetermined by him, the appellant cannot be said to be in default for failure to comply with the rule for filing the transcript. A refusal of the judge to settle the proposed bill, or a disallowance of the same after proceedings for its settlement have been taken before him, should be regarded, for the purposes of the rule, with the same effect as its settlement. The appellant would not know until such action by the judge that the bill would not be settled, and a reasonable construction of the rule would allow him the same time after such disallowance within which to file the transcript as if the bill of exceptions had been settled at that date instead of being disallowed. In the present case the bill of exceptions was disallowed by the judge February 17, 1896, and the appellant thereafter took no steps to review this action of the judge, or looking towards the settlement of the bill, and the present motion was made after the expiration of 40 days therefrom. The fact that a previous motion to dismiss the appeal was pending did not of itself extend the time within which the appellant might file the transcript. Whether the pending of such motion would have been deemed by the court a sufficient ground for extending the time for filing the transcript need not be considered. The appellant made no application for such extension, and the respondent is entitled to enforce the rights conferred upon him by the rule. Shain v. Lumber Co., 98 Cal. 120, 32 Pac. 878. The document which was presented to the judge for settlement as a bill of exceptions consisted of the "findings of fact and conclusions of law" made upon the hearing of the application for a supplemental and final decree, together with the "decree" entered thereon, from which the present appeal was taken; and also a copy of the notice of appeal with proof of its service, and a recital that a sufficient undertaking on appeal had been filed with the clerk. Neither of these matters would be properly included in a bill of exceptions. The first two were already matters of record, and did not need the authentication of the judge in a bill of exceptions in order to have them considered upon appeal; and the notice of appeal and undertaking on appeal were made subsequent to the matter appealed from, and could in no way have affected the action of the court. The motion is granted.

We concur: GAROUTTE, J.; VAN FLEET, J.

On Prior Motion to Dismiss.

PER CURIAM. The motion herein made to dismiss the appeal has been superseded by a subsequent motion on the part of the respondent to dismiss the same appeal, which motion has this day been granted. The motion herein is therefore denied.

(112 Cal. 587)

HUGHES et al. v. ALSIP. (Sac. 29.)[1]

(Supreme Court of California. May 9, 1896.)

MOTION FOR NEW TRIAL — NOTICE — DEFECTS — WAIVER BY APPELLEE—RULINGS—REVIEW—ATTORNEY'S FEE—COMPLAINT—SUFFICIENCY AFTER VERDICT.

1. A ruling on a motion for a new trial will not be reviewed where the notice of motion fails, as required by Code Civ. Proc. § 659, to state whether the motion will be based on affidavits, minutes of the court, bill of exceptions, or statement.

2. On appeal both from a judgment and an order denying a new trial, the appellee does not waive objections to defects in the notice of motion for a new trial by presenting amendments to the appellant's bill of exceptions.

3. Where plaintiff united in a single action several causes of action on separate assessments against the same defendant, and recovered on all, he was entitled to a single attorney's fee of $15, under St. 1885, p. 157, § 12, authorizing suit against the owner of land assessed to enforce the assessment, and providing that, if successful, plaintiff shall recover $15, as an attorney's fee, in addition to the taxable costs.

4. After verdict, and in the absence of a demurrer, an averment in a complaint, which has referred to the city council as the "board of trustees," that notice was posted "at or near the office door of the said board of trustees," is sufficient to show compliance with a law requiring it to be posted "on or near the council chamber door of said council."

Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by Hughes & Twaddle against E. K. Alsip. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Modified.

J. C. Bates, for appellant. White, Hughes & Seymore, for respondents.

McFARLAND, J. Action to foreclose several liens for street assessments in Sacramento city. Judgment went for plaintiffs, and defendant appeals from the judgment, and from an order denying his motion for a new trial.

The motion for a new trial cannot be considered, though that question is not of much consequence here, because nearly all of appellant's points are made on the alleged insufficiency of the complaint. The notice of motion for a new trial does not state what it will be based on; that is, it does not state whether it would be made upon affidavits, minutes of the court, bill of exceptions, or statement, as required by section 659 of the Code of Civil Procedure. Respondents are not estopped from making this point because they presented amendments to a certain bill of exceptions proposed by appellant, and took part in the settlement of said bill. Appellant had the right to a bill of exceptions to be used on his appeal from the judgment, and an objection by respondents that his notice of motion for a new trial was defective would not have affected his right to have the bill settled. He could have waived his motion for a new trial, and still have been entitled to his bill of exceptions. If this contention of appellant were about a statement on motion for a new trial, it would present a different aspect. The respondents moved in the court below that the motion for a new trial be dismissed for the defect in the notice above stated. The only questions in the case arise upon the judgment roll; that is, whether the complaint, to which no demurrer was interposed, is sufficient, after trial on the merits, to sustain the judgment, and whether the judgment grants any unauthorized relief.

Where there has been no demurrer, and the case has been tried on its merits, an appellate court will not reverse a judgment for plaintiff on account of alleged deficiencies of the complaint, unless it entirely fails to state material facts necessary to constitute a cause of action. Merely defective or imperfect statements of such facts will not warrant a reversal. They will be considered as cured by the verdict. Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081; Schluter v. Harvey, 65 Cal. 158, 3 Pac. 659; Hallock v. Jaudin, 34 Cal. 167; 1 Chit. Pl. 673. In the case at bar, appellant makes many objections to the sufficiency of the complaint which we do not deem called upon to notice in detail. It is enough to say that the complaint, as a whole, states a cause of action upon which respondents were entitled to the judgment rendered. Indeed, it is not clear that any of the necessary averments can be considered as defectively or imperfectly stated. In answer to appellant's leading points, we may say that the complaint shows that the city council or board of trustees did sufficiently determine the work to be done so as to acquire jurisdiction; that the work was sufficiently described in the resolutions of intention; that it was not left to the discretion of the superintendent of streets to determine how much work was to be done, but that it was to be done in accordance with specifications prepared by the city surveyor, and filed with the board, upon which the bids were made; that the posting of notice "at or near the office door of the said board of trustees" is a sufficient averment of a compliance with the provision of the law requiring the notice to be posted "on or near the council chamber door of said council"; and that the substance of the warrants, and the returns thereon, are sufficiently averred, at least in the absence of a demurrer, and after trial, at which, it is presumed, all essential facts were proven.

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[1] Rehearing denied.

Six different causes of action, arising out of assessment liens against six different lots belonging to appellant, are united, each being stated in a separate count. No objection is made that these different causes of action are improperly united, but in the judgment the respondents are given a statutory attorney's fee of $15 for each of the said six causes of action. Appellant contends that respondents are entitled, under section 12 of the act (St. 1885, p. 157), to only one attorney's fee of $15, and this contention must be sustained. The said section provides that "the contractor, or his assignee, may sue, in his own name, the owner of the land, lots or portions of lots assessed * * *; and in all cases of recovery under the provisions of this act the plaintiff shall recover the sum of fifteen dollars, in addition to the taxable costs, as attorneys' fees." This clearly means a $15 attorney's fee for each action, no matter how many causes of action it may include. The consideration that, if respondents had brought six separate actions and had recovered judgment in each, the burden of the costs against appellant would have been heavier, does not change the plain language of the statute. A plaintiff may, perhaps, sometimes consider that if he should bring several actions, instead of one, and should be defeated, the burden of costs against him would be heavier. At all events, under the language of the statute, if he brings only one action he can get only one attorney's fee. The judgment will therefore have to be modified in this respect. The order denying the motion for a new trial is affirmed, and the cause is remanded, with directions to the superior court to modify the judgment by striking out the words and figures, "and for $15.00 attorney's fees," wherever they occur, except in the first subdivision of said judgment. The judgment as thus amended will stand affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

112 Cal. 513

STRATTON'S ESTATE v. MORGAN et al.

(S. F. 279.)

(Supreme Court of California. May 1, 1896.)

CONSTRUCTION OF WILL—EVIDENCE—APPEAL.

1. Testatrix, in an olographic will, after bequeathing certain personal property, gave "to E., my large mirror. He has been a good young man to us"; and then specified certain other articles to be given to him, such bequest being followed by the words, "I reserve the right to sell any article if we need the money." Following this clause, and separated therefrom by a large space, were the words, "Common bedsteads * * * and all the rest of the furniture and all money in whatever shape he will have full control after all expenses is paid of my sickness and death," after which came the signature of testatrix, and at the left, lower down, was written, "My husband, Thomas Stratton." *Held*, that the husband, not E., was the residuary legatee.

2. Evidence of certain unfriendly treatment of testatrix by her husband is not admissible to show that she intended to exclude him from her will.

3. A motion to dismiss an appeal for failure of the transcript to show service of notice of appeal on one of the parties will be denied, where proof of service is made at the hearing of the motion.

Department 1. Appear from superior court, Santa Cruz county; J. H. Logan, Judge.

Petition by the administrator of Georgiana Hanham Stratton, deceased, for the distribution of the estate. From a judgment ordering distribution of the residuary estate to Eugene F. Smith, defendants Morgan and others appeal. Reversed.

Spalsbury & Burke, for appellants. W. M. Beggs, W. A. Beasley, and John G. Jury, for respondent.

HARRISON, J. The administrator with the will annexed of the above estate presented to the superior court a petition for the distribution of the estate, alleging therein that the residue thereof was bequeathed by the decedent to her husband, Thomas Stratton. This distribution was contested by the respondent herein, and upon the hearing of the application the court distributed the residue in the hands of the administrator to him. We are of the opinion, however, that upon a proper construction of the will the testatrix intended that her husband should be the residuary legatee of her estate. The will is an olographic one, and the following is a copy thereof:

“CALIFORNIA WATSONVILLE SATA CRUZ CO }
“March 8th 1893 }

“I, Mrs Georgiana Hanham Stratton

“My last will, is, Within Two monnths of my death I give to my Stept daghter Mrs Mary Ellen Hanham Smith now reside in Stockton Cal.

“My Largest Feather Bead Boilster and one Pair of the Best small Feather Pillows Her Uncle Thomas Hanham Picture and also mine Mrs. G. H. Stratton

“Her daughter Mrs. L B. Weaver—a Now reside in Stockton white shall Black Lace mantell and my Casmere Shall—

“To Miss Estella

“Estella Smith now reside in Stockton my Rings—and other little Jewlerey

“To Thomas Smith wife two white rappers

“To Albert Smith wife two white rappers

“The affore said Mrs Mary Ellen Hanham Smith all my Clothes I should have at my death

“To Eugene F. Smith my Large Meeror He has been agood young man to Us

“My wallnut Bead Room seat with wool Mattress and Spring Bead with Larg pillows and a 3quarter walnut Beadstead with Spring Bead wool Mattress and Large Pillows

“I reserve the right to sell any arclel if we need the money

“Common Beadsteads with Feather Bead and all the rest of the Furniture and all Money in what Ever Shape he will have full controle after all Expenses is Paid of my sickness and death

Mrs Georgiana Hanham
“my Husband Stratton
“Thomas Stratton.”

From the foregoing copy of the will it will be seen that after apportioning her personal belongings to some of her female friends she mentions the respondent, to whom she gives a large mirror, and then, as if to give a reason for making him one of her beneficiaries, says, “He has been a good young man to us.” She then specifies certain other articles of furniture to be given to him, and, after enumerating these articles, inserts after them the following clause: “I reserve the right to sell any article if we need the money.” This clause would be peculiarly appropriate in a gift to a stranger, but would be entirely unsuitable in a gift to her husband; and from its position in the will, being applicable to the articles previously enumerated rather than to those subsequently named, tends to show that in the mind of the testator she intended them to form a bequest distinct from the other articles. By the “we” therein referred to, as by the “us” in the early part of the bequest to the respondent, the testatrix evidently referred to her husband and herself. A further indication that this portion was a separate bequest in her mind, rather than a continuation of the prior bequest to the respondent, appears from the fact that after writing this reserving clause a space considerably greater than between the written lines on the page is left blank before the concluding bequest is written. There is no legatee named in the body of this concluding portion of the will, but underneath, and at the left hand thereof, are written the words, “my husband Thomas Stratton.” Taken by themselves, these words have no apparent connection with the other portions of the will, but the testatrix must be deemed to have written them with the intention that some effect should be given them, and that intention, so far as it can be gathered from the will itself and the circumstances under which it was executed, is to be ascertained by the court, and effect given thereto accordingly. The order in which the words of a will are written is not determinative of the testator's intention, and under a well-recognized rule this order will be transposed, if thereby the intention of the testator can be ascertained. So, too, a word that has been manifestly omitted, and is essential to an understanding of the intention of the testator, will be supplied. Mitchell v. Donohue, 100 Cal. 202, 34 Pac. 614. If these words had been written at the beginning of this concluding portion of the will, even without any words of gift, the intention of the testatrix that her husband should have this property would be undoubted. So, too, if they had been written at the close of the will in direct continuation thereof, prior to the signature of the testatrix, the same intention would have been manifest, even if the preposition “to” had been omitted. The statute does not require that an olographic will shall be “subscribed by the testator at the end thereof.” It is sufficient that it be “signed” by him (Civ. Code, § 1277), and this signing may be at the beginning or in any part of the document. 1 Jarm. Wills (6th Ed.) p. 113. See In re Walker's Estate (Cal.) 42 Pac. 815. When authenticated by his signature, all the remaining portion of the document is to be construed as expressing his will; and effect, if possible, is to be given to all of the language found therein.

The testatrix did not name an executor for her will, but in the portion under consideration is the clause, “He will have full control after the expenses is paid of my sickness and death.” She must be assumed to have known that, in the absence of an executor named in the will, her husband would be entitled to the administration of her estate, and would be the person to pay the expenses of her sickness and death; and her declaration that “he” will have full control must be held to have referred to him. It is very clear that the person thus referred to as “he” is the one to whom she intended to give her common bedsteads, and all the rest of the furniture, and the use of the phrase “all the rest” of the furniture is quite cogent for holding that the furniture thus disposed of constituted a different bequest from that made to the respondent. If she had intended that the respondent should have all her furniture, and be her residuary legatee, this expression would have been unnecessary. The same person, however, who is to receive "all the rest" of the furniture is the "he" who will have full control of her estate. We think that the language of her will sufficiently shows that she intended that this person should be her husband. The finding of the court that these words were intended to be merely descriptive of the testatrix is without any support, either from the will itself or from the evidence offered at the hearing. Aside from being a very unusual mode to be employed by a wife for describing herself,—one would have expected her to say "wife of Thomas Stratton" after her signature,—the position of the words is inconsistent with this conclusion of the court.

The testimony of the witnesses to their observation of certain unfriendly treatment of the testatrix by her husband should not have been admitted by the court. Such testimony is incompetent to authorize a conclusion that either of them intended to exclude the other from his estate. None of these witnesses testified to anything more than their own observation; nor did they testify that the testatrix had ever expressed any other than the most wifely feeling towards her husband, and it is not to be assumed that she would disregard her duty as a wife merely because in the opinion of others her husband had been unkind to her. Temporary bickerings and passionate utterances between husband and wife are consistent with conjugal affection, and with a devotion of each to the other in preference to all other persons. For the same reason the court should not have received evidence of the friendly conduct of the respondent towards the testatrix.

A motion was made to dismiss the appeal herein for failure of the transcript to show a service of the notice of appeal upon the administrator of the decedent's estate. At the hearing of this motion, proof of such service was made, and the ground for the dismissal was thus obviated. The motion to dismiss the appeal is denied. The judgment and order are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

112 Cal. 674

PEOPLE v. CAVANAUGH. (Cr. No. 123.)

(Supreme Court of California. May 22, 1896.)

ELECTIONS AND VOTERS—PRIMARIES—OFFENSES—APPLICATION OF STATUTE.

The "Purity of Elections Act" (St. 1893, p. 12), entitled "An act to promote the purity of elections by regulating the conduct thereof, and to support the privilege of free suffrage by prohibiting certain acts and practices in relation thereto, and providing for the punishment thereof," does not apply to primary elections, which are merely creations of political parties and associations, and may be held at such times and places, and on such terms and conditions, as may seem fit.

Department 1. Appeal from superior court, Sacramento county; Lucien Shaw, Judge.

B. W. Cavanaugh was indicted for a violation of the "Purity of Elections Act." A general demurrer to the indictment was sustained, and the state appeals. Affirmed.

Atty. Gen. Fitzgerald, for the People. Johnson & Johnson and C. T. Jones, for respondent.

GAROUTTE, J. The defendant was charged by indictment with the commission of a felony. A general demurrer was sustained to the indictment, and the people appealed. The prosecution is based upon an alleged violation of the "Purity of Elections Act." St. 1893, p. 12. The charging portion of the indictment alleges that defendant "did then and there willfully, unlawfully, feloniously, and knowingly give to one George Vice a certain sum of money, to wit, the sum of one hundred dollars, in lawful money of the United States of America, to induce said George Vice to procure, at a certain Republican primary election which was duly and regularly called by the Republican county central committee of the Republican party at Sacramento county, in the state of California, and was to be and was duly and regularly held in Sacramento county, state of California, on the 25th day of August, 1894, the election of certain persons, to wit [naming them] as delegates to a certain Republican county convention to be held in Sacramento city, state of California, on Tuesday, the 28th day of August, 1894, which said convention was duly and regularly called for the purpose of nominating candidates for the various legislative, county, district, township, and city offices to be voted for at the next general state election." It will be observed that defendant was charged with attempting, by the use of money, to influence the election of certain delegates at a Republican primary election. It is now claimed that the "Purity of Elections Act" does not apply to primary elections, and this court is in accord with such contention. A primary election is purely a creation of political parties and associations. These parties and associations may hold such elections, or they may not. It is not compulsory upon them, and, if they do hold such elections, they may hold them at such hours, at such places, and upon such terms and conditions, as to them may seem fit. While there is a law upon the statute books providing the machinery for holding primary elections, it is not in any sense mandatory upon political parties to invoke its provisions, but, upon the contrary, a resort to its provisions is a mere matter of choice. It follows from the foregoing that no importance can be attached to the words found in the indictment stating that this primary election was "duly and regularly called"; for these words are not equivalent to the statement, and do not even convey the idea, that it was held under the provisions of the Political Code, inasmuch as such election could have been "duly and regularly called" in entire disregard of the provisions of that Code, for, as we have seen, political parties are a law unto themselves, as to the conduct of primary elections.

Another question presents itself, which cuts deeper than the one to which we have already adverted. The attorney general has been able to place his finger upon but a single provision of this law which looks towards the support of this indictment, and that provision is subdivision 3 of section 19. Among other things, section 19 provides: "It shall be unlawful for any person, directly or indirectly, by himself or through any other person: (1) To pay, lend or contribute, or offer or promise to pay, lend or contribute, any money or other valuable consideration to or for any voter, or to or for any other person, to induce such voter to vote or refrain from voting at any election * * * (2) To give, offer or promise any office, place or employment, or to promise to procure or endeavor to procure any office, place or employment, to or for any voter, or to or for any other person, in order to induce such voter to vote or refrain from voting at any election. * * * (3) To make any gift, loan, promise, offer, procurement or agreement, as aforesaid, to, for or with any person in order to induce such person to procure, or endeavor to procure, the election of any person or the vote of any voter at any election." The word "election," as here used in subdivision 3 and the other subdivisions of section 19, does not refer to primary elections. The "Purity of Elections Law" is entitled "An act to promote the purity of elections by regulating the conduct thereof, and to support the privilege of free suffrage by prohibiting certain acts and practices in relation thereto, and providing for the punishment thereof." In the body of this act may be found the word "election" a hundred times or more, and it may be said in every instance that it is plainly apparent that the word is not used as applying to primary elections. The words "primary election" are found in the act, in subdivision 8 of section 19, and in section 25, but in neither of these places in the law does this indictment find any support. For the foregoing reasons the judgment is affirmed.

We concur: VANCLIEF, J.; HARRISON, J.

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5 Cal. Unrep. 366

LOOSE v. STANFORD. (S. F. 11.)

(Supreme Court of California. May 8, 1896.)

APPEAL—REVIEW—EVIDENCE—CONTRACTS.

Plaintiff, while his mare was on the ranch of defendant's decedent, entered into negotiations for its sale to decedent, through an agent authorized to sell only the mare. Subsequently, after the mare had given birth to a colt, the agent testified that he sold both to decedent, the communications between the parties being by telegraph. Plaintiff permitted decedent to retain possession of the colt for 12 years, during the first three of which the colt developed as a wonderful trotter, and, during the time, asked decedent to give him an additional sum as a gratuity, on account of his good luck in the purchase. *Held*, that a finding that plaintiff sold both the mare and colt to decedent would not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by W. A. R. Loose against Leland Stanford, which, on the death of defendant, was continued against Jane L. Stanford, his executrix. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Reddy, Campbell & Metson, for appellant. W. H. L. Barnes and Frank Shay, for respondent.

SEARLS, C. This action was brought December 2, 1891, against the testator, Leland Stanford, to recover possession of a trotting mare commonly known as "Hinda Rose," or for the recovery of $50,000, the value of said Hinda Rose, in case a delivery of said mare cannot be had, and $25,000 damages, etc. Defendant answered, denying the ownership of plaintiff; averred that about February, 1880, he purchased said Hinda Rose from the plaintiff, and ever since has been, and still is, the owner of, and in possession of, said mare, etc. Defendant further pleads the bar of plaintiff's cause of action under subdivision 3 of section 338 of the Code of Civil Procedure. The defendant departed this life pendente lite, and Jane L. Stanford, the executrix of his last will, was substituted as defendant. The claim of plaintiff was presented to the executrix for allowance, and was by her rejected, which matters were set up by supplemental complaint. The cause was tried by the court without the intervention of a jury, written findings filed, in favor of defendant, upon the issues of ownership and the statute of limitations, upon which findings judgment went for defendant, from which judgment and from an order denying his motion for a new trial, plaintiff appeals.

The entire question in the case turns upon the sufficiency of the evidence to sustain the findings of the court. Counsel for appellant contend that there is practically no dispute as to the facts, and that the issues involved are of law. They then proceed to demonstrate that, upon the facts as assumed by them, Leland Stanford was the bailee of a mare known as "Beautiful Bells"; that, while in his possession, this mare gave birth to the colt Hinda Rose; that plaintiff sold the mare, but not the colt, to Stanford; that as a result the animal Hinda Rose remained in possession of Stanford, as bailee, for some 12 years, when plaintiff demanded possession of her, which was refused; that this refusal operated as a conversion; and that, as the action was brought within three years next thereafter, the cause of action is not barred by the statute of limitations, and hence that plaintiff is entitled to recover. Assuming the premises of appellant's counsel to be correct, we agree fully with their conclusion. We think, however, that, while there is no substantial conflict in the evidence as to the main probative facts, the inferences to be deduced therefrom—the ultimate facts upon which the case turns—are open to grave doubt; and while, upon the case as presented by the record, we are not impelled with mathematical certainty to the result reached by the court below, there are yet cogent reasons leading to such result. The testimony is too lengthy for recapitulation. The following summary will convey some idea of its trend. The plaintiff lived at Bodie, Mono county, and was the owner of Beautiful Bells, a brood mare. Defendant, Leland Stanford, was the owner of Palo Alto ranch, upon which he was conducting the business of stock-breeding, and rearing trotting and running horses. In March, 1879, plaintiff caused his mare Beautiful Bells to be sent to Stanford's stock farm, where she was mated with Electioneer, a stallion owned and kept by Stanford. The mare remained on the ranch until the following spring, when, on February 27th, she gave birth to a colt, the subject of the litigation in this cause. Early in the winter, Stanford had seen and admired Beautiful Bells, and had authorized Harris F. Covey, his superintendent, to purchase her, if he could do so at a reasonable figure. F. W. Covey, who was at times secretary, and at others assistant superintendent of the stock farm, held a power of attorney from plaintiff authorizing him to sell Beautiful Bells to Stanford for $2,000. This was more than Stanford was willing to give, and the negotiations were broken off until the month of March or 1st of April, 1880 (after the birth of the colt), when plaintiff telegraphed accepting an offer on behalf of Stanford to pay $1,200, and remit a bill of $200 and upward, ranch fees, etc., upon the mare. The money was paid to plaintiff, and the mare and colt sold to Stanford, or, as the witness F. W. Covey says: "Under that power of attorney, I sold Beautiful Bells and her filly, and made the transfers on the books of the Palo Alto stock farm at that date. The books show placed to the credit of Leland Stanford." The negotiations for the sale were both before and after the birth of the filly, of which last fact plaintiff was advised; and Stanford understood, and has always claimed, that he purchased both the dam and colt. Thus matters rested for, say, 11 years, during which the filly, Hinda Rose, was trained as a trotter, making phenomenal speed, and in her yearling, two and three year old, form, beating the then world's record for trotters. At three years of age she broke down, and became useless as a trotter, whereupon she was placed in stock as a breeder, but has never produced any colts. In the month of November, 1891, plaintiff called at the Palo Alto stock farm, was introduced to Senator Stanford, and stated to the latter, according to the testimony of Marvin, one of the witnesses, "that as she had turned to be such a valuable brood mare, and as he had bought her from him, he thought he could afford to give him something. He stated, 'Senator, I have no claim on you whatever, but I think you could afford to give me something.'" Several other witnesses who were present at the same conversation stated, in effect, that plaintiff claimed that, as Beautiful Bells had done so well, he thought Stanford would be willing to do something for him, etc. Hinda Rose was not mentioned in this conversation. Plaintiff was a witness in his own behalf, and only stated that he never sold, or authorized the sale of, Hinda Rose. The court below may well have reasoned something in this wise: (1) Plaintiff must have known of the renown attained by Hinda Rose, or he would not have been so deeply impressed with the success of Beautiful Bells, whose only claim to greatness, so far as appears, consisted in her being the dam of the former. (2) Knowing of the success of the colt, it is preposterous to suppose that he considered himself its owner, and yet for 11 years never mentioned the fact, or asserted his claim of ownership. (3) The claim that Beautiful

Bells had done so well for Senator Stanford that plaintiff supposed the former would be willing to do something for him was not compatible with his claim of ownership, for the reason that if Hinda Rose belonged to him he was the fortunate man, and not Stanford. These and other circumstances, not very important when considered singly, but all pointing in a given direction, were, we think, when combined, sufficient to warrant the court below in finding that the negotiations which began before the birth of the colt, and were not consummated until it was in esse, culminated in the sale of both, and were so understood by the plaintiff at the time, as it certainly was by the defendant; and, as a consequence, warranted the finding of the ultimate fact of ownership in defendant, and the further finding, as a sequence thereof, that the claim of plaintiff was barred under the three-years limitation of the statute. It must be borne in mind that defendant, Stanford, did not himself conduct the negotiations, and that Harris F. Covey, who acted for him, had died before the cause was tried. F. W. Covey, who held the power of attorney from the plaintiff, was not authorized thereby to sell the colt, but the final sale was the result of telegraphic communications; and, as they are lost, we can only conclude as to the result of them by the circumstances and conduct of the parties, all of which are consistent with a sale, and inconsistent with any rational theory of continued ownership in plaintiff. We therefore recommend that the judgment and order appealed from be affirmed.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

112 Cal. 634

PLATT v. BUTCHER. (No. 18,324.)

(Supreme Court of California. May 19, 1896.)

STATUTE OF FRAUDS—CONTRACT REQUIRED TO BE IN WRITING—EXTENSION BY PAROL.

Under the statute of frauds (Civ. Code, § 1624, subd. 6), requiring "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission" to be in writing, a valid extension of such a written agreement cannot be made by parol.

In bank. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Action by G. N. Platt against William Butcher. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. A. Lamont, for appellant. A. J. Dobbins and Chas. A. Swisler, for respondent.

GAROUTTE, J. This is an action by a real-estate broker to recover commissions upon a sale of real estate. Judgment went against defendant, and he appeals. The contract of employment was in writing, and by its terms was to remain in full force and effect until September 1, 1885. A short time prior to that date, by parol agreement, the time for performance was extended; and during such extension of time the broker found a purchaser for the land, and a sale was made. The merits of the present litigation are dependent solely upon the validity of the parol agreement extending the time for performance.

By section 1624 of the Civil Code, certain contracts are declared invalid "unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged or his agent. * * * (6) An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission." And this provision of law is invoked to defeat plaintiff's claims. But section 1698 of the same Code declares that a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise; and plaintiff insists that the parol extension of time for the performance of the original written contract, coupled with the fact that he found a purchaser within such extension, to whom the land was sold, constitutes an executed parol agreement, and thereby validates the contract. Plaintiff has no cause of action, upon the showing made. The parol agreement in this case was a covenant to extend the time for the performance of a certain contract. If that covenant be construed as one in effect covering all the terms of the original written contract, then it was not an alteration or variation of that contract, but the creation of a new one, and, to be valid, should have been in writing. If the covenant be simply and solely one extending the time for the performance of a prior written contract, it cannot be that "oral agreement" spoken of in said section 1698; for it is not the original contract, as altered, which must be executed, but the oral agreement alone, and an oral agreement simply extending time cannot be executed, for there is nothing to execute. No affirmative action is required. Such an agreement calls for nothing to be done, and expires by mere lapse of time.

Another view of this matter, even more conclusive against plaintiff's contention, presents itself: An oral agreement does not alter a contract in writing until it becomes an executed oral agreement. The oral agreement relied upon in this case was not valid when made, for it was not executed at that time. According to plaintiff's claims, it was not executed until months after September 1, 1885,—the time fixed for the expiration of the original contract itself. Upon September 1, 1885, the written contract expired by express provision, unless some valid agreement then in existence kept it alive, but at that time there was no valid agreement in existence. The oral agreement was no agreement until executed, and it was not executed until long after that date, and when executed there was no existing contract in writing which might or could be altered. The date when an oral agreement takes effect as altering a written contract is the date when it is executed. It then has the same effect as an agreement in writing of that date altering the original contract. Under the facts of this case, at the time the oral agreement was executed there was no contract in writing upon which an executed oral agreement could take effect. For the foregoing reasons the judgment is reversed.

We concur: HARRISON, J.; VAN FLEET, J.; HENSHAW, J.; McFARLAND, J.

112 Cal. 613

TATE v. FRATT. (Sac. 28.) 1

(Supreme Court of California. May 13, 1896.)

PARTY WALLS—RIGHT TO MAKE ADDITIONS—OPINION EVIDENCE—APPEAL—OBJECTIONS TO FINDING—HARMLESS ERROR.

1. The east wall of plaintiff's building was the west wall of defendant's, and by it the joists of both buildings were supported. The wall from the base to the grade was 16 inches thick, from there to the ceiling 12 inches, and above the ceiling to the top of the fire wall 8 inches, the offset being on plaintiff's side. *Held*, that the wall must be considered as a party wall throughout its whole extent, upon which either party had the right to make additions.

2. Where a witness testifying as to a survey and monuments incidentally stated, "I do not think the down-town monuments were changed," the remark was inconsequential, and the overruling of an objection thereto was not prejudicial.

3. An inadmissible remark having been made before the making of an objection to its admission, the proper remedy was by motion to strike out, a failure to adopt which constituted a waiver of objection.

4. A witness, being asked if he could tell whether plaintiff's or defendant's building was constructed first, answered that defendant's building was first erected, and gave the facts showing such to be the case. *Held*, that the testimony was not objectionable, as being opinion evidence.

5. An objection to a finding of fact containing no specification of the particulars wherein the finding was not justified by the evidence will not be considered on appeal.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by J. D. Tate against F. W. Fratt to enjoin defendant from making additions to a party wall. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

A. L. Hart, for appellant. Holl & Dunn, for respondent.

BELCHER, C. The plaintiff and defendant are the owners of adjacent lots, situate in the block bounded by I and J and Third and Fourth streets, in the city of Sacramento, each lot having a frontage of 20 feet on J street, and a depth of 100 feet. Many years ago, brick buildings, then two stories high, but now only one story above the grade of J street, were erected on these lots by the grantors of plaintiff and defendant. Up to 1881 defendant's building extended back from J street only 70 feet, but in that year it was enlarged so as to cover the whole lot. The east wall of plaintiff's building is the west wall of defendant's building, and by it the joists of both buildings are supported. This wall, at its base and extending as high as the present grade of J street, is 16 inches thick, and above that to the ceiling joists it is 12 inches thick, and from there to the top of the fire wall, about 4 feet, it is 8 inches thick; the offset of 4 inches being on the plaintiff's side of the wall. The defendant concluded to add another story to his building, and for that purpose commenced to build up the said 8-inch wall. When he had built it up about 6 feet, the plaintiff brought this action to obtain an injunction restraining him from constructing the new wall or any wall on the old 8-inch wall. It was alleged in the complaint that the plaintiff was the owner of the lot on which his building stood, and of a strip of land along the west side of defendant's lot about 8 inches in width; that the said wall was wholly on his land, and was owned by him; that the wall was not sufficient in strength to support a building higher than his own building; that defendant had commenced to construct, and was engaged in constructing, on the top of the east wall of plaintiff's building, another and additional wall, eight inches in thickness, and that he intended to construct the same about 14 feet high, and make it the west wall of the second story of the building east of plaintiff's building; and that defendant was constructing the said wall with 6 openings for windows therein, facing to the west, and over the top of plaintiff's said building. The defendant, by his answer, alleged that he was the owner of the west quarter of lot 7, on which his building was constructed, and denied that plaintiff was the owner of a strip of land along the west side of said lot, about 8 inches or any number of inches wide, or ever had possession thereof; alleged that the wall in controversy stands wholly upon his lot, and no part thereof stands or ever stood upon land belonging to the plaintiff; alleged that neither the plaintiff nor his grantors ever owned the said wall or had any possession thereof, other than such as he or they acquired by using the same to insert therein and rest upon it the floor and ceiling joists and roof timbers of his building, and to inclose the eastern side of said building; alleged that, before he was informed of this proceeding to enjoin him, he had commenced the construction of a second story upon his building, and had constructed a new wall,

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1. Rehearing denied.

8 inches thick and about 6 feet high, on top of the old 8-inch wall, which was intended to form the western wall of his said second story; and denied that he intended to construct the new wall to a greater height than 10 feet and 6 inches; denied that he intended to make any openings for windows or for any other purpose in said new wall, except such as had already been made before the injunction was granted; and alleged that he was ready and willing to close up said openings and windows with a solid brick wall.

The court found, among other things, that the wall in controversy stands wholly upon the defendant's lot; that "this wall when originally built was intended as a party wall, and when it was afterwards raised in height, and extended further back, it continued to be a party wall, and the same now is, and during all the dates and time mentioned in the complaint it was, a party wall, and has been used as such by the adjacent owners ever since its construction, except the north thirty feet thereof, which was not used by defendant until he extended his building back the additional thirty feet in 1881, but this extension was built as and for a party wall, and has been used as such by the defendant continuously since 1881"; that the new wall which defendant had commenced to build "does not interfere in any way with plaintiff's building, and it does not endanger the said party wall on plaintiff's said building"; and that "the eight-inch wall constructed by the defendant on top of said party wall is a solid wall, and has no opening for either doors or windows." And, as conclusions of law, the court found that the defendant had a right to raise said party wall to the height of his second story by constructing an eight-inch wall on the top thereof, and that the plaintiff was not entitled to an injunction restraining defendant from constructing said wall; that the plaintiff had not been damaged by any act of the defendant; and that the defendant was entitled to judgment dismissing the action. Judgment was accordingly so entered, from which, and from an order denying a new trial, the plaintiff appeals.

Most of the findings of fact above referred to are assailed as not justified by the evidence, but we do not deem it necessary to follow the arguments of counsel in their discussion of these questions. The principal question in the case is, was the wall on which defendant had commenced to build a party wall? We think it clearly appears from the evidence that it was, and that the court was fully justified in so finding.

Whether the said wall stands wholly upon defendant's lot or not is a question which need not be considered. It arose only incidentally, and the finding upon it would not be determinative as to the true line between the lots if the wall should be torn down, and a controversy should then arise as to that line. It is not necessary that a party wall should stand half upon each of the adjoining parcels of land. It may stand half upon each, or wholly upon one, and may or may not be the common property of the two proprietors. Washb. Real Prop. (5th Ed.) p. 386; Bloch v. Isham, 92 Am. Dec. 289. And it seems to be settled law that, where there is a party wall, each of the owners may increase the height thereof when it can be done without injury to the adjoining building, and without impairing the value of the cross-easements to which the adjoining proprietor is entitled. Brooks v. Curtis, 10 Am. Rep. 545; Graves v. Smith, (Ala.) 6 South. 308; Everett v. Edwards (Mass.) 22 N. E. 52. Here the evidence was quite sufficient to show that the wall could be constructed without injury to the adjoining building.

The finding that the new wall constructed by defendant "is a solid wall, and has no opening for either doors or windows," is objected to as not sustained by the evidence or by the pleadings. But the statement contains no specification of the particulars wherein this finding is not justified by the evidence, and the objection as to the sufficiency of the evidence cannot therefore be considered. It will be presumed, and nothing to the contrary appears, that before the trial defendant had closed up the openings in the wall, which he at first left, as he stated in his answer he was ready and willing to do. We do not think any supplemental answer was necessary setting up the fact that he had closed the openings.

Two rulings of the court upon the admission of evidence are urged as erroneous.

The witness Boyd was a surveyor, and, in giving his testimony, stated: "I do not think the down-town monuments were changed." Counsel for plaintiff then objected to the witness testifying as to what he thought about the matter, and the objection was overruled. The witness had been testifying about certain monuments, and a survey made by Mr. Bassett, and incidentally made the said remark. No motion was made to strike the remark out, and the witness went on testifying as to the facts without objection. It is clear that there was no prejudicial error in the ruling complained of as to this witness, for two reasons: (1) The remark objected to was entirely inconsequential. (2) The remark was made before the objection, and, if counsel deemed it injurious to his case, a motion should have been made to strike it out.

The witness Goodell had lived in the city of Sacramento 43 years, and was an architect by profession, and had been engaged in the business of his profession for 25 years. He was asked: "Could you tell, from your examination, as to whether Tate's building or Fratt's building was constructed first?" The question was objected to by counsel for plaintiff, upon the ground that the answer would involve a matter of opinion, and the testimony was not admissible. The objection was overruled, and the witness answered: "Fratt's building was constructed first. There is every evidence to prove it." He then went on to state the reasons why he knew it must be so. The witness was not asked his opinion, but whether he could tell which building was constructed first; and, in giving his answer, he stated the facts within his knowledge and observation, and not his opinion. The ruling was therefore proper, but, if otherwise, we fail to see that the plaintiff was in any way prejudiced by it.

The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

112 Cal. 598

ANDERSON v. PACIFIC BANK. (S. F. 270.)

(Supreme Court of California. May 13, 1896.)

BANKS—SPECIAL DEPOSITS—INTEREST.

1. Plaintiff, under an agreement with a bank, deposited with it $2,000, to secure the bank and the sureties it might procure, from liability as bail, and received a receipt reciting the deposit, and that it was payable on return of the certificate and release from liability on bail bond. The money, without the consent of plaintiff, went into the bank vaults through the regular channels. *Held*, that the deposit was special, and therefore, on the insolvency of the bank, plaintiff did not stand merely in the same position as the general creditors of the bank.

2. On refusal of the bank to return the money, the liability on the bail bond having terminated, plaintiff is entitled to interest from the date of the demand, and not from the date of the termination of liability as bail.

Department 2. Appeal from superior court, San Francisco county; J. C. B. Hebbard, Judge.

Action by Edward Anderson against the Pacific Bank. From a judgment for plaintiff, defendant appeals. Modified.

Sawyer & Burnett, for appellant. H. W. Hutton, for respondent.

HENSHAW, J. Appeal from the judgment given in favor of plaintiff under the following facts: Plaintiff and defendant entered into a contract whereby defendant agreed to furnish bail for Harry Christian and Martin Olsen, who had been held for trial before the superior court. To protect defendant, and the sureties it might furnish, from liability or loss, plaintiff agreed to deposit with defendant the sum of $2,000 in gold coin as a pledge. Plaintiff delivered the money to McDonald, the acting president of the bank, leaving it with him in the president's room. He received from the bank the following acknowledgment: "Edw. Anderson has deposited in this bank two thousand dollars ($2,000), in gold coin, payable to self or order, on return of the certificate properly indorsed. (Payable only on release of bonds.) (Not subject to check.) R. H. McDonald, Jr., Vice President. W. S. Morse, Teller." The money afterwards, but without the knowledge or consent of the plaintiff, went into the bank vaults, through the regular channels. The bonds were furnished, and neither defendant nor the sureties were subjected to any liability or loss thereunder. Subsequently, the defendants in the criminal charge were surrendered into custody by their bondsmen, and plaintiff thereafter, upon February 26, 1894, made demand upon defendant, which had meanwhile become insolvent, for a return of the money pledged. The bank refused a return, and this action was instituted.

Under this statement, which is taken from the findings, appellant contends that the facts disclose a general, and not a special, deposit with the bank, and that, upon the bank's insolvency, plaintiff stands in the same position as that occupied by the general creditors of the institution. It is unquestionably true that one making a general deposit with a bank in the usual course of business parts with title to the moneys deposited. In the case of a special deposit, however, which is a mere bailment, the rule is the same with banking institutions as with individuals. Whether the special deposit be under a contract of bailment for the better protection of the bailor's property, or under a contract of pledge as security for some specific obligation of the pledgor, title does not pass to the bailee or pledgee, but remains in the pledgor. The pledgee acquires no right to make general use of the property. Civ. Code, §§ 1835, 2888. It would seem, therefore, that in this case the question is completely disposed of by the finding of the court that the money was given and received as a pledge, and by the additional finding that it was afterwards carried into the bank's vaults through the regular channels without the knowledge or consent of the pledgor. But, indeed, all of the circumstances found substantiate the ultimate finding that the deposit was a special one, while none are inconsistent with it. Defendant demanded a delivery to it of $2,000, not for banking purposes, but to protect the bondsmen it might procure. There was reason why the plaintiff should make a special deposit of $2,000 with the bank as bailee, and none at all why he should make a commercial deposit of that sum. The money was delivered in a manner strictly in accord with the idea of a pledge, but quite inconsistent with the notion of an ordinary banking deposit. The so-called "certificate of deposit" issued by the bank is not a certificate of deposit, but a mere receipt, expressing, though briefly, the contract of pledge. Every contract by which possession of personal property is transferred as security only is to be deemed a pledge. Civ. Code, § 2987. Under such a contract, the fact that the bank afterwards wrongfully commingled and used the funds, if it did do so, cannot be urged by it in defense as effecting any change in the contractual relations and rights of the parties. It would be but allowing it to plead its own wrongdoing to its own advantage. Henderson v. O'Conor, 106 Cal. 385, 39 Pac. 786; Massey v. Fisher, 62 Fed. 958; Bank v. Insurance Co., 104 U. S. 54.

There is nothing in the case of Association v. Jacobs, 141 Ill. 261, 31 N. E. 414, upon which appellant relies, which can aid his contention here. The plaintiff in that case sued to recover the sum of $6,000 deposited by it with the banking house of Kean & Co., as indemnity on an appeal bond. But, as the court declares, the plaintiff gave its check to Kean & Co., which was cashed by that house; and the funds thus received with the knowledge of plaintiff were mingled and used with the general funds of the bank, and there was nothing in the certificate of purchase issued and received by plaintiff which indicated a special deposit. The court merely finds from a review of the evidence that it was not established that the deposit was special. In the case at bar the trial court finds a special deposit, and does not find a commingling and use of the money with plaintiff's knowledge. Indeed, it does not find any such commingling and use at all. It merely finds that after its reception, and without plaintiff's knowledge or consent, the moneys "went into the bank vaults through the regular channel." The bank vaults are the usual and proper places for the reception and keeping of special deposits. The finding strictly means no more than that the money went into the bank vaults as a special deposit in the regular manner.

The court allowed plaintiff, as damages, legal interest upon the money from the date upon which Christian and Olsen were surrendered by the sureties. But while plaintiff was entitled to a return of his money immediately after this event, defendant was not in default until its refusal, after demand, to make restoration of it. Not being in default, it should not be charged with interest as damages. This demand was actually made by plaintiff upon February 26, 1894, from which date plaintiff is entitled to interest as compensation. The judgment is ordered modified accordingly, each party to bear his respective costs upon this appeal.

We concur: McFARLAND, J.; TEMPLE, J.

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112 Cal. 593

CLUNIE v. SIEBE. (S. F. 498.)

(Supreme Court of California. May 13, 1896.)

TAXATION—ASSESSMENT—MISREPRESENTATIONS AS TO VALUE.

Pol. Code, § 3648, providing that any property willfully concealed, removed, transferred, or misrepresented by the owner, to evade taxation, on discovery, must be assessed at not exceeding 10 times its value, and section 3649, providing that any property discovered by the assessor to have escaped assessment for the last preceding year, if owned by the same person who owned or controlled it for such preceding year, may be assessed at double its value, have no application where property in a preceding year has been assessed too low through misrepresentations of the owners.

Department 1. Petition by Andrew J. Clunie for a writ of mandamus to compel John D. Siebe, as assessor of the city and county of San Francisco, to assess the property of the Market Street Railway Company as required by Pol. Code, §§ 3648, 3649. Writ denied.

Andrew J. Clunie, in pro. per. Foshay Walker and Naphtaly, Friedenrich & Ackerman, for respondent.

HARRISON, J. The petitioner seeks by this proceeding to compel the respondent, who is the assessor of the city and county of San Francisco, to assess the property of the Market Street Railway Company as required by sections 3648 and 3649 of the Political Code, upon the ground that said property escaped assessment and taxation for the fiscal year commencing July 1, 1895, by reason of misrepresentations of the officers of said corporation as to the value of said property. It is alleged in the petition that the said corporation on the first Monday of March, 1895, was, and thence hitherto has been, the owner of certain real and personal property situated in the city and county of San Francisco, subject to taxation, and that said property has been during all of said time of the actual cash value of $17,500,000, and would have been taken in payment of a just debt due from said corporation for that sum of money; that between the first Mondays of March and July of the year 1895 said corporation, through its officers and agents, willfully and falsely represented to the respondent, while he was endeavoring to ascertain the full cash value of said property in order that he might assess the same for the purposes of taxation for said fiscal year, that the full cash value of said property did not exceed the sum of $3,883,866; that in fact said officers and agents of said corporation then knew that the said property was of the value of $17,500,000, and that said representations were made with the design and for the purpose of evading taxation upon said property for the fiscal year commencing July 1, 1895; that the respondent, as such assessor, assessed the property for that fiscal year at the sum of $3,883,866; that in fixing the amount of said assessment he relied upon the statements made to him by the officers and agents of said corporation, and that by reason of their misrepresentations he was induced to assess the property at that valuation, instead of its actual value, and that thereby said corporation escaped taxation for that fiscal year upon the sum of $13,616,134, the difference between the full value of said property and the amount for which it was assessed; that the respondent is now engaged in assessing property in said city and county of San Francisco for the fiscal year commencing July 1, 1896, and has been notified by the petitioner that said corporation escaped taxation as aforesaid for the preceding fiscal year, and has been demanded to assess the same as provided by sections 3648 and 3649 of the Political Code; and that, unless directed by the mandate of this court, he will not comply with this demand. These sections of the Political Code are as follows:

"Sec. 3648. Any property willfully concealed, removed, transferred or misrepresented by the owner or agent thereof to evade taxation, upon discovery must be assessed at not exceeding ten times its value, and the assessment so made must not be reduced by the board of supervisors.

"Sec. 3649. Any property discovered by the assessor to have escaped assessment for the last preceding year, if such property is in the ownership or under the control of the same person who owned or controlled it for such preceding year, may be assessed at double its value."

We are of the opinion that the facts presented by the petitioner herein do not authorize the application of either of these sections. It is not alleged that any "property" of the Market Street Railway Company "escaped assessment" for the fiscal year ending July 1, 1895, or that any of its property was concealed, removed, or transferred by it to evade taxation for that year, or that there has been any "discovery" of any property that was not assessed for that fiscal year. On the contrary, it is alleged that the property of said corporation was assessed by the respondent for that fiscal year, and, in the absence of any qualifying clause, this must be held to include all of its property. The further allegation that the amount at which it was assessed was caused by the willful misrepresentation of its value by the officers and agents of the corporation is not equivalent to a charge that the corporation, or any of its officers or agents, made any misrepresentation of the property itself. The statute does not require, or even authorize the owner of property to make any representation to the assessor of its value, and it is not to be assumed that the legislature intended that the owner should be visited with a penalty for a misrepresentation in reference to a matter upon which it had not authorized or required him to make any representation whatever. By section 3629 of the Political Code, the assessor is authorized to demand from the owner of property a statement containing a list of all the property owned by him on the first Monday of March, preceding; and by section 3650 he is required to prepare an assessment book, in which must be specified, in separate columns, the value of all such property. There is no provision of the statute requiring the owner to place any value upon his property, but the assessor is chosen by the people for the express purpose of exercising that function. It is not claimed that the Market Street Railway Company failed to give to the respondent the statement provided for by section 3629, or that its property was not exhibited to him, and full opportunity offered to examine the same and determine its value; and it cannot be held that, even if the owner has willfully misrepresented to the assessor the value of his property, he has thereby misrepresented his property, if he has at the same time given to that officer a full and correct statement of the several items of that property, and exhibited the property itself. The assessor is himself required to ascertain and determine the value of the property, and for that purpose may make such inquiries or receive such information as he desires; but the valuation which he finally places upon the property is his own act, whether it results from the exercise of his own judgment, or from the representations of the owner or of a stranger. If he has erred in his estimation of this value, the statute has provided a board of equalization as the tribunal for the correction of such error, which, by section 3673 of the Political Code, is authorized to "make the assessment conform to the true value of such property in money," and if no correction is made by that body the valuation made by the assessor is final. The assessment of property for the purposes of taxation is a function of the executive department of government, but the proceeding contemplated by the petition herein would transfer that function to the judicial department of the government. In order to determine whether there had been any misrepresentation of the value of the property, it would be necessary to ascertain its actual value; and for a court to enter upon this investigation would be to step beyond the boundaries of its constitutional jurisdiction, and intrude within those which, in the division of governmental functions, have been by the organic act placed elsewhere. The writ is denied.

We concur: GAROUTTE, J.; VAN FLEET, J.

5 Cal. Unrep. 371

SCRIVANI v. DONDERO. (S. F. 254.)

(Supreme Court of California. May 18, 1896.)

Appeal—Review—Granting of New Trial.

The rule that an appellate court will not disturb a verdict where there is evidence to sustain it does not apply with equal force to the trial judge, who saw and heard the witnesses, and an order granting a new trial will not be reversed unless there has been an abuse of discretion.

Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by Batisto Scrivani against Charles Dondero. Plaintiff appeals from an order setting aside a verdict in his favor and granting a new trial. Affirmed.

Geo. P. Burke, for appellant. Julius Lee, for respondent.

PER CURIAM. This is an action to recover damages for malicious prosecution. There was a verdict and judgment for $500 in favor of the plaintiff. Defendant moved for a new trial, which was granted. Plaintiff appeals from the order granting a new trial.

The order appealed from states no ground for the decision, but the motion was made upon the ground, among others, of the insufficiency of the evidence to justify the verdict; and, as the record is presented, the order must stand or fall upon the correctness of the ruling on that question. Appellant contends that the court below abused its discretion in granting the order upon the ground stated. This court has uniformly held that motions for new trial are addressed to the sound discretion of the trial courts, and that their action thereon will not be disturbed unless there has been a manifest abuse of discretion. In this case there is a substantial conflict of evidence material to the issue. In Sherman v. Mitchell, 46 Cal. 577, the appeal was from an order granting the defendant a new trial, as to which the court said: "In Dickey v. Davis, 39 Cal. 569, we said: 'In this court, when there is a substantial conflict in the evidence, we decline to set aside a verdict or finding of facts as being contrary to the weight of evidence, solely because we have had no opportunity to observe the manner of the witnesses and to decide upon their credibility. But this reason does not apply to the district judge, and, though it is the peculiar province of the jury to decide upon the facts submitted to them, generally, in doubtful cases, the verdict ought not to be set aside as contrary to the weight of the evidence, nevertheless, if the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony.'" In Warner v. Thomas Cleaning Works, 105 Cal. 409, 38 Pac. 960, the court said: "It is * * * settled law that when the evidence is conflicting the trial court is authorized to review it, and if, in its opinion, the verdict is against the weight of the evidence, it is its duty to grant a new trial. Bjorman v. Redwood Co., 92 Cal. 500, 28 Pac. 591; Domico v. Casassa, 101 Cal. 411, 35 Pac. 1024, and cases cited." In Bates v. Howard, 105 Cal. 173, 38 Pac. 715, this court said: "It is a cardinal doctrine of this court, the oft enunciation of which has rendered it monotonous, that, where upon a question of fact the testimony in the court below involves a substantial conflict, the action of such court below will not be disturbed." See, also, Curtiss v. Starr, 85 Cal. 376, 24 Pac. 806; Townsend v. Briggs, 88 Cal. 230, 26 Pac. 108; Crooks v. Miller, 89 Cal. 35, 26 Pac. 615; Jones v. Sanders, 103 Cal. 678, 37 Pac. 649; In re Carriger's Estate, 104 Cal. 81, 37 Pac. 785. The rule invoked by appellant is that which prevails in the appellate court. The lower court is not governed by the same rule. Bates v. Howard, 105 Cal. 178, 38 Pac. 715; Wilson v. Railroad Co., 94 Cal. 168, 29 Pac. 861; Sherman v. Mitchell, 46 Cal. 577; Dickey v. Davis, 39 Cal. 569. The order appealed from is affirmed.

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112 Cal. 630

In re CHOPE. (No. 15,664.)

(Supreme Court of California. May 19, 1896.)

Insolvency Proceedings—Parties—Sufficiency of Petition—Prayer for Discharge—Excess of Assets over Liabilities—Judicial Notice.

1. Notice of appeal by a creditor from an order adjudging petitioner to be insolvent, and appointing a temporary receiver, need not be served on the receiver, under Insolvent Act 1880, § 67, which requires service only on the "adverse party."

2. Notice of appeal by a creditor from an order adjudging petitioner to be insolvent need not be served on creditors who have not, at the time such appeal is taken, filed proofs of their claims, or in any manner appeared.

3. A creditor may appeal from an order adjudging petitioner to be insolvent, though he has filed proof of claim in such proceeding.

4. A petition in insolvency which avers that petitioner desires to be discharged from his debts and liabilities, as required by Insolvent Act 1880, § 2, is sufficient, though it does not conclude with a formal prayer for such discharge.

5. A petition in insolvency which alleges that petitioner "is unable to pay his debts in full, and is an insolvent within the true meaning and intent" of the insolvency act, is sufficient, if not denied, to authorize an adjudication of insolvency, though the accompanying schedule shows that the assets exceed the liabilities.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county.

Petition in insolvency by Arthur H. Chope. From an order declaring petitioner insolvent, fixing a date for the meeting of creditors, and appointing a receiver to take charge of the estate until the appointment of an assignee, Columbus Waterhouse, one of his creditors, appeals. Affirmed.

Ford & Burnell, for appellant. J. F. Coonan, for respondent.

BRITT, C. On December 16, 1893, Chope filed in the superior court of Humboldt county a paper purporting to be his voluntary petition in insolvency, and on the same day the court made an order, under section 6 of the insolvent act of 1880, as amended in 1891, declaring him insolvent, fixing January 20, 1894, for the meeting of creditors, and appointing the sheriff of the county a receiver to take possession of his estate and keep the same until the appointment of an assignee. On January 11, 1894, Columbus Waterhouse, one of the creditors named in the schedules accompanying said petition, took the present appeal to this court from the said order of December 16th. Notice of the appeal was served on no one but the attorney of Chope.

Respondent has moved for a dismissal of the appeal on the grounds: (1) That the notice thereof was not served on the receiver and on the other creditors of the petitioner; and (2) that Waterhouse cannot prosecute the appeal, because, since taking the same, he has proved and filed a claim for his debt in the court below. The motion is not well founded. The notice of appeal from the order adjudicating the petitioner to be insolvent, like similar notices in ordinary civil cases, was to be served on the "adverse party." Insolvent Act, § 67; Code Civ. Proc. § 940. The receiver appointed by the court was the mere instrument of the law and of the court for the temporary preservation of the debtor's property, and was in no sense a party to the proceeding adverse to the creditors. It would be as appropriate to call the sheriff or his keeper of attached property a party adverse to the plaintiff or defendant in an action where the process of attachment has been employed. As to the other creditors named in the debtor's schedule, it is not shown that they had, when the appeal was taken, filed proofs of their claims or in any manner appeared in the proceeding. They were therefore not parties to whom notice of the appeal was requisite. Chinette v. Conklin, 105 Cal. 465, 38 Pac. 1107; Code Civ. Proc. § 1014. If it be true that the appellant made claim and proof of his debt in the superior court, the fact does not estop him to pursue his appeal. That proof of claim by the creditor and his right of appeal in such a case may stand together is the necessary postulate of the decision in Stateler v. Superior Court, 107 Cal. 536, 40 Pac. 949.

The appellant's case rests upon certain alleged defects in Chope's petition. This did not conclude with a formal prayer for the debtor's discharge, and hence appellant says it was no petition at all. It did, however, contain a distinct averment, as required by section 2 of said act, that the petitioner desires to be discharged from his debts and liabilities. No other prayer was necessary. A schedule accompanying the petition showed that some of the creditors reside at "Eureka," and others at "San Francisco." Appellant claims that this was insufficient, in that no county or state is specified. The better practice would certainly be to indicate in the schedule the state, as well as the locality within the state, of each creditor's residence; but in this instance judicial notice is taken that both Eureka and San Francisco are incorporated cities in the state of California. City of Pasadena v. Stimson, 91 Cal. 241, 27 Pac. 604; Cole v. Segraves, 88 Cal. 103, 25 Pac. 1109; Payne v. Treadwell, 16 Cal. 220.

It is further objected that no case of insolvency is made out by the petition, because the schedules showed petitioner's assets to amount to $2,900 in value, and his debts to be $2,272.07 only. This showing is not necessarily inconsistent with a state of insolvency. In re Ramazzina (Cal.) 42 Pac. 970. The petitioner alleged that he "is unable to pay his debts in full, and is an insolvent debtor within the true intent and meaning" of the act of 1880. No doubt this averment may be controverted by the creditors, or any of them; and, if put in issue, it should be established by the debtor as a fact. Hunt v. His Creditors, 9 Cal. 45; In re Thomas (Cal.) 44 Pac. 327. But we think it was quite sufficient to invoke the jurisdiction of the court to declare the petitioner insolvent. The motion to dismiss the appeal should be denied, and the order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the motion to dismiss the appeal is denied, and the order appealed from is affirmed.

5 Cal. Unrep. 375

RANDOL v. ROWE. (S. F. 33.)

(Supreme Court of California. May 19, 1896.)

SET-OFF—ESTOPPEL TO PLEAD.

An equitable estoppel to plead a set-off of a note in an action on an account against defendant, which had been assigned to plaintiff by the maker of the note, did not arise out of the assignor's direction to defendant, after the assignment, to pay the amount of the account to plaintiff, and defendant's silence as to his possession of said note, it not appearing that plaintiff had knowledge of such request.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by J. B. Randol against William Rowe on an account. From the judgment rendered, plaintiff appeals. Affirmed.

J. H. Campbell, for appellant. C. L. Witter and D. W. Burchard, for respondent.

BELCHER, C. The facts of this case briefly stated, are as follows: In July, 1893, one Z. H. Martin sold and delivered to the defendant a certain quantity of hay, for which the agreed purchase price was $541.17. On or about July 15, 1893, defendant paid Martin, for and on account of the hay, the sum of $194.37, leaving a balance still due therefor of $346.80. On August 2, 1893, Martin assigned and transferred his said claim to the plaintiff, who has ever since been the owner and holder thereof. On February 25, 1893, Martin executed and delivered to one Hornberger his negotiable promissory note for $675, payable 30 days after date, with interest; and thereafter, on July 25, 1893, Hornberger indorsed and transferred the said note to the defendant, who has ever since been the owner and holder thereof. Before the said transfer there was paid on the note the sum of $75, and the balance of principal and interest remains due and unpaid. On July 14, 1894, the plaintiff commenced this action to recover the sum of $346.80, with interest, alleged to be due on his said assigned claim, and the defendant pleaded as a counterclaim thereto the said note assigned to him. The court below allowed the counterclaim, and gave judgment that the plaintiff take nothing by his action, and that defendant recover his costs. The plaintiff appeals from the judgment, upon the judgment roll, and contends that the court erred in allowing the counterclaim.

Substantially the same question as that involved in this case arose, and was quite elaborately discussed, in Bank v. Gay, 101 Cal. 286, 35 Pac. 876, and the decision was adverse to the contention of appellant here. That decision we consider decisive of this case, and a further discussion of the question is therefore unnecessary.

The point is made that "the defendant is estopped by his tortious silence from asserting the alleged counterclaim." This point is rested upon a finding of the court which is as follows: "That after the said assignment by Z. H. Martin to the plaintiff, and about the 4th day of August, 1894, said Z. H. Martin told the defendant thereof, and requested him to pay said assigned claim to plaintiff, and the defendant made no objection or response thereto, and neither then or theretofore, nor at any time until afterwards, gave notice or made any mention to plaintiff or said Z. H. Martin of the assignment of said note to him." The year, as above written, should probably be 1893, and not 1894; but, whether so or not, we see no ground in the facts found for invoking the doctrine of estoppel. The well-settled rule is that, to create an equitable estoppel, the person sought to be estopped must do some act or make some admission to influence the conduct of another, which act or admission is inconsistent with the claim he proposes now to make, and the other party must have acted on the strength of such act or admission. At the time named, Martin had no interest in the transaction, and it does not appear that the plaintiff ever knew of the interview referred to, and certainly it cannot be said that his conduct was ever influenced thereby. The judgment should be affirmed.

We concur: BRITT, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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5 Cal. Unrep. 370

BURNS v. SENNETT et al. (S. F. 31.)

(Supreme Court of California. May 15, 1896.)

FELLOW SERVANTS—STEVEDORE'S CREW—SLINGMAN AND RIGGER.

The slingman of a stevedore's crew employed to load a vessel, whose duty it is to stand on the wharf and attach the hoisting tackle to the articles to be loaded, is a fellow servant of the riggers, whose duty it is to set up and rig the hoisting apparatus to the vessel.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Patrick Burns against Sennett & Miller for personal injuries. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Mullany, Grant & Cushing, for appellant. Mastick, Belcher & Mastick, for respondents.

PER CURIAM. This is an appeal from a judgment of nonsuit entered upon the conclusion of the hearing of plaintiff's testimony. All of the evidence is presented by bill of exceptions. Upon the former appeal in this case (Burns v. Sennett, 99 Cal. 363, 33 Pac. 916), it was held that, under the evidence before the court, the duty of defendants was fulfilled when they furnished to the employés suitable material and appliances for the construction and support of the hoisting tackle. As the task of setting up or rigging these appliances, and of safely maintaining them, was a part of the duty of plaintiff's fellow employés, the defendants were not liable to plaintiff for injuries which might have resulted to him from a negligent performance of that duty. These propositions are not here questioned. But it is strenuously insisted that the evidence adduced upon the new trial presents a different state of facts, and establishes that the riggers of the vessel were not fellow servants of the injured man. A most careful examination of the testimony fails to support this claim. It would be profitless to set forth at length the explanations of the different witnesses, but the following brief quotation from the testimony of plaintiff serves as a fair illustration of all: "The foreman of the stevedore firm hires a gang of men, and takes them on board the ship. He directs four or five to go up and rig the vessel,—the gear,—and just as soon as the gearing is finished we all start to work. That is the usual practice." In view of this evidence, and of the opinion upon the former appeal, where the questions are elaborately considered, the judgment is affirmed.

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112 Cal. 652

STONE v. BANCROFT. (S. F. 171.)

(Supreme Court of California. May 21, 1896.)

CONTRACT—PARTNERSHIP OR EMPLOYMENT—ACTION FOR SALARY.

1. A contract between plaintiff, S., and defendant, B., recited that B. was conducting a publishing business under the name of the H. Co., about to be incorporated, and that, in consideration of the valuable services rendered by S. in connection therewith, B. sells and assigns to S. a tenth interest in said company, on the following conditions: S. is to devote all his time for not less than 10 years to the publication and sale of the works which the H. Co. may take up. On the incorporation of the H. Co., one-tenth of the shares shall be issued to S.; but, if he fails to carry out his agreement, said one-tenth interest shall be forfeited to B., provided that, in case of the death of S. before expiration of five years, he having fulfilled his agreement to that time, then one-half of said one-tenth interest shall become the property, unconditionally, of the heirs of S. The salary of the said S. shall be $350 per month. *Held*, that this was not a contract of partnership, but of hiring.

2. Under such contract, B. is liable to S. for his salary, though the H. Co. receives the benefit of his services.

3. One properly sues on his contract of employment for his salary, rather than for damages for breach thereof, where he has not been discharged, and has held himself in readiness, though he has rendered no services, because no work has been offered him.

Department 1. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by N. J. Stone against H. H. Bancroft. Judgment for plaintiff. Defendant appeals. Affirmed.

E. J. McCutcheon, for appellant. Reddy, Campbell & Metson, for respondent.

GAROUTTE, J. This action is brought to recover upon a written contract for 14 months' salary, at the rate of $350 per month, commencing upon January 1, 1892. The verdict of the jury was in favor of plaintiff, and defendant appeals from the judgment and order denying his motion for a new trial.

A general demurrer was interposed to the complaint, and also a special demurrer to the point that the complaint was ambiguous, uncertain, and unintelligible in various particulars. The consideration of this demurrer leads us to an examination of the contract made by these parties, for that contract is set out in full in the complaint. The material parts thereof recite: "This agreement, made in San Francisco, California, by H. H. Bancroft and N. J. Stone, witnesseth: That in consideration of the valuable services done by the said Stone in conducting the publication and sale of the historical works of the said Bancroft, the business formerly being conducted as the Bancroft Works Department of A. L. Bancroft & Co., but now being done, and shortly to be incorporated under the laws of California, as the History Company, the said Bancroft hereby sells and assigns to the said Stone a one-tenth interest in the said History Company, plates, paper, stock, money, outstanding accounts, or other property of said company, upon the following conditions: The said N. J. Stone is to devote his whole time and best energies, so far as his health and strength shall permit, for a period of not less than ten years from the date of this agreement, to the publication and sale of the historical works of H. H. Bancroft, and of such other works, and conduct such other business, as may be from time to time taken up and entered into by said History Company. The said Stone agrees not to enter into or engage in, directly or indirectly, any other mercantile or manufacturing business, or any other business or occupation which shall in any wise absorb his mind and strength, or interfere with his interest or efforts on behalf of the said History Company during the said term of ten years. Upon the incorporation of the History Company, one-tenth of the whole number of shares shall be issued and delivered to the said N. J. Stone; but should the said Stone fail in any wise to carry out this agreement, or any part thereof, in its full letter and spirit, then the said one-tenth interest in the said History Company shall be forfeited and revert to the said H. H. Bancroft; provided, and it is distinctly understood and agreed, that, in case of the death of the said N. J. Stone before the expiration of five years from the date of this agreement, the said Stone having fulfilled all the conditions of this agreement up to that time, then one-half of the said one-tenth interest of the said Stone in the History Company shall go to his heirs, and be their property unconditionally. The salary of the said Stone shall be $350 a month."

We think the only fair interpretation to be given this contract is that Bancroft was to pay Stone $350 per month for his services. There is but a single theory that can be advanced looking to a contrary construction, and that is to the effect that this contract between Bancroft and Stone constituted them partners (Stone possessing a one-tenth interest in the partnership), and that, consequently, the salary of said Stone was to be paid by the partnership. Upon a mere cursory examination of the contract, it is plainly evident that it does not, and was never intended to, create a partnership between these two parties. This is patent from the fact that it was contemplated in the writing itself that in the near future the "History Company" was to be incorporated. It is doubly apparent when we consider that the one-tenth interest in the property given by Bancroft to Stone failed to vest any absolute title in him, but was dependent upon conditions, and liable to be forfeited and revert to Bancroft at any moment. That Stone had no such interest in this business as to constitute him a partner is further made plain when we look at the provision of the contract wherein it is expressly stipulated that, if Stone should die within five years from its date, then only one-half of the one-tenth interest should pass to his heirs. To hold these parties partners under the agreement would make Stone's salary dependent upon the profits of the business. There is nothing contained therein to indicate any such intention, and it is certainly not so provided. We conclude that the contract should be construed as a contract of hiring of Stone by Bancroft at an agreed price of $350 per month. There are no other matters of law raised by the demurrer of sufficient importance to demand our attention.

Within a few months after the aforesaid agreement was entered into, the History Company was incorporated, with a capital stock of 100 shares, 10 of which were issued to Stone, in pursuance of the agreement, and he was thereupon elected vice president of the corporation. Prior to the agreement with Stone, and the subsequent incorporation, Bancroft was the sole owner of the business, conducting it under the name of the History Company. For several years after incorporation, the business progressed amicably and prosperously, and then differences arose. No salary was forthcoming, and this litigation resulted. It is now insisted by appellant that, during the 14 months covered by this litigation, respondent is not entitled to any salary, for the reason that he performed no service. It must be borne in mind that this action is not one for damages based upon the breach of a contract of hiring, but is an action based upon the contract itself, upon an express promise to pay, and in this regard the complaint was advisedly framed, for the evidence of both the plaintiff and defendant expressly shows that he (Stone) was never discharged from his employment; and, if he was hired for a term of 10 years at a monthly salary, until he was discharged by his employer, or voluntarily gave up the employment, we know of no legal reason why his employer's promise to pay is not binding and enforceable in an action at law. The evidence may well be said to be conflicting as to the amount of work done by plaintiff during the term covered by the complaint, but the action of the jury, followed by the decision of the trial court, as to these matters, is binding upon us. And, even conceding that during a great portion of this time plaintiff was not working at all, yet if he was ready and willing to work at all times if work had been offered, and no work was offered, and he had not been discharged, then the contract was in full force, and his right of action upon it cannot be gainsaid. It is no defense to an action upon the contract under such circumstances to say that plaintiff has not performed his duties thereunder. It was said in the early case of Webster v. Wade, 19 Cal. 292: "In the present case, the steamer upon which Collins was employed as steward was laid up by the defendant in pursuance of a contract made by him to that effect with other parties; but the defendant did not notify Collins that he should no longer employ him, and Collins continued at all times ready to perform the services required by the contract. The mere laying up of the steamer did not, of course, terminate the relation of the defendant as employé, or release him from his obligations to the steward [Collins]." It was further said in that case that a discharge of the employé without cause did not defeat an action upon the contract. But it would seem that in later years the true rule has been recognized to be that an action in damages for the breach is the proper remedy in such a case. Bancroft was president of the corporation, and it is evident that neither he nor the History Company wanted the plaintiff to assist in the conduct of the business. At the same time, plaintiff was not discharged, and there is evidence in the record to indicate that the intention of Bancroft was not to discharge him, but rather to make his position as an employé so unpleasant and disagreeable as to cause him to withdraw from the contract under which he began his labors. The many petty annoyances to which he was subjected by defendant can only be accounted for upon such ground. The reason for this course of conduct may possibly be found in a desire upon Bancroft's part to cause Stone's withdrawal from the firm without legal cause; for such withdrawal would have resulted in the forfeiture and reversion of Stone's stock to his benefit, as provided in the agreement. There is evidence in the record pointing in the direction indicated; but, whatever may have been Bancroft's reason in not openly and directly discharging Stone, it is immaterial, for the fact remains that he was never discharged, and the further fact remains that he never voluntarily withdrew from the employment, or relinquished his claims under the contract, and those are the salient facts which justify this action. The many cases cited by appellant holding that, if a servant be wrongfully discharged, his remedy is by damages upon the breach of the contract, have no weight here, for there is no discharge in this case.

The point is made that, if plaintiff rendered service, such service was rendered to the History Company, and not to the defendant. While Bancroft and the History Company prior to its incorporation were actually one, and practically one after its incorporation, and thus service rendered to the History Company was in effect service rendered to Bancroft himself, still, in order to show the weakness of appellant's contention in this respect, we are not even forced to that position. It is in no way material to this case to determine who received the benefit of Stone's services. He was hired by Bancroft to perform labor in the publication of certain literary works, and Bancroft was to pay his salary. Stone was to do this work under the contract, and whether Bancroft or the History Company or some one else got the benefit of his labor is a matter immaterial, as not bearing upon Bancroft's liability.

There are many exceptions taken to the rulings of the trial court in the admission and rejection of evidence; but, upon an examination of them, we find a majority not well taken, and others, even if meritorious in the abstract, still are of minor importance, and not prejudicial. Neither can we say that plaintiff violated his contract by engaging in other business during this time. That matter was fairly submitted to the jury upon the evidence and the law, and a finding made against appellant's contention.

Much complaint is made to the instructions given to the jury as to the law of the case. We will not review many of them in detail, but, as fairly illustrative of appellant's position, we cite the following: "(1) If you find from the evidence that the said N. J. Stone performed the services required of him by said contract, or that he was willing and ready at the time, and has continued willing and ready, and in the manner required by said agreement, to perform said services, but was prevented from doing so by the defendant or under his directions, you should find in favor of the plaintiff. (2) There is testimony tending to show that the plaintiff was not discharged from employment under said agreement, either by the defendant or the History Company. Under this state of facts, the plaintiff was simply bound to hold himself in readiness to perform such services as may have been required of him by the said defendant or the History Company. If you find from the evidence that he was not required or allowed by either the said company or the said defendant to perform any services, but held himself in readiness to execute the contract in accordance with its terms, such readiness to perform is equivalent to performance. (3) If you find from the evidence that the defendant, either by himself or in conjunction with others, prevented the plaintiff from discharging the duties required of him under the said contract, the defendant cannot complain of the nonperformance of acts or duties which he himself prevented; and the plaintiff in such case, and in so far as he was prevented from performing by the acts of the defendant, is entitled to the salary mentioned in the complaint, the same as if all the duties required by said contract had been performed." Our views already expressed are in full accord with this law declared by the trial court. Bancroft testified that Stone was not discharged, and counsel for appellant in his brief concedes that he was not discharged. There being no question of Stone's discharge from employment in the case, the contractual relation still existed between them; and, Stone being ready and willing at all times to perform the services which he agreed to perform, he is in a position to rely upon the contract. The instructions quoted only cover this principle of law, and are entirely sound.

There is no substantial merit in the other points made by appellant. The judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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112 Cal. 669

PEOPLE v. RANGOD. (Cr. 127.)

(Supreme Court of California. May 21, 1896.)

RAPE—INDICTMENT—EVIDENCE—SUFFICIENCY—INSTRUCTIONS—APPEAL—HARMLESS ERROR.

1. An indictment for rape of a female under 14 years old need not allege force and want of consent.

2. The positive statements of the prosecutrix in a rape case, with the corroborative fact that defendant was seen coming from her room at 5 o'clock in the morning, is sufficient to support a verdict of guilty.

3. The failure to caution the jury as to the danger of convicting defendant in a rape case on the sole testimony of prosecutrix is not reversible error, where defendant does not request it.

4. Where the prosecutrix is materially corroborated, it is not proper to caution the jury as to the danger of convicting defendant on the sole testimony of prosecutrix, and an intimation that her testimony should be carefully scanned is all that is warranted.

5. An instruction that "any penetration," however slight, is sufficient in a rape case, is not objectionable because of the omission of the word "sexual," where there are instructions defining the offense, which, when read in con-

nection with the former, show that sexual penetration is referred to.

6. On a trial for rape of a female under 14 years old, the materially objectionable features of evidence of acts of intercourse by defendant with prosecutrix, other than the specific one charged, were not objected to, and no exception was reserved; and, as soon as its purpose was clear, the judge stopped further inquiry, and in a manner that must have indicated to the jury that they should consider only evidence of the one act. *Held*, that there was no prejudicial error, if any; especially, where it appeared that, in view of the other evidence, defendant could not have been materially affected by the objectionable evidence.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Edward Rangod was convicted of rape, and appeals. Affirmed.

L. A. Mendelsohn and H. H. Appel, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. The defendant was convicted of rape, committed upon a girl under 14 years of age, and appeals from the judgment and an order denying him a new trial.

1. The demurrer to the information was correctly overruled. The offense was charged substantially in the language of the statute, and this was sufficient. People v. Mills, 17 Cal. 176; People v. Burke, 34 Cal. 661. It was not necessary to allege force by the defendant, and want of consent of the child. Facts not required to be proven need not be alleged. In this instance it was alleged that the offense was committed upon a female under the age of 14 years, and in such case force and want of consent are immaterial factors in the offense. Pen. Code, § 261; People v. Verdegreen, 106 Cal. 215, 39 Pac. 607.

2. There is no tenable ground for the claim that the evidence does not sustain the verdict. The positive statements of the prosecutrix as to the facts, with the corroborating fact that the defendant was seen coming from her room at the unseemly hour of 5 o'clock in the morning on the occasion testified to, left only the question whether the jury would give credence to the testimony, and this is concluded by their verdict in the affirmative.

3. Nor do we find any error in the giving or refusal of instructions. The first complaint on this head is that the court erred in submitting the case to the jury without cautioning them as to the danger of convicting the accused upon the sole testimony of the prosecutrix. In the first place, the failure to give such caution, even in a proper case, without its request at the hands of the defendant, would not constitute reversible error. But, in the next place, any suggestion of the kind in this instance would not have been pertinent to the case made by the evidence, since it did not rest upon the unsupported testimony of the prosecutrix. She was distinctly and materially corroborated by other evidence, and, under the circumstances, any such instruction might well have been construed by the jury as an intimation from the judge that he did not regard the corroboration as material or worthy of consideration, which would have been clearly improper. Furthermore, the judge did distinctly intimate to the jury that the testimony of the prosecutrix should be carefully scanned, and this was going as far in this regard as he was warranted under the circumstances. The jury were told that "any penetration," however slight, is sufficient, in a case of rape; and it is urged that the instruction was erroneous because of the omission of the qualifying word "sexual," since it is only sexual penetration which will constitute the offense. But we do not regard the omission as material, in view of the other instructions defining the offense, and which, read in connection with the one under consideration, very clearly disclosed to the jury that it was sexual penetration which was referred to in the latter. There are no further objections under this head calling for particular notice. The defendant cannot be heard in criticism of the instruction upon the credibility of witnesess, even if erroneous, since it was given at his request, and, so far as the portion now criticised is concerned, in his own words. As to the requested instructions refused, they are fully covered by those given.

4. We do not regard the action of the court upon the effort of the prosecution to introduce evidence of acts of intercourse by the defendant with the prosecutrix, other than the specific one charged, as prejudicial error, if error it be. The materially objectionable features of the evidence called out were not objected to, or any exception reserved; and as soon as the purpose of the prosecution was made clear to the judge, any further inquiry in that direction was stopped, and in a manner which must have clearly indicated to the jury that it should consider only evidence as to the one act. But, furthermore, even if the objectionable evidence which did come before the jury was considered by them, we do not think, in view of the other evidence in the case, that the defendant could have been materially affected thereby, and the judgment should not, therefore, be reversed on that ground. The judgment and order are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(112 Cal. 573)

HOLLER v. EMERSON. (S. F. 169.)[1]

(Supreme Court of California. May 8, 1896.)

PUBLIC LANDS—SURVEYS—SUFFICIENCY—LOCATION OF SECTION CORNERS.

1. Where the north line of a government section is actually run, and the northwest corner of the southwest quarter section located, the northwest section corner is located by running a line due north from the northwest corner of the southwest quarter section until it intersects the north line, and the point of intersection will be the true northwest corner; and this method should be adopted though the length of the north line being given as 80 chains, and the northeast section corner established, it would appear that a point on the north line 80 chains due west from the northeast section corner would establish the northwest section corner.

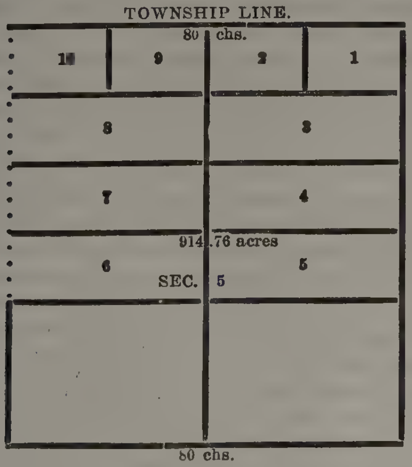
2. Where all the lines of the north half of a section were actually run, but the west, the survey was sufficient to authorize the issuance of a patent.

Department 1. Appeal from superior court, Lake county; R. W. Crump, Judge.

Action by B. Holler against Samuel R. Emerson. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

R. J. Hudson, for appellant. Sheridan & Sayre, for respondent.

GAROUTTE, J. This is an action to recover possession of a small tract of land. Plaintiff and defendant are patentees from the United States government to lots 2 and 9, respectively, of section 5 of a certain township and range. The result of this litigation is dependent upon the proper location of the division line between these aforesaid lots. The section is found in the northern tier of sections of the township, and contains something in excess of 900 acres. It is depicted upon the official map of the township as follows:



It will be observed, from the plat, that the exterior lines of the section are marked out upon the ground by the government survey, save a portion of the western boundary line. It further appears by the field notes that such line was never run. The surveyor general, in platting the survey, projected a line due north from the northwest corner of the southwest quarter (an established corner) to the township line, as a dividing line between sections 5 and 6, and thereupon divided the excess of the section as appears from the plat. The true line between lots 2 and 9 is dependent upon the location of the quarter-section corner upon the township line,—a corner which was not established by the government surveyor. Hence it follows that the location of that corner is dependent upon the location of the northwest corner of the section (an unestablished corner); for it must be conceded that the quarter-section corner should be located at a point equidistant from the northeast and northwest corners of the section. The trial court held that the northwest corner of the section should be located by running a line north to the township line from the established corner at the northwest corner of the southwest quarter. This, also, was evidently the view taken by the surveyor general when he platted the township from the field notes, and we think it entirely sound. If the government surveyor had fully performed his duty, and run this line, he would have run it due north to the township line; and there, at the point of intersection, would have been the true corner, and there we should now hold it to be. Appellant contends, with reason, that the map shows the north line of the section to be 80 chains in length, and, there being no monument to indicate the northwest corner of the section, it should be established by running west upon the township line from the northeast corner of the section 80 chains, the course and distance thus controlling in the absence of monuments. If the boundary lines under consideration had been established by private survey, we would attach much weight to this contention, but such is not the case. We are now engaged in tracing a government survey for the purpose of locating the exterior lines of a section, and, in the interpretation of that survey, we are bound to take into consideration the rules and principles applicable to the laying out of townships by government surveyors. Invoking these principles, we know that the western boundary line of section 5, when it reaches the township line, terminates; and, there being no reason apparent why it should not do so, we are also bound to assume that the western boundary line runs due north to the township line. These conditions being true, the point where this line intersects the township line will be the corner of the section, beyond any question. To establish the corner at a point 80 chains west of the northeast corner of the section would cause the western boundary line to assume a northeasterly course, and also cause section 6, adjoining upon the west, to present a most unsightly and irregular appearance. Again, let us assume that the government surveyor in fact did locate upon the ground the northwest corner of section 5, and that the monument there placed has been lost. Defendant is certainly in no more favorable position in this litigation than if such were the case. Yet, upon that assumption of the fact, we are clear that the corner should be relocated exactly as it has been done here. And the 80 chains given upon the map as the length of the north line could not be used for the purpose of locating the lost corner, but such corner would be established by a line running due north to the township line.

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[1] Rehearing denied.

There is no merit in defendant's contention that, by reason of the surveyor's failure to run upon the ground a portion of the western boundary line of the section, therefore the north half of the section has not been surveyed, and consequently no title vested in plaintiff to lot 2 by the patent issued from the government. For the foregoing reasons the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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112 Cal. 603

RECLAMATION DIST. NO. 535 OF SACRAMENTO COUNTY v. HAMILTON.

(Sac. 63.)

(Supreme Court of California. May 13, 1896.)

New Trial—Proposed Statement—Settlement—Stipulation—Order—Holidays—Judicial Business.

1. A proposed statement for new trial should insert nothing, in extenso at least, but what is pertinent to the questions made by the moving parties, and necessary for their proper consideration; Code Civ. Proc. § 648, providing that the objection must be stated with so much of the evidence or other matter as is necessary to explain it, "and no more."

2. Refusal to settle proposed statement for new trial is not justified because of reference to certain records, thus, "In minute book of said board appears the following order on page 331: (Here insert)," though in the engrossed statement the order would have to be set out.

3. A stipulation extending defendant's time for preparing proposed statement for new trial, and reciting that it is agreed on the part of defendant that he will use his utmost endeavors to have the statement settled, is not an agreement limiting the time for settlement, so that further extension cannot be had by order of the court.

4. A mistake in an order extending defendant's time in which to prepare, serve, and file statement of the case and affidavits "on appeal," instead of for new trial, will be disregarded; notice of intention to move for new trial having been served, and a prior stipulation extending time having referred to "statement on motion for new trial," and it being impossible that plaintiff should have been misled by the mistake.

5. Defendant's right to settlement of statement on motion for new trial will not be defeated though there was no settlement within the time limited by stipulation and order for preparing, serving, and filing the statement, it having been prevented by plaintiff.

6. A stipulation extending time for preparing statement for new trial, and providing that it need not be filed, having been acted on, is binding, notwithstanding Code Civ. Proc. § 283, declaring that an attorney may bind his client in any of the steps of an action by his agreement filed with the clerk, "and not otherwise."

7. Service of a statement for new trial is not "judicial business," within Code Civ. Proc. § 134, declaring that judicial business shall not be transacted on holidays.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by reclamation district No. 535 of Sacramento county against J. H. Hamilton. From an order, defendant appeals. Reversed.

Albert M. Johnson, William M. Sims, and J. C. Catlin, for appellant. Armstrong & Bruner, for respondent.

HAYNES, C. Appeal from an order refusing to settle defendant's statement on motion for a new trial, and dismissing said motion. After the service of defendant's proposed statement, the plaintiff, upon due notice, mover the court to refuse to settle the same, and to dismiss defendant's motion for a new trial, and to deny the same, upon the following grounds: (1) "That it is a mere skeleton statement, and does not substantially conform to the requirements of the Code of Civil Procedure." (2) "That the same was not served within the time allowed by law, nor within the time to which the court had jurisdiction to extend the time, and the court made no order extending the time for preparing and serving the statement on motion for a new trial." (3) "On the further ground that said alleged statement on motion for a new trial was not served upon a judicial day, but was served upon the day of a general election." The court below granted the motion upon the second ground, and, while saying that it was not necessary to pass upon the other grounds, expressed the opinion that they were insufficient to sustain the motion. Respondent, however, insists that, if the motion was properly granted upon any or either of the grounds specified, the order must be affirmed, and discusses all of them.

1. It is true the appellant's proposed statement should be a fair one; but nothing should be inserted, in extenso at least, but that which is pertinent to the questions made by the moving party, and necessary for their proper consideration. The first alleged defect in said proposed statement pointed out by respondent is an illustration of the proper mode of preparing statements. It is as follows: "Plaintiff offered in evidence the following documentary evidence: Minutes of the board of trustees of reclamation district No. 535, showing order employing J. C. Boyd, engineer; also the report of said engineer to

the board of trustees." No objection or exception was made, and no question seems to be made thereon, and therefore a copy of the minutes would only incumber the transcript, and increase both labor and expenses. If, however, for any reason, the opposite party deemed the whole or some part of the minutes essential to his protection upon the hearing of the motion, or upon appeal, it would be allowed as an amendment by the court upon the settlement of the statement, upon its materiality being shown. The Code provides: "The objection must be stated with so much of the evidence or other matter as is necessary to explain it, and no more." Code Civ. Proc. § 648.

It is further objected that reference is made to certain records, thus: "In minute book of said board appears the following order on page 331: (Here insert.)" This is common practice in preparing proposed statements. It is seldom that proposed statements are not amended, and almost invariably it becomes necessary to rewrite them. The reference to the document or record, with the remark "Here insert," notifies the opposite party that it is to become part of the statement. Such reference would, of course, not be sufficient in the engrossed statement. Such engrossed statement would be a "skeleton statement," as declared in People v. Bartlett, 40 Cal. 146, and Bush v. Taylor, 45 Cal. 112, cited by respondent. We see no such defects in this proposed statement as would justify the court in refusing to settle it.

2. We think the court erred in granting respondent's motion upon the second ground therein stated. The 10 days allowed by statute for serving the proposed statement expired October 4th, but was extended by stipulation of counsel until October 8th, and on that day was extended by order of the court to and including the 22d, and on that day again extended by order until and including November 6th, on which last-named day it was served. These orders extended the time 29 days, and the stipulation 4; in all, 33 days. Respondent's contention seems to be that the court had no power in any event to extend the time for a period which, added to the time allowed by the stipulation, would exceed 30 days. But he goes further, and says that "the Code limits the power of the court to extend the time allowed by the Code alone." From his argument we infer that he claims that the stipulation cut off the power of the court to extend the time at all. But these questions have been settled by Curtis v. Superior Ct., 70 Cal. 390, 11 Pac. 652, and Simpson v. Budd, 91 Cal. 488, 27 Pac. 758, and need not be discussed.

Respondent contends, however, that the stipulation limits the time, "by agreement," to the 8th day of October, in which to prepare, serve, and file the statement. The language of the stipulation in that regard is: "It is also agreed on the part of the defendants in said cases that they will use their utmost endeavors to have the statement of the case settled by the judge, and will, at as early a day as possible, have their transcript on appeal printed," etc. This was not an agreement that they would waive their right to prepare the statement and move for a new trial if they failed to serve their statement on the day named.

Some questions are also made upon the form of the orders made by the court, extending time. The orders were each in the following form, the dates only being different: "Good cause appearing, it is hereby ordered that the defendants in each of the above-entitled cases have to and including the 6th day of November, 1894, in which to prepare, serve, and file their statement of the case, and affidavits on appeal to the supreme court of the above said cases." Notice of intention to move for a new trial had been served, and the stipulation extending time referred to the "statement on motion for a new trial." It is impossible that respondent should have been misled by the error, and informalities and mistakes which do not mislead must be disregarded.

It is also said that the stipulation and orders were for time to "prepare, serve, and file" the statement, and as the statement cannot be "filed" until it is settled, and as there was no settlement of the statement attempted within the time limited by the order, that the defendants were too late; that the order limited the settlement and filing, as well as the preparation and service. But that could not have been intended upon the one side, or so understood upon the other. Counsel might reasonably stipulate against delay on his own part, but would not be likely to stipulate against delay on the part of opposing counsel, when his delay might terminate the case, and, through mere delay on his part, win a victory.

It is further contended that the stipulation and orders above mentioned were never filed. The bill of exceptions contained in the record recites: "Defendant's counsel introduced, as filed before the hearing of said motion, the following stipulations and orders, which were received in evidence." There are two answers in this contention: First. The above statement imports that they were filed before the hearing. Second. Respondent's counsel expressly stipulated in writing that the orders and stipulation extending time need not be filed. Counsel for respondent cites section 283, Code Civ. Proc., to the effect that an attorney shall have authority (1) "to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise." They also cite rule 23 of the superior court of Sacramento county, which is of similar purport. The above section of the Code was carefully considered by this court in bank in Smith v. Whittier, 95 Cal. 279, 30

Pac. 529. It was there said, speaking of said section: "It is not intended to enlarge or abridge the authority of the attorney, but only to prescribe the manner of its exercise. Preston v. Hill, 50 Cal. 53. The section does not require a construction that in no instance shall an agreement which the attorney may make in behalf of his client be binding, unless entered in the minutes of the court or filed with the clerk. Its provisions have reference to executory agreements, and not to those which have been wholly or in part executed; and it was with reference to oral agreements of an executory character that the court said, in its opinion in Borkheim v. Insurance Co., 38 Cal. 628: 'Of such agreements, therefore, there can be no specific performance.' If, under the terms of a mutual stipulation which was only verbal, one party has received the advantage for which he entered into it, or the other party has at his instance given up some right or lost some advantage, so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate the obligation of his own agreement upon the ground that it had not been entered in the minutes of the court. Himmelmann v. Sullivan, 40 Cal. 125; Hawes v. Clark, 84 Cal. 272, 24 Pac. 116; People v. Stephens, 52 N. Y. 306. If the party admits that he made such verbal stipulation, it will be as binding upon him as if it had been entered in the minutes of the court. Patterson v. Ely, 19 Cal. 36; Reese v. Mahoney, 21 Cal. 306." The duty of counsel to himself, the court, and the profession in such cases, where his client has not interfered or dissented, is clear, and need not be discussed.

3. The third ground of respondent's motion was that the statement was served on a nonjudicial day, November 6, 1894, that being the day of a general election. This objection is exceedingly technical. That day being a holiday, the statement might have been served the next day. Code Civ. Proc. § 12. Counsel for respondent insists, however, that the service of the statement was "judicial business," the transaction of which is prohibited by sections 133 and 134, Code Civ. Proc. Section 133 provides: "Courts of justice may be held and judicial business transacted on any day, except as provided in the next section." Section 134, as amended in 1893 (St. 1893, p. 187), omitting the enumeration of the holidays, is as follows: "No court shall be open, nor shall any judicial business be transacted, on * * *, except for the following purposes: (1) To give, upon their request, instructions to a jury when deliberating on their verdict. (2) To receive a verdict or discharge a jury. (3) For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature; provided, that the supreme court and the superior courts shall always be open for the transaction of business; and provided, further, that injunctions and writs of prohibition may be issued and served on any day." The amendment consists in inserting the words "and the superior courts" after the words "supreme court," in the third exception. This amendment would settle the question before us but for a clause in our constitution which provides that the superior courts "shall be always open (legal holidays and nonjudicial days excepted)." Article 6, § 5. But the service of this statement was not "judicial business." Section 134 is a qualification of section 133, which relates solely to courts of justice. However that may be, the act in question was merely ministerial, and not judicial. In the Law Dictionary by Rapalje & Lawrence, "judicial acts" are defined as those "requiring the exercise of some judicial discretion, as distinguished from ministerial acts, which require none." Many of the cases referring to judicial acts and the service of writs on dies non relate to acts done on Sunday, and which were held invalid under statutes prohibiting the transaction of any secular business upon that day, and therefore have no application here. In re Worthington, 7 Biss. 455, Fed. Cas. No. 18,051, a judgment docketed on Christmas day was held valid, upon the ground that the act was ministerial, and not judicial. In Nevada v. California Mining Co., 13 Nev. 203, the undertaking on appeal was executed on Sunday, and that was held not to be "judicial business." Whipple v. Hill, 36 Neb. 720, 55 N. W. 227, is a stronger case than this. There the first Monday in September is, by statute, a legal holiday, known as "Labor Day"; and the statute provides: "No court can be opened, nor can any judicial business be transacted, on Sunday or any legal holiday, except: (1) To give instructions to a jury then deliberating on their verdict. (2) To receive a verdict or discharge a jury. (3) To exercise the powers of a single magistrate in a criminal proceeding. (4) To grant or refuse a temporary injunction or restraining order." Comp. St. 1893, c. 19, § 38. It was there held that the issuance of a writ of attachment on a debt past due is a purely ministerial act, and does not fall within the inhibition of the statute. The court said: "The language of the section is plain and unambiguous, and should not be extended by judicial interpretation beyond the plain import of the words used. Had the legislature intended to debar courts or court officers from performing ministerial acts upon holidays, words suitable to express such intention would have been employed. If the transaction of all legal business was forbidden on such days, as is the case in some of the states, we would grant that the order in question would be void; but the statute does not so provide. It is the opening of courts and the transaction of judicial business on legal holidays which the law forbids.

This intent is clearly manifest." In Smith v. Ihling, 47 Mich. 614, 11 N. W. 408, it was held that the issuing of a summons by a justice of the peace was a ministerial act, not forbidden by the statute. In Weil v. Geier, 61 Wis. 414, 21 N. W. 246, it was held that the statute providing that "no court shall be opened or transact any business on a legal holiday" (Rev. St. § 2576) does not prohibit a justice of the peace from issuing a summons on that day, that being a purely ministerial act. At common law, Sunday is dies non juridicus, and judicial acts cannot be done on that day, though other acts may be, unless prohibited by statute. Story v. Elliot, 8 Cow. 27. What has been said sufficiently answers the authorities cited by respondent.

The order refusing to settle the defendant's statement on motion for new trial, and dismissing said motion, should be reversed, with directions to settle said statement and hear said motion.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order refusing to settle defendant's statement on motion for new trial is reversed, with directions to settle said statement and hear said motion.

(112 Cal. 620)

HOVEY v. BRADBURY. (S. F. 88.)[1]

(Supreme Court of California. May 14, 1896.)

RES JUDICATA TRUSTS—CONDUCT OF TRUSTEE—REPUDIATION—LACHES—ESTOPPEL.

1. Plaintiff confided to defendant's intestate, as trustee, certain shares of corporate stock, with instructions to look after his interests therein. At various times defendant's intestate acknowledged the trust. Actions having been brought by third parties against the intestate, a large amount of stock standing in his name, including that belonging to plaintiff, was attached, and in the judgments rendered in such actions, among other things, the stock was decreed to belong to intestate. Plaintiff was not a party to these actions, nor was he cognizant of them. *Held*, that these judgments could not be pleaded in estoppel of plaintiff's claim to the stock.

2. Though the conduct of a trustee amounted to a repudiation of the trust, such repudiation cannot set in motion the statute of limitations, nor raise the bar of laches, unless it was unequivocally brought to the knowledge of the beneficiary.

3. Where a trustee holding certain shares of corporate stock has acknowledged his trust from time to time, though failing to account for dividends on the stock, it was not laches for the beneficiary to refrain from taking an action to enforce an accounting under the trust till over two years after the death of the trustee.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanders, Judge.

Action by Asa E. Hovey against William B. Bradbury, as personal representative of James McCord, deceased. There was judgment for plaintiff, and defendant appealed. Affirmed.

Thos. V. O'Brien, for appellant. H. G. Platt, for respondent.

HENSHAW, J. Appeals from the judgment and from the order denying a new trial. Plaintiff pleaded that he was the owner of 465 shares of the capital stock of the Cable Railway Company, that he intrusted this stock to James McCord, who held it as his trustee until his death, after which it passed into the hands of defendant as the personal representative of McCord. He asked a judgment declaring the trust, and decreeing an accounting of the dividends received upon the stock. No demurrer was interposed. Defendant, for answer, made denial, set up by way of estoppel judgments in certain actions involving and affecting the title to the stock, and pleaded the statute of limitations and stale claim. The principal defense and chief contention of appellant is the laches of respondent. The following facts were established upon the trial without substantial controversy: Hovey, while living in San Francisco, was the inventor and owner of certain valuable patent rights. These rights were transferred to the Hovey Patent-Right Company, and for them Hovey was to receive one-seventh of the capital stock of that corporation. The Cable Railway Company succeeded to the interests of the Hovey Patent-Right Company under an agreement whereby Hovey was to receive 465 shares of the stock of the former corporation. Before this stock was issued to him, Hovey moved to Chicago, where he continued to reside with his family. He and McCord were intimate friends, and when he left he confided all of his interests to McCord, in the implicit trust and upon the express understanding that McCord would use his best efforts in managing and protecting them. Thus in time, and under this agreement, Hovey's 465 shares of stock were issued to and in the name of McCord. Hovey knew that McCord so held the stock, but was satisfied, because of his faith in McCord, and because of the advice of some of his fellow stockholders, that he should leave the stock in the hands of some trustworthy friend in California, who might vote it in case of a contest for corporate control. It was in 1881 that Hovey moved to Chicago. In 1884, McCord visited him there; again in 1886; and still again in 1888. Upon each of these visits McCord spoke of Hovey's stock; told him that it had earned dividends, the exact amounts of which he did not remember; and promised at each visit to forward a full statement of account upon his return to California. He did not do so. In 1889, McCord died, and in 1891, Hovey, who, after McCord's death, had written to California about his property, with inconclusive results, commenced his action. That McCord held Hovey's stock under these circumstances the evidence does not permit us to doubt. Besides Hovey's testimony, there is that of Maurice Schmitt, J. L. Schmitt, and Robert F. Morrow, fellow incorporators with Hovey and McCord, who fully corroborate plaintiff, and who separately bear evidence to admissions made by McCord of the nature and terms of his trusteeship. It is beyond peradventure from all this uncontradicted evidence that McCord, during his lifetime, fully and repeatedly recognized his obligations to plaintiff. While Hovey was thus living in Chicago, two actions were commenced against McCord. To neither of these was Hovey a party, nor does it appear that he ever had the slightest knowledge of them. One—the case of Schmitt v. McCord—was an action to recover $3,000, in which 930 shares of the cable company's stock standing in the name of McCord, and including the Hovey 465 shares, were attached. This attachment, by agreement of the parties, was released, and the stock deposited with one McClure, in pledge to await the result of the action. Thereafter McClure died, and his administrator commenced the second action in interpleader to have the rights of the McCord estate (McCord also having died) and of the Schmitts to the stock settled and determined. By this action the stock was decreed to belong to the McCord estate, subject to the payment of the Schmitt judgment.

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[1] Rehearing denied.

The judgments in these actions manifestly present no estoppel against plaintiff's claim. He was not a party to them, nor charged with notice of them. Nor do they present any circumstance of laches upon the part of plaintiff. No act or omission of his induced McCord to do or refrain from doing anything in connection with them. Hovey was in entire ignorance of the litigation, and McCord let him remain so. There is no doubt that the conduct of McCord in this matter amounted in law to a repudiation of his trust. But before such repudiation can operate to set in motion the statute of limitations, or to raise the bar of laches, the repudiation must be clearly and unequivocally brought to the knowledge of the cestui que trust. Laches is imputable to him only when he fails to act after knowledge of repudiation. But in this case the facts were never made known to Hovey. Nor when we come to view plaintiff's conduct generally can there be seen any act or omission upon his part which would justify so stern a treatment of his claim as its rejection under the doctrine of laches. That doctrine, as has been said, is neither technical nor arbitrary. It is not designed to punish a plaintiff. It can be invoked only where to allow the claim would be, because of the claimant's own acts, to permit an unwarranted injustice. It looks to the peace of society, and not to the punishment of the claimant, even if he has been negligent. Whether or not the doctrine applies depends, and must depend, therefore, upon the circumstances of each case. It is usually applied where a plaintiff, with knowledge that his rights have been invaded or his trust repudiated, has submitted to unconscionable delay, during which other rights have arisen, founded somewhat upon his silence and acquiescence. But it is never permitted to be invoked merely to aid a faithless trustee in consummating his wrong. Nor was it ever designed to be a check upon the right of a person to impose confidence and trust in another. It is well said in the case of Petroleum Co. v. Hurd, L. R. 5 P. C. 221, 8 Eng. R. 196: "Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct, and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. * * * Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy." When we come to consider the conduct of the plaintiff in this case, we find that he permitted McCord to take the stock in his (McCord's) own name. A third person dealing with McCord upon the faith of his apparent ownership of the stock would undoubtedly be protected against any claims of Hovey, but no rights of third persons are here involved. Plaintiff also permitted McCord to retain the stock after his repeated failure to account to him for its dividends; but during all of this time it is to be remembered that McCord never repudiated the trust, and that plaintiff had, and continued to have, the utmost confidence in his fidelity and integrity. They were intimate friends. McCord's failures to account did not amount to a repudiation of the trust, for each failure was followed by an express acknowledgment of the trust, and admission of his fault, and a promise to repair it. The years which elapsed before plaintiff finally demanded through the courts an accounting was not unreasonable in view of the relations which existed between him and his trustee. The negligence of McCord in accounting, and his failure to turn over the dividends, injured no one but the plaintiff, and it was an injury which he certainly had the right to overlook without exposing himself to the charge that he was justifying McCord in treating the property as his own. By no word or act or omission of plaintiff was McCord given any right, even the slightest, to suppose that Hovey had surrendered into his absolute ownership the property which he held in trust. He did nothing to induce McCord to think that the stock was his, nothing to lead McCord to change his position in the slightest degree. His mere forbearance to call the trustee to a strict account could not have been taken advantage of by McCord in his lifetime, and cannot avail his representative after his death. Moreover, it is to be borne in mind that the conduct of the plaintiff is to be considered in the light of the fact that McCord had never repudiated the trust, or done any act within the knowledge of Hovey which amounted to a repudiation. It was only after McCord's death, and his failure to obtain any satisfactory statement from his relatives and representatives of the condition of the trust, that he was first put upon notice of repudiation. Within 2½ years after McCord's death this action was instituted. Such delay, as explained by the evidence, was not unreasonable, and, indeed, if unexplained at all, would not raise either the bar of the statute nor justify the claim of a stale demand. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

112 Cal. 661

HELLMAN v. MERZ et al. (L. A. 55.)

(Supreme Court of California. May 21, 1896.)

SALE OF DECEDENT'S LAND — PUBLICATION OF NOTICE—RECOVERY OF DEPOSIT—INTEREST.

1. Under Code Civ. Proc. § 1549, providing that, when a sale of decedent's real property is ordered to be made at private sale, notice stating a day on or after which sale will be made must be published in a newspaper for two weeks successively next before such day, *held*, that publication, from the 5th to the 19th day of the month, of a notice, naming the 21st day thereof as the day on or after which sale would be made, was insufficient.

2. A bidder at a private sale of a decedent's real estate, ordered by court, has a right to refuse to comply with his bid, and to recover his deposit, on the ground that the publication of notice did not comply with Code Civ. Proc. § 1549, where the affidavit of publication existing at the time of his bid shows insufficient publication, though, after hearing in his action, an amended affidavit is filed showing sufficient publication.

3. Though a will give executors power to sell decedent's land without any order of court, still, where a deposit and bid is made for a proposed private sale, to be authorized by an order of court, and an order for private sale is obtained, and such a sale is confirmed, its validity will depend on the sufficiency of publication of notice required by Code Civ. Proc. § 1549, in case sale of decedent's real estate is ordered to be made at private sale.

4. Judgment for plaintiff in an action to recover deposit on a private sale made by executors of decedent's real estate will not be reversed because entered against defendants individually, objection that defendants were sued as individuals and not as executors not having been raised by demurrer or answer.

5. In an action by a bidder at a sale by executors of decedent's land to recover his deposit on the ground of the invalidity of the sale, interest should not be allowed prior to the demand for return of the deposit.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Maurice S. Hellman against H. Merz and another. Judgment for plaintiff. Defendants appeal. Modified.

H. A. Barclay, for appellants. McLachlan & Cohrs, for respondent.

BELCHER, C. This is an action to recover from defendants the sum of $500, money had and received by them for the use of the plaintiff, with interest thereon from December 10, 1891. The plaintiff had judgment as prayed for, and the defendants appeal from the judgment and an order denying a new trial.

On December 10, 1891, defendants, as executors of the last will of D. Mahlstedt, deceased, executed to plaintiff a written contract, which, after acknowledging the receipt of $500, "being a deposit and part payment on account of a bargain and sale made" to him of a certain described lot or tract of land, proceeds: "Said tract of land above described having been sold to said Maurice S. Hellman this day for the sum of $16,000, less mortgage of $10,000, provided that the undersigned make this agreement with the understanding that it shall be considered merely as a bid in advance of the order of the court authorizing a sale of said property, and that the executors of said estate shall not be held to accept said bid in case they secure any higher bid, nor shall they be in any manner bound by this agreement, or liable thereon, either as individuals or executors, but, in case no higher bid is received, they will accept a bid for said property for the amount of $16,000, provided no higher bid is received, the balance to be paid as follows: The sum of $5,500 15 days after delivery of abstract of title, showing above sale confirmed by superior court, the balance being balanced off by mortgage thereon for $10,000 to German Savings & Loan Society. The title to said above lands to prove good, or no sale, 15 days being allowed to examine abstract and pass upon title after said abstract is delivered. If the remaining payments be not made according to the agreement and contract, the above-mentioned deposit to be forfeited without recourse. If title prove defective, said deposit to be returned. Above sale subject to confirmation by superior court of Los Angeles county. Title to be clear and free of all incumbrances except mortgage mentioned above." In pursuance of this agreement, defendants made application for and obtained from the court an order for a private sale of the property. Plaintiff put in a bid of $16,000, and his bid was accepted, and the sale confirmed; but, because of certain defects in the proceedings, he refused to accept a conveyance of the property. Thereupon, to obviate such defects, defendants made application for, and on April 1, 1892, obtained, a new order for the sale of the property at private sale. Notice of this sale was published in a newspaper, and plaintiff again put in a bid of $16,000. His bid was accepted, and the sale to him was confirmed by an order of court. Defendants thereupon executed and tendered to plaintiff a deed of the property, but, on the advice of his attorneys that the deed would not pass a good title, he refused to accept the same. Thereafter, on September 2, 1892, plaintiff demanded of defendants a return of his deposit, but they refused, and ever since have refused, to return the same, or any part thereof.

This action was commenced December 9, 1893, and on January 3, 1894, defendants made application to the court for another order for the sale of the said property. On January 16th, before their application was acted upon, defendants filed their petition, setting out the facts of the sale to plaintiff, the confirmation thereof, the tender of a deed, and refusal to accept the same, and praying that the order of confirmation be set aside; and on the same day the order of confirmation was duly vacated and set aside. On January 19th defendants served notice on the plaintiff that they had made application for an order for the resale of the said property, "for the purpose of selling said property, and ascertaining the deficiency, if any, which may be due upon said sale, in case the amount realized on such resale does not cover the bid heretofore made by you, and the expenses of the sale to you." Thereafter an order for the resale of the property was obtained, and on February 19, 1894, defendants sold the same to one George Zobelein for the sum of $15,000, which sale was subsequently duly confirmed by the court, and a deed for the property was executed and delivered by defendants to the said purchaser. The facts as to the resale were set up in a supplemental answer, and the prayer was for judgment that the $500, deposited by plaintiff, be retained by defendants, and applied in payment of the deficiency resulting from the resale, and that they recover from the plaintiff the further sum of $500, the balance of said deficiency. The court found, among other things, that the sale under the order made on April 1, 1892, was irregular and invalid; "that the notice of such sale was defective, in that the same was not published for two weeks successively before the day on or after which said sale was to be made; that the proof filed May 2, 1892, with the return of said sale, showed publication of such notice for 15 consecutive days, commencing April 5, and including April 19, 1892, each day inclusive, and giving notice that said sale was to be made on or after April 21, 1892; that at the time of the making of said bid by plaintiff such proof was the only evidence on file or possessed by plaintiff, as to the time and manner of publication of said notice; that the said sale was further irregular and invalid, in that the terms of sale were advertised to be 'the assumption of the payment of a mortgage of ten thousand dollars ($10,000), and the interest thereon, given by the said D. Mahlstedt in his lifetime to the German Savings & Loan Society of San Francisco, the balance to be paid in cash, United States gold coin, upon the confirmation of sale by superior court, deed at expense of purchasers'; that such terms were not in accordance with the bid of plaintiff, or the terms of the agreement entered into between plaintiff and defendants as to the purchase of said property; and that a deed by said executors, pursuant to said last-mentioned proceedings, would convey no title to plaintiff." And as conclusions of law the court found that the plaintiff was entitled to judgment for the sum of $500, with interest at the rate of 7 per cent. per annum from December 10, 1891, and that defendants were not entitled to recover anything upon the counterclaim set up by them.

Appellants contend that these findings were not justified by the evidence, and whether they were justified or not is the principal question involved in the case. Section 1549 of the Code of Civil Procedure provides that, when a sale of real property is ordered to be made at private sale, notice of the same must be published in a newspaper for two weeks successively next before the day on or after which the sale is to be made. The notice must state a day on or after which the sale will be made. The rule is well settled that proceedings for the sale of the real property of a decedent are statutory, and that such a sale will be void unless the requirements of the statute are complied with. In re O'Sullivan, 84 Cal. 444, 24 Pac. 281; Hartley v. Croze, 38 Minn. 325, 37 N. W. 449, and cases cited. In the last-named case there was a sale by the administrator of certain real property belonging to an estate, under a statute which required notice of the sale to be published "for three weeks successively next before such sale." Notice of the sale was published in a weekly newspaper for three successive weeks, but not during the last week next before the day named for the sale, there being an interval of nine days between the completion of the last publication and the day of sale. The sale was made on the day appointed therefor, and was subsequently reported to and confirmed by the court, and in pursuance thereof a deed of the property was executed and delivered to the purchaser. The question was as to the validity of the sale, and it was held that the failure to publish the notice during the said interval of nine days was a fatal defect, and that the sale was therefore void, and the deed conveyed no title. In this case the notice of sale named April 21, 1892, which was Thursday, as the day on or after which the sale would be made, and it was published in a daily newspaper from the 5th to the 19th day of that month, as shown by the affidavit of the publisher, which was returned and placed on file, and was the only evidence of publication until after the case was tried and submitted for decision. This publication was insufficient to meet the requirements of the statute, for if publication in a daily paper may be omitted for one day, then it may be omitted for two or more days, and there can be no certainty as to when the last publication must be made.

After the hearing of the cause defendants procured and filed an amended affidavit, showing that the notice was in fact published from the 5th to the 20th of April, 1892, inclusive, and they now claim that any apparent defect in the publication which existed before the filing of the new affidavit was thereby obviated and cured. The obvious answer to this claim is that plaintiff was justified in acting upon the facts as they were shown to exist when he made his bid on May 2, 1892, and when, thereafter, on the advice of his attorneys, he refused to accept the deed, and demanded the return of his deposit. The case must therefore, in our opinion, be decided upon the facts as they were presented at the trial, and without any consideration of the amended affidavit.

By the will of the decedent the executors thereof were given full power and authority to sell and convey the property of the estate, or any portion thereof, without any order of court; and it is claimed that the sale to plaintiff should therefore be held valid, notwithstanding any defects or irregularities in the preliminary proceedings taken to effect it. But the deposit and bid of plaintiff were made for a proposed sale to be authorized by an order of court, and it was such a sale only which was confirmed. Under these circumstances the decision must rest upon the validity of the sale as made, and not upon the supposed validity of a sale which might have been made under authority given in the will. It follows from what has been said that, by reason of the insufficient publication of the notice of sale, the attempted sale to the plaintiff was ineffectual and void, and that the deed made and tendered in pursuance thereof would have passed no title.

It is further claimed that the judgment should be reversed because it was entered against the defendants individually, while they were liable, if liable at all, only as executors of the estate; and it is said that they had settled their accounts as executors, in which account was included the $500 in question. This claim cannot be sustained. No objection to the action on the ground that defendants were sued as individuals, and not as executors, was raised by demurrer or answer. They accepted the deposit under an express agreement that they would return it if the title should prove defective. They evidently held the money when this action was brought, and when they were thereby clearly notified that plaintiff claimed its return. They must also have held the money nearly, if not quite, up to the time of the trial; for in their supplemental answer, filed only a short time before the trial, they prayed for judgment that the said $500 be retained by them and applied in payment of the alleged deficiency. And, if they did not, they should have retained the money until judgment was rendered, and then have applied it as thereby directed.

The judgment rendered in favor of the plaintiff was for $644.40, and costs of suit. Plaintiff was not entitled to interest on his deposit before he demanded its return on September 2, 1892. From that time to the date of the judgment, January 25, 1895, the interest would amount to only $83.87. The cause should be remanded, with directions to the court below to amend the judgment by striking therefrom the sum of $60.53; and, as thus amended, the judgment and order should be affirmed.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the cause is remanded, with directions to the court below to amend the judgment by striking therefrom the sum of $60.53; and, as thus amended, the judgment and order are affirmed.

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5 Cal. Unrep. 373

LEWIS v. COLGAN, Comptroller.

(Sac. 164.)

(Supreme Court of California. May 18, 1896.)

STATE BOARD OF EXAMINERS—POWER TO APPOINT EXPERT—CONSTITUTIONAL LAW—TITLE OF ACT.

1. Under Const. art. 4, § 32, forbidding the legislature to pay, or to authorize the payment of, any claim made under a contract "not expressly authorized by the law," the appropriation in Act March 28, 1895 (St. 1895, p. 280), "for salary of expert to board of examiners," is unavailable for that purpose, there being no express antecedent authority in the board to appoint such expert.

2. The performance of quasi judicial acts by the state board of examiners in auditing claims does not make such board a judicial body, with implied power to appoint an expert and other necessary assistants at the expense of the state.

3. The several members of the state board of examiners, which consists of the governor, the secretary of state, and the attorney general, do not, by virtue of their appointment on such board, carry with them, for exercise therein, the power conferred on them as executive officers, but have only such authority as relates to them as members of the board.

4. Act March 28, 1895 (St. 1895, p. 280), entitled "An act making appropriations for the support of the government," etc., among which is an appropriation "for salary of expert to board of examiners," cannot be construed as creating the office of expert to such board, since the act would to that extent be unconstitutional, as embracing a subject not expressed in the title.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Mandamus by Thomas A. Lewis to compel Edward P. Colgan, as state comptroller, to draw his warrant in favor of plaintiff for an amount claimed to be due him as expert to the state board of examiners. A demurrer to the answer was sustained, and a peremptory writ granted. Defendant appeals. Reversed.

Devlin & Devlin, Barham & Miller, and A. E. Bolton, for appellant. R. B. Carpenter, for respondent.

SEARLS, C. Mandamus against the defendant, as comptroller of the state of California, commanding him to draw his warrant in favor of the plaintiff upon the treasurer of said state for the sum of $166.66⅔, as salary due plaintiff from the said state for services as expert to and for the state board of examiners during the month of July, 1895. An alternative writ of mandate issued to defendant, who demurred to the verified petition, and, upon his demurrer being overruled by the court, answered the petition. Plaintiff moved to strike out the fourth paragraph of defendant's answer, and demurred to the residue thereof. The motion to strike out was granted, and the demurrer sustained, and a peremptory writ granted. Defendant appeals, and the cause comes up on the record illustrated by a bill of exceptions. The substance of the verified petition upon which the writ issued is that "on the 28th day of June, 1895, plaintiff was employed by the state board of examiners as expert for said board of examiners, at an annual salary of two thousand dollars, payable monthly, and necessary traveling expenses in the business of said employment"; that he entered upon the discharge of the duties of such employment July 1, 1895, and continued to act as expert, etc., during the month of July, whereby there became due him from the state of California the sum of $166.66⅔. The board of examiners duly audited, allowed, and approved his claim for said sum of money. The comptroller, upon demand, refused to draw his warrant on the state treasurer in favor of the plaintiff therefor. The more formal portions of the petition are here omitted.

The question presented in the whole case practically relates to the duty of the defendant as comptroller, upon the foregoing facts, to draw his warrant in favor of the petitioner on the state treasurer. The petitioner does not specify any authority on the part of the board of examiners to employ him as an expert, and our attention is not called to any statute or law conferring such authority, unless it is to be found in the statute in relation to appropriations, hereinafter mentioned. The petitioner contents himself with stating as a fact that he "was employed by the state board of examiners as expert," etc. The act making appropriations for the support of the government of the state of California, for the forty-seventh and forty-eighth fiscal years, approved March 28, 1895 (St. 1895, p. 280), makes an appropriation as follows: "For salary of expert to board of examiners, four thousand dollars." "For traveling expenses of board of examiners and expert, two thousand dollars." The board of examiners is the creature of the statute, and consists of the governor, the secretary of state, the attorney general, and the secretary of the board, who is an ex officio member, and only authorized to act in the absence from the capitol of any two members. St. 1893, p. 182; Pol. Code, § 364. The law provides for a secretary and assistant secretary for the board, and a clerk. Pol. Code, §§ 654–685. Provision is also made for the appointment by the board of a "printing expert," to examine and report upon the character and value of printing done for the state. Id. § 679. Beyond these provisions we are not aware that the board of examiners is authorized by any positive law to appoint or employ any subordinates, assistants, or employés. The duties of the state board of examiners are prescribed by section 654 et seq., article 18, c. 3, tit. 1, pt. 3, Pol. Code. Among these duties the board is required to examine the books and accounts of the comptroller and treasurer, to count all moneys in the state treasury, and, under section 672, to audit all claims against the state which are not especially exempted from the provisions of that section, other than claims for official salaries, and claims upon the contingent fund of either house of the legislature.

The contention of appellant is that no office can be created by the general appropriation bill, and that the appropriations named therein can only be expended for some object antecedently authorized. As to the first branch of the proposition, it is sufficient to say that the appropriation bill from which we have quoted does not make any attempt to create an office or agent, or to authorize the appointment by others of any officer or agent, or to employ servants or assistants. It simply appropriates given sums of money for specific objects therein named, and among them a given amount "for salary of expert to board of examiners." Had the legislature attempted by the appropriation bill to do more than to appropriate money, that portion of it would have been void, because the object was not stated in the title of the act, which is "An act making appropriations for the support of the government of the state of California for the forty-seventh and forty-eighth fiscal years." Section 24 of article 4 of the constitution provides that "every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title." As bearing upon the latter branch of the proposition, viz. that an appropriation can only be expended for some object authorized by law, it is pertinent to say that, under section 31 of article 4 of the constitution, the legislature is deprived of the power to give or lend the credit of the state, "nor shall it have power to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual," etc. Section 32 of the same article provides, so far as applicable here, as follows: "The legislature shall have no power to * * * pay, or to authorize the payment of, any claim hereafter created against the state, * * * under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

Respondent contends, in substance, that the board of examiners, in auditing and allowing or rejecting claims against the state, acts judicially, and that, as a judicial body, the board has power to appoint such assistants and subordinates as may be necessary to discharge its duties. It has often been held that all independent departments of government are vested with governmental functions, and may, as an incident of the powers conferred, exercise such incidental powers as are necessary to a due exercise of the express powers conferred. Under this head, it has been held that courts of record, and especially courts of last resort, may, when necessary to the conduct of their business, and where no suitable provision has been made therefor by the other departments of the government, procure suitable places in which to hold court, provide fuel, lights, suitable furniture, appoint necessary janitors, clerks, bailiffs, etc. These authorities are founded upon the principle that no one department of the government can be divested of its power to act by the willful or negligent conduct of the other co-ordinate departments. The board of examiners is not, however, in any proper sense, a judicial body; and were it so, and in the exercise of functions properly belonging to the judicial department of the government, its organization would be void under section 1 of article 3 of the constitution, which provides that the powers of the government "shall be divided into three separate departments; and no person charged with the exercise of powers properly belonging to one of those departments shall exercise any functions appertaining to either of the others, except as in this constitution expressly directed or permitted." The membership of the board of examiners is composed of the highest officers of the executive department of the state. Their exalted position, we may suppose, was regarded as a guaranty of their character, capacity, and fitness for the important duties imposed upon them as members of the board. When the board, pursuant to the statute, examines, audits, adjusts, and allows or rejects claims against the state, its acts are so far of a judicial character that their decision as to the facts is conclusive, unless reversed on appeal. Black, Judgm. § 532. Like considerations apply to similar acts by boards of supervisors, county commissioners, and auditors. Colusa Co. v. De Jarnett, 55 Cal. 373. It would hardly be contended, we think, that the performance of these quasi judicial acts by local boards of audit, constitutes them judicial bodies and draws to them all the incidental powers of courts of justice. The board of examiners is a creature of the statute, possessing no authority except that conferred upon it by the law of its creation. In its relation to the several departments of the government, it is simply a local board, exercising limited powers, taking to itself nothing of authority not clearly conferred or necessarily implied from the language of the statute under which it acts, and from which its authority emanates. The several officers composing the board do not, by virtue of their appointment to membership on such board, carry with them, for exercise therein, the powers conferred upon them by the constitution or general laws, but only such as relate to them in their capacity of members of the board. If the board of examiners, by virtue of the duties imposed upon it, may appoint an expert, then, by parity of reasoning, boards of supervisors, county commissioners, auditors, and other like bodies and individuals, performing like or similar services, should be entitled to make like appointments. We are of opinion the board of examiners possesses neither the inherent nor delegated power to make such appointment, and that the attempt so to do was in excess of the authority of the board, and void. Under the constitution of this state adopted in 1849, the foregoing conditions might have existed without detracting from the right of the petitioner to the salary appropriated for his benefit. The legislature was not under it, as now, restricted in that respect. As was said in Blanding v. Burr, 13 Cal. 350: "It may appropriate [the public moneys] to claims which have no legal obligation, and are founded only in justice. Of the propriety of the appropriation, as of the expediency of the taxation, it is the sole judge. With the exercise of the power in either case the judiciary cannot interfere." Under section 32 of article 4, supra, of the present constitution, however, it may not appropriate money to pay any claim founded upon any agreement or contract "made without express authority of law, and all such unauthorized agreements or contracts shall be null and void." We think the record shows that the agreement or contract by which petitioner was to serve as an expert to the board of examiners was "made without express authority of law," and hence that the appropriation in payment thereof was in violation of the constitution, and that the demurrer to the petition should have been sustained.

The motion to strike out a portion of defendant's answer was properly granted.

The matter set up in the fourth paragraph was irrelevant matter, not material to the defense.

We recommend that the judgment be reversed, and the cause remanded, with directions to the court below to sustain the demurrer to plaintiff's verified petition.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the court below to sustain the demurrer to plaintiff's verified petition.

112 Cal. 637

ROWE v. BLAKE et al. (S. F. 226.)

(Supreme Court of California. May 20, 1896.)

JUDGMENT—ORDER OF SALE—COLLATERAL ATTACK—GENERAL FINDING—SUFFICIENCY.

1. Where an order of sale has been issued under a judgment, it is sustained by the same presumptions of regularity as attach to the judgment itself; and, though erroneous, the order is not absolutely void, and cannot be questioned in a collateral attack on the proceedings of the court which resulted in the order.

2. The general finding that a judgment sued on "has been wholly put in execution and satisfied" is sufficient to sustain a judgment for defendants, when not inconsistent with special findings, and the evidence has not been brought up on appeal.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by William B. Rowe against P. H. Blake and others to enforce a judgment. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

J. H. Henderson (J. D. Thornton, of counsel), for appellant. William H. Fifield, for respondents.

VAN FLEET, J. Appeal from the judgment, upon the judgment roll, the sole question being whether the findings support the judgment. The action is based upon a judgment obtained by one Latham against these defendants in another suit, foreclosing a lien upon certain lands, and directing a sale thereof in satisfaction of the lien—the object of the present action by the plaintiff, claiming as assignee of Latham, being to enforce said judgment by procuring a sale of the property therein directed to be sold. It was held on a former appeal herein that the action would lie, and that the complaint stated a cause of action. Rowe v. Blake, 99 Cal. 167, 33 Pac. 864. The complaint alleges that the judgment sued upon was recovered in 1879, and that the assignment by Latham to plaintiff was made in 1884. These allegations are not denied, but the defense relied upon by the defendants was that the judgment had, before such assignment and the bringing of the present action, been put in execution and satisfied by a sale of the property. Upon this issue the court found these facts: "In the year 1882 one George W. Osborn claimed to have become the owner of said decree, and to have lawfully succeeded to the interests of said Latham therein; and on the 25th day of May, 1882, at the instance of said Osborn, the superior court here made and entered an order directing that an order of sale upon and in execution of the said decree of Latham v. Blake and others be issued by the clerk here, under the seal of the court, and be delivered to the sheriff of this city and county, commanding him to sell the said lands and premises in the said decree described, pursuant to the terms of said decree, and in execution and enforcement thereof. Said order, as thus made and entered upon the minutes here, has not been appealed from, vacated, or in any wise set aside or modified; and pursuant thereto an order of sale, in due form, was on the 26th day of May, 1882, issued by the clerk here, attested by him, and under the seal of the court, and delivered to the sheriff of the city and county of San Francisco on the next day thereafter, by the terms of which said order said sheriff was enjoined and commanded, among other things, to proceed to notice for sale, and thereupon to sell at public outcry, all the said premises in the said decree described, and to apply the proceeds of such sale, when made, as in said decree and order further directed, and that he make report of his acts and doings thereunder, within a time therein in said order named and specified. Accordingly, on the 22d day of June, 1882, after notice duly given and published, the said sheriff, in virtue of the said decree and the said order of sale in his hands, did expose to sale at public outcry, and did sell to the highest bidder at said sale, the said lands and premises, and the whole thereof, and did receive therefor from said bidder, who was the purchaser, the sum of one thousand six hundred and thirty dollars. A certificate of sale, in the usual form, and containing the customary recitals, was thereupon delivered by the sheriff to the said purchaser. No redemption from said sale has been made, and in due time thereafter a deed of conveyance, in due form, was delivered by the sheriff to said purchaser, purporting to convey to him the said premises in said decree described, and therein adjudged and decreed to be thereafter sold according to law by said sheriff. Neither the said order of sale of May 25, 1882, nor the said proceedings of said sheriff thereunder, has or have been vacated, set aside, modified, or in any wise disturbed, but they remain in full force and virtue. The said decree in the said second amended complaint set forth has been wholly put in execution and satisfied, and no part thereof remains unsatisfied."

The ground upon which it is urged that these findings fail to warrant the judgment in favor of defendants is, in brief, that it affirmatively appears therefrom that the process under which it was attempted to sell the property in satisfaction of the decree in suit was issued at the instance of one not authorized to control it; that, the ownership of Latham and the assignment to plaintiff not being denied, the latter alone must be held to have had the right and authority, under the law, to control the judgment, and the only one on whose application process could competently issue; that consequently the order of sale issued and executed at the instance of Osborn, a mere stranger to the judgment, was wholly void, and the proceedings had thereunder without legal effect. It is undoubtedly true, as an abstract proposition, that the owner of a judgment is the one on whose demand process may regularly and properly issue thereon; but is it true, as urged by appellant, that the findings show that the process was not so issued in this instance? There can be no question that the court wherein a judgment is entered has control of such judgment, and authority to direct the issuance and execution of process thereunder in the interest of the party entitled thereto, and necessarily, as incidental to such power, that of determining in any instance who is entitled to process. Code Civ. Proc. §§ 128, 385; McAuliffe v. Coughlin, 105 Cal. 268, 38 Pac. 730. Here it appears that the court, in the exercise of such jurisdiction, made an order, at the instance of Osborn, that an order of sale issue. Manifestly, this involved a determination that Osborn was the party entitled to have and control process, and this determination, it seems to us, is conclusive upon the plaintiff's rights in this action. It is true that there is no express finding that Osborn was the owner of the judgment at the time of his application, or that the application was other than ex parte, and without notice or opportunity to Latham to appear and be heard in opposition thereto. But it must be observed that this is not a direct, but a collateral, attack upon the proceedings of the court which resulted in such order, and in such case every intendment is to be indulged in support of the regularity of those proceedings and such determination; and we are bound to presume, if necessary to sustain the validity of the order, that the application therefor was regularly made upon notice to the parties interested, and that the court, upon competent evidence, found and determined that Osborn was at the time the owner of the judgment, and for that reason entitled to have process for its execution. See Crim v. Kessing, 89 Cal. 478, 26 Pac. 1074; Caruthers v. Hensley, 90 Cal. 559, 27 Pac. 411. The order was sufficiently pleaded and found (Weller v. Dickinson, 93 Cal. 108, 28 Pac. 854), and is to be sustained by the same presumptions of regularity as attach to a judgment, and is not subject to be overthrown otherwise than in a direct proceeding for the purpose. However erroneously the court may have acted in the premises, it being within its jurisdiction to make the order, its order is not absolutely void, and mere error cannot affect its binding effect for present purposes. This being true, the process issued in pursuance of such order was not void, even if erroneous, and the proceedings taken thereunder in execution of the judgment are protected by the same presumptions of regularity as attach to the judgment itself. "A collateral attack can no more be made upon an erroneous execution than upon an erroneous judgment. Like erroneous judgments, an erroneous execution is valid until set aside upon a direct proceeding brought for that purpose, and until set aside all acts which have been done under it are also valid. In a collateral action it cannot be brought in question, even by a party to it,—much less, as in this case, by a stranger to it." Hunt v. Loucks, 38 Cal. 382. Independently of these considerations, we think the general finding that the judgment sued on "has been wholly put in execution and satisfied" is sufficient, of itself, to sustain the judgment, whether such finding be regarded as a conclusion from the special or probative facts found, or as an independent finding. If the former, it is not inconsistent therewith; and, if the latter, the appeal being upon the judgment roll, without the evidence before us, it is conclusive. And in such case, even if the probative facts did not, in our judgment, sustain the general finding, the latter would control, since to hold otherwise would be to determine that the evidence did not justify the decision, and that cannot be done in this mode. Perry v. Quackenbush, 105 Cal. 305, 38 Pac. 740, and cases therein cited. The judgment is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

112 Cal. 646

WAYMIRE et al. v. SAN FRANCISCO & S. M. RY. CO. et al. (S. F. 227.)

(Supreme Court of California. May 21, 1896.)

CORPORATIONS—SUIT BY STOCKHOLDERS—INJUNCTION—FORECLOSURE—DEFENSES.

1. In an action by stockholders to enjoin the foreclosure of a trust deed securing bonds issued by a railroad corporation, and to compel a reconveyance of the bonds, it was alleged by plaintiffs that the bonds had been fraudulently transferred without consideration; that no demand had been made that an action be instituted by the corporation, because it would not have been complied with; that a complete and effectual defense could not be made in the foreclosure action because the individual holders of the bonds were not parties. *Held*, that the facts alleged were available as a defense to the foreclosure action and insufficient to support an injunction, it not being shown that the corporation would not properly defend the foreclosure.

2. Being the principal defendant in the foreclosure action, the corporation was not at liberty to institute an action in another court to enjoin further proceedings in foreclosure, but was bound to plead the facts alleged in plaintiff's complaint by answer or by cross complaint in the foreclosure action.

3. In such case, where the corporation refuses to answer, or to prosecute its defense in good faith, the stockholders may intervene, and prove all material facts essential to a complete and effectual defense, and cause the necessary parties to be brought in.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by James A. Waymire and others, stockholders, against the San Francisco & San Mateo Railway Company and others, to enjoin the foreclosure of a trust deed against the corporation. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

E. L. Campbell, for appellants. E. P. Cole, Page & Eells, and Rodgers & Paterson, for respondents.

VANCLIEF, C. In May, 1891, the defendant railway company issued to the defendant trust company 1,100 bonds, each for $1,000, in trust, to be sold for the use of the former company, and, to secure the payment of said bonds, executed to the trust company a trust deed of all its property, consisting of street railroads, franchises, and all personal property pertaining thereto. The bonds bear interest at the rate of 6 per cent. per annum, payable semiannually, and contain a provision to the effect that, upon certain defaults in the payment of interest, the trustee may elect to declare the principal due, and foreclose the trust deed. In alleged compliance with these provisions, the trust company, on May 10, 1894, commenced an action in the superior court of San Francisco against the railway company to foreclose the trust deed, and for the appointment of a receiver to take possession of the property conveyed by the trust deed, and to operate the same pending the action. On April 6, 1895, and pending the aforesaid action to foreclose the trust deed, this action was commenced by James A. Waymire and six other stockholders of the railway company, "on behalf of themselves and all other shareholders and creditors of the railway company," to enjoin the trust company and its beneficiaries, the bondholders, from further prosecuting said foreclosure action, on the alleged grounds that, by a conspiracy and collusion of the directors of the railway company with the directors of the construction company (a majority of such directors of each company being the same persons), said bonds had been fraudulently, and without consideration, transferred to the defendants the S. S. Construction Company, C. A. Spreckels, John A. Buck, Nicholas Ohlandt, Charles H. Buck, and John C. Ohlandt, and also to enjoin these defendants from selling or otherwise disposing of said bonds pending this action. The specific ultimate relief prayed for is that the sales and transfers of bonds to the last above-named defendants be adjudged fraudulent and void, that said defendants may be ordered to redeliver the bonds to the trust company for the proper use of the railway company, and that the injunction against the further prosecution of the foreclosure suit may be made perpetual. The court sustained a general demurrer to the complaint, and thereupon dissolved the temporary injunction and dismissed the action. The plaintiffs appeal from the order dissolving the injunction, and from the judgment, upon the judgment roll alone.

If the demurrer was properly sustained, of course, the injunction was properly dissolved. Therefore the only question for decision is, did the court err in sustaining the demurrer? I think the court did not err in sustaining the demurrer. The alleged fraudulent acts of the directors and others were directly injurious to the corporation, and the relief asked is for the direct benefit of the corporation. The stockholders were only indirectly injured by the wrongs complained of, and would be only incidentally benefited by the judgment asked. Therefore, as a general rule, the action should have been brought by, and in the name of, the corporation; but when, upon proper demand by stockholders, the corporation wrongfully refuses to institute an appropriate action, or when it appears that such demand by stockholders would have been unavailing and fruitless, an action may be instituted and prosecuted by a stockholder for the direct and immediate benefit of the corporation, and for the incidental benefit of the stockholders. Neall v. Hill, 16 Cal. 145; Cogswell v. Bull, 39 Cal. 320; Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788; Spell. Priv. Corp. § 612.

In this case it is alleged in the complaint that the stockholders made no demand that an action be instituted by the corporation, "for the reasons that such demand would not be complied with, and we fruitless, and that the plaintiffs are ad that there is doubt whether said railwapany can maintain such action; that tlense herein urged will not avail to deaid action of foreclosure, and will not bplete and effectual, because the personning said bonds are not parties thereto; to these allegations, it should be obse (1) That so far as the facts alleged in tlplaint entitle plaintiffs to the relief pray for, or to interpose any obstruction action to foreclose the trust deed, to tktent the facts alleged are available as ase to the foreclosure action. It seems countable that plaintiffs were advised tlts which would entitle them to a judgnullifying the sale and transfer of the bond perpetually enjoining the further pron of the action to foreclose the deed of tould not be made available as a defenshe foreclosure action. (2) Even if thkholders had demanded that the corporinstitute an independent suit, such demanld have been properly refused, for the rthat, being the principal defendant in tl to foreclose the deed of trust, the coon was not at liberty to institute an actianother court, nor in the same court, in further proceedings in the foreclosuon, but was bound to plead the facts all plaintiffs' complaint herein by answ if necessary to aid the defense, by cmplaint in the foreclosure action. PomJur. §§ 1371, 1372; High, Inj. § 52; R Co. v. Ramsay, 45 N. Y. 637; Grahanailroad Co., 118 U. S. 161, 6 Sup. Ct. 1009vley v. Davis, 37 Cal. 268; Judson v. P61 Cal. 562; Wilson v. Baker, 64 Cal. 47c. 253; Spell. Priv. Corp. § 612. (3) If rporation refused to answer the fore complaint, or, having properly and fulvered, probably would not prosecute thse in good faith, then, upon a proper aion to the court, the stockholders woul been permitted to intervene, and to pleaprove all material facts alleged in theplaint in this action, and also to causeecessary parties to be brought in. Civ. Proc. §§ 387, 389, 442; Cook, Stockh. & Corp. Law, § 659; Bronson v. R Co., 2 Wall. 283; Bayliss v. Railway Biss. 193, Fed. Cas. No. 1,140; Morrill ufacturing Co., 46 Minn. 260, 48 N. W In this case, however, it is not alleg the corporation has refused or failed y to answer the complaint in the foreclosure suit, nor that it will not defend in good faith; and, as to this, counsel for appellant, in his brief, says: "In justice to the lower court, I venture to state that the railway company filed an answer in the foreclosure suit setting up most of the facts alleged in the complaint in this case, and praying a dismissal," on the ground that the bondholders, upon whose requisition the action was brought, obtained those bonds "by fraud, and without consideration, or with notice of those facts, and therefore such requisitions conferred no authority upon the trust company to institute proceedings," but asked no other relief. If the mere dismissal of the foreclosure suit on the ground that it was prematurely commenced was all the relief sought by the corporation, that fact (assuming, as we must, that the allegations of plaintiffs' complaint are true) was probably sufficient evidence of bad faith on the part of the corporation to entitle the stockholders to intervene. But, however this may be, the stockholders had no better right to maintain this action to enjoin or obstruct the prosecution of the foreclosure action upon grounds or facts available as a defense to that action, or which entitled them to affirmative relief merely in aid of, or as a necessary consequence of, such defense, than had the corporation; and it is plainly apparent that the matters alleged in the complaint herein were available as a defense to that action, and that, so far as affirmative relief is asked, it is either in aid of such defense, or a necessary legal consequence thereof. If the defense of fraud in the transfer of the bonds be found true, it will necessarily and conclusively follow that the fraudulent transfer was void, and that the bonds should be restored to the trust company; and I see no reason why it might not have been so expressly adjudged in the foreclosure action, provided that the facts alleged in plaintiffs' complaint had been stated by them in an intervention complaint in that action, and provided, further, that the claimants of the bonds had been brought in as parties to that action, as we have seen they might have been. I think the judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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